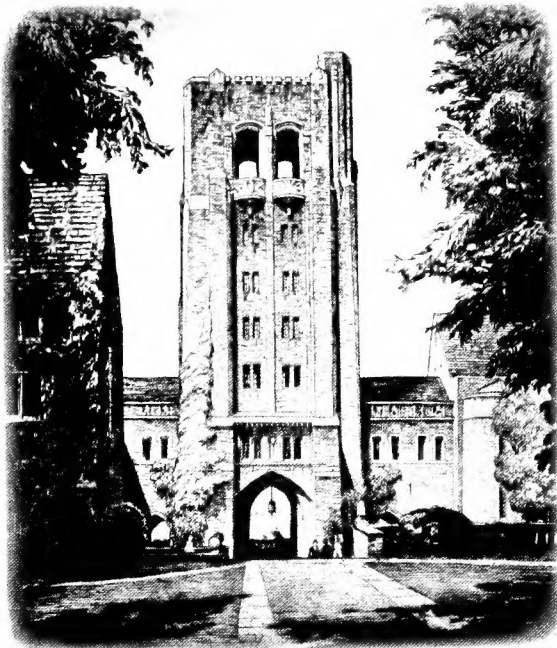


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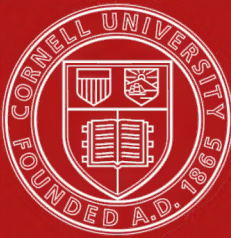
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COMMENTARIES
ON THE LAW OF
MASTER AND SERVANT
INCLUDING THE MODERN LAWS ON WORKMEN'S
COMPENSATION, ARBITRATION, EMPLOYERS'
LIABILITY, ETC., ETC.

BY
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IN EIGHT VOLUMES

VOLUME V.

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COMPENSATION ACTS, BLACKLISTING, RIGHTS
IN PRODUCTS OF SERVICE.

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MASTER AND SERVANT.

VOLUME V.

CHAPTER LXXI.

EFFECT OF GENERAL STATUTES UPON THE EXTENT OF A MASTER'S LIABILITY.

1640. When employees are within the purview of such statutes.

1641. Effect of such statutes considered with relation to the doctrine of common employment.

As to statutes shifting the burden of proof, see chapter LXVII., subd. B, *ante*.

1640. [637] When employees are within the purview of such statutes.—In cases which turn upon the right of a servant to take advantage of a general statute which affects the obligations of that class of individuals or corporations to which his employer belongs, the first question to be determined is whether, having regard to the language in which the statute is couched, and the particular mischief which it is designed to remedy, or the peculiar advantage which it is designed to confer, the intention of the legislature was that servants as well as strangers should fall within its purview. A number of decisions showing the conclusion of the courts as to various enactments of this description are tabulated below.¹

¹ (a) *Statutes prescribing certain precautions in regard to the operation of railways.*—The statutes which declare railway companies to be liable for the damage done by the running of trains, or prescribe the observance of certain precautions in regard to the operation of trains, are not deemed to be applicable to railways which are under construction. Thus, under §§ 1166, 1167 of the Tennessee Code, by which it is provided that “when any person, animal, or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident;” and that “every railroad company that fails to observe these precautions or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur,”—it has been held that the servant of a contractor, who, while riding on the pilot of an engine, is injured by its collision with a stationary car while the road is still under construction, cannot recover. *Griggs v. Houston* (1881) 104 U. S. 553, 26 L. ed.

840 (engine, on the pilot of which the servant of a contractor was riding, collided with a car standing on the track).

Under another statute of this type (Ga. Code, § 2979), it has been held that a railway company was not liable to the servant of a contractor, who was injured by the fall of a trestle over which a car was being drawn while the road was being graded. *Central R. & Bkg. Co. v. Grant* (1872) 46 Ga. 417.

The various statutes requiring a bell to be rung or a whistle to be blown on railway trains when they are within a certain distance from a public crossing are considered to be enacted for the benefit of such members of the public as may be using the crossing, and not of the railway employees themselves. Thus, it has been held that § 1144 of the Alabama Code of 1886, which is to this effect, has no application to the case of employees on the top of cars which are passing under a low overhead bridge. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277; *Louisville & N. R. Co. v. Markee* (1893) 103 Ala. 160, 49 Am. St. Rep. 21, 15 So. 511.

Nor does a provision of this tenor create a duty in favor of a watchman stationed to look out for the trains and guard the public. *Ruane v. Lake Shore & M. S. R. Co.* (1896) 64 Ill. App. 359.

That such a statute is not enacted for the protection of employees was also laid down in *Union P. R. Co. v. Elliott* (1898) 54 Neb. 299, 74 N. W. 627; *Rogers v. Cincinnati, N. O. & T. P. R. Co.* (1905) 69 C. C. A. 321, 136 Fed. 573; *Louisville & N. R. Co. v. Holland* (1909) 164 Ala. 73, 137 Am. St. Rep. 25, 51 So. 365; *Lacy-Buek Iron Co. v. Holmes* (1909) 164 Ala. 96, 51 So. 236; *Central of Georgia R. Co. v. Harper* (1906) 124 Ga. 836, 53 S. E. 391; *Fore v. Chicago & A. R. Co.* (1905) 114 Mo. App. 551, 89 S. W. 1034.

In an action for injuries to laborers upon a track, it is error to permit a witness to testify that he and the other members of the gang relied upon the custom of the company to ring and whistle for crossings to warn them when repairing track in the vicinity of the approach of trains, since the custom was merely a compliance with the requirements of a statute enacted for the benefit of the public. *Norfolk & W. R. Co. v. Gesswine* (1906) 75 C. C. A. 214, 144 Fed. 56.

In *Fletcher v. Freeman-Smith Lumber Co.* (1911) 98 Ark. 202, 135 S. W. 827, it was held that the "lookout" statute was not applicable to coemployees on the same train.

Statutes and municipal ordinances conservative of the safety of the public at defined public places along the highway are not for the benefit of the servants of the master. *Southern R. Co. v. Cooper* (1911) 172 Ala. 505, 55 So. 211.

Section men are not entitled to the benefit of a statute requiring crossing signals to be given by railroad companies, although the statute provides that failure to give the signal shall render the company liable for all damages which shall be sustained by any person by reason of such negligence. *Leopard v. Michigan C. R. Co.* (1911) 166 Mich. 373, 40 L.R.A. (N.S.) 1105, 130 N. W. 668.

The fact that the point at which the injured person was crossing the track when the accident occurred was within that distance from a public crossing at which the signal should have been sounded will not enable him to recover. *Evans v. Atlantic & P. R. Co.* (1876) 62 Mo. 49 (a decision upon Mo. Gen. Stat. 1865, chap. 63, § 38).

The absence of a flagman required by a city ordinance to be provided for each street crossing was held not to be a failure of duty on the part of the railroad company to its employees, such an ordinance being passed to save the public traveling along the streets from injury from passing trains. *Kansas City, Ft. S. & M. R. Co. v. Kirksey* (1894) 9 C. C. A. 321, 22 U. S. App. 94, 60 Fed. 999.

To the same effect, see *Rohback v. Pacific R. Co.* (1869) 43 Mo. 187, where the court, referring to the Missouri act cited above, said: "It is obvious that the enactment of the law was intended primarily for the protection of the traveling public and passengers. At a public crossing or street, frequented by travelers and persons engaged in business, the danger of collision and accident is constant and recurring, without a signal warning them of the approach of the train. Not only is danger to be apprehended to those who may happen to be on the track, but the lives of the passengers are also jeopardized. The law, in a previous part of the section, subjects the company to a penalty for omission of duty in ringing the bell;

but, lest that might be deemed exclusive, it also makes it responsible in damages at the suit of any person injured. There is a strong and peculiar reason why this precaution of giving a signal should be observed, as regards passengers and the traveling public, but it is not apparent when it comes to be applied to the servants of the road. There is nothing to show that from their business and occupation they are in greater hazard at a public crossing than at a private crossing or anywhere else on the track. That the draftsman of the law used the word 'person' in the sense that it should apply to the classes above referred to, and without any intention of changing the common-law construction, can scarcely be questioned. In this view of the law we are strengthened by the different phraseology used in the 2d section of the act relating to damages, and on which *Schultz v. Pacific R. Co.* (1865) 36 Mo. 13, was based. That section provides that 'whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car, or train of cars, etc., it shall be responsible to the representatives of the deceased.' Both acts were passed by the same legislature. They show clearly that the law as it existed was understood by that body; that in one case a modification was intended to be made, and in the other not. If it had been intended that the 38th section should change the law, so as to allow persons to sue who had been previously barred, words of similar import to those used in the damage act would have been employed."

Section men whose duty requires them to work upon the track cannot predicate negligence upon the disobedience of a law forbidding the railroad company from running its trains above a certain speed per hour. *Norfolk & W. R. Co. v. Gesswine* (1906) 75 C. C. A. 214, 144 Fed. 56; *Louisville & N. R. Co. v. Hairston* (1905) 122 Ga. 372, 50 S. E. 120; *Birmingham R. Light & P. Co. v. Mosely* (1910) 164 Ala. 111, 51 So. 424.

City ordinances regarding the speed of cars are made for the protection of the public, where they have a right to cross or be upon the track of the railway, and not for the benefit of employees operating cars upon such railways. *Birmingham*

R. Light & P. Co. v. Mosely (1910) 164 Ala. 111, 51 So. 424.

A railway servant who is himself responsible for the nonobservance of statutory precautions is, of course, precluded from recovering damages for injuries resulting from such nonobservance. *East Tennessee, V. & G. R. Co. v. Rush* (1885) 15 Lea, 145. A decision was rendered with regard to §§ 1166 *et seq.* of the Tennessee Code, quoted supra. The court said: "This last clause, it seems to me, strikes the true note. The statute was intended for the benefit of the general public, not for the servants of the company, and clearly not for a servant whose negligence caused, or contributed to cause, the accident. The legislature surely never intended that a railroad company, by a mere noncompliance with certain precautionary forms made obligatory as to strangers, whether their observance would have prevented the act or not, should become liable to an employee whose plain dereliction of duty caused the accident. In such a case, to use the language of Judge McFarland in *Louisville & N. R. Co. v. Robertson* (1872) 9 Heisk. 276, the liability of the company to its agent for injuries resulting from the misconduct or negligence of that agent must be determined, not by statute, but by common-law principles."

On the other hand, it has been held that railroad employees are entitled to the same protection as other persons in crossing railroad tracks within the city limits the performance of their duties, under a city ordinance requiring a bell on the engine to be rung continuously while a train is within the city limits. *Illinois C. R. Co. v. Gilbert* (1895) 157 Ill. 354, 41 N. E. 724, affirming (1894) 51 Ill. App. 404; *Gulf, C. & S. F. R. Co. v. Calvert* (1895) 11 Tex. Civ. App. 297, 32 S. W. 246. To the same effect, *Houston & T. C. R. Co. v. Burnett* (1908) 49 Tex. Civ. App. 244, 108 S. W. 404; *Louisville & N. R. Co. v. Schroader* (1908) — Ky. —, 113 S. W. 874; *Illinois C. R. Co. v. McIntosh* (1904) 118 Ky. 145, 80 S. W. 496, rehearing denied in 118 Ky. 156, 81 S. W. 270; *International & G. N. R. Co. v. Tisdale* (1905) 39 Tex. Civ. App. 372, 87 S. W. 1063; *Indiana, I. & I. R. Co. v. Otstot* (1904) 113 Ill. App. 37, affirmed in (1904) 212 Ill. 429, 72 N. E. 387.

"The statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks is for the benefit of employees as well as others." *St. Louis Southwestern R. Co. v. Graham* (1907) 83 Ark. 61, 119 Am. St. Rep. 112, 102 S. W. 700.

Statutes and ordinances regulating the running of trains within city limits are for the benefit of employees as well as the public. *Eidem v. Chicago, R. I. & P. R. Co.* (1910) 158 Ill. App. 82.

A track repairer injured while working at a place where there were many tracks, by a train backing upon him without its bell ringing or having a man stationed on the car farthest from the engine, as required by a city ordinance, may recover for his injuries. *Kelly v. Union R. & Transit Co.* (1888) 95 Mo. 279, 8 S. W. 420.

A railway servant who is run over by a train while engaged in his duties is as much entitled as any stranger to hold his employer responsible for injuries caused by such employer's violation of an ordinance fixing the limits of the speed at which trains can run within city limits. *Bluedorn v. Missouri P. R. Co.* (1891) 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103.

An employee of a street railway company may recover for the company's negligence in failing to maintain its wires at least 16 feet above the surface, in accordance with the requirements of a city ordinance. *Pike v. Cedar Rapids & M. C. R. Co.* (1911) 152 Iowa, 53, 131 N. W. 50.

Section 251 of the railway act of Nova Scotia, providing for the stationing of a man on the last car of a train that is moving reversely in any city, town, or village, is for the benefit of servants as well as strangers. *McMullin v. Nova Scotia Steel & Coal Co.* (1908) 39 Can. S. C. 593, 7 Can. Ry. Cas. 198, 10 Ann. Cas. 39. To the same effect, *Lamond v. Grand Trunk R. Co.* (1908) 16 Ont. L. Rep. 365, 7 Can. Ry. Cas. 401, applying § 276 of the railway act, R. S. C. 1906, chap. 37.

A trackman is entitled to rely on the company's performance of its statutory duty not to run its train at any greater speed than 6 miles an hour. *Schultz v. Chicago & N. W. R. Co.* (1878) 44 Wis. 638. See, also, *Cleveland, C. C. & St. L. R. Co. v. Powers* (1909) 173 Ind. 105, 88 N. E. 1073, rehearing denied in 173

Ind. 125, 89 N. E. 485; *Pittsburgh, C. C. & St. L. R. Co. v. Rogers* (1909) 45 Ind. effect. *Lamond v. Grand Trunk R. Co. v. Beedle* (1909) — Ind. App. —, 87 N. E. 690, rehearing denied in (1909) — Ind. App. —, 88 N. E. 535 (reversed in [1909] 173 Ind. 437, 90 N. E. 760, because of defects in matters of pleading).

The violation of an ordinance regulating speed and signals of trains is not a risk assumed by a railroad employee, but obedience to the ordinance is a duty owing by the railroad company to its employees. *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1899) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290.

In *Dick v. Indianapolis, C. & L. R. Co.* (1882) 38 Ohio St. 389, it was thought unnecessary to consider whether the act of 1872 (69 Ohio Laws, 49) by which railroad companies were made liable in damages for injuries occasioned by a failure of the engineer to sound the whistle and ring the bell at a public crossing on the same level with its tracks was for the protection of travelers on the public way only, or extended to persons working upon the track, and held that, even in the absence of such a statute, it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at such crossings and in dangerous places.

A railway servant who sues on the ground that a train was negligently operated by the engineer within the meaning of a statute, and seeks to sustain the charge of negligence by showing that the train was run over an unsafe piece of track, cannot recover unless it is proved that the engineer knew, or ought to have known, of the unsafe condition of the track. *McKenna v. Missouri P. R. Co.* (1893) 54 Mo. App. 161, (action on Mo. Rev. Stat. 1879, § 2121; Mo. Rev. Stat. 1889, § 4425).

(b) *Statutes requiring the blocking of frogs, etc., on railway tracks.*—The Canadian railway act (51 Vict. chap. 29, § 289), by which any person injured by violation of the act is entitled to recover damages, inures to the benefit of railway employees in such a sense that they may recover for an injury caused by a frog not blocked as required by § 262. *Le May v. Canadian P. R. Co.* (1890) 17 Ont. App. Rep. 293. The consideration which was emphasized by the three judges who delivered opinions was that a provision such as

that relating to the packing of frogs must have been intended primarily to afford protection to employees, as being the very persons who usually sustain injury from the omission of such a precaution. The American decisions relied upon by defendant's counsel were distinguished on the ground that their actual effect was merely that general statutes could not be construed as abrogating the defense of common employment (see next section), while in the case under review the default was that of the company itself in regard to the non-delegable duty of seeing that the track was properly constructed before trains were run over it. Hagarty, C. J. O., intimated that a different conclusion might possibly have been arrived at if the frog had been duly packed at the time when the road was put in operation, and had not been repacked owing to a fellow servant's neglect. The other judges did not express any opinion on this particular question. See generally, as to the point thus adverted to, §§ 1498, 1499, *ante*.

(c) *Statutes regarding railway fences and cattle guards*.—Both reason and authority sustain the doctrine that, in the absence of provisions showing a different intention on the part of the legislature, a statute requiring railway companies to fence their tracks should be construed as enuring to the benefit of the employees of those companies.

In Wisconsin, employees of a railway company are regarded as being within the purview of a statute declaring all such companies to be liable to "persons" generally for injuries caused by the want of a fence. Wis. Laws 1881, chap. 193. *Quackenbush v. Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519. The court did not argue the question at length, but merely remarked that "no good reason was perceived" why servants should be an exception.

In a case decided a few years later the New York court of appeals took the ground that the duty to fence, under a statute, is one which exists as to all the world; and held that, where a brakeman is injured by the collision of his train with an animal which has come upon the track through a defective fence, the company is liable for the damages, under the New York general railroad act of 1850, § 44. *Donnegan v. Erhardt* (1890) 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051, disapproving *Langlois v.*

Buffalo & R. R. Co. (1854) 19 Barb. 364, so far as it holds a different doctrine.

Mendizabal v. New York C. & H. R. R. Co. (1903) 89 App. Div. 386, 85 N. Y. Supp. 896, appeal dismissed in (1904) 178 N. Y. 619, 70 N. E. 1102, follows the *Donnegan Case*.

The two earlier decisions were cited with approval and followed in *Atchison, T. & S. F. R. Co. v. Reesman* (1894) 23 L.R.A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370, where the following rule was formulated: "If, through a failure of the railroad company to erect and maintain a sufficient fence as required by the statute, an animal gets onto the track, whereby a train is derailed, and an employee on that train is injured by such derailment, the latter is entitled to maintain his action for damages against the company." The court said: "It is doubtless true that, when a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits; but it does not follow that, when a duty is so imposed, a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. In this case a technical argument might be made from the mere language of the section. It provides that the corporation shall be liable in double the amount of all damages, not only for those 'done by its agents, engines, or cars to horses, cattle,' etc., but also for those done 'by reason of any horses, cattle,' etc., 'escaping' from such contiguous fields. As the presence of the steer on the track was the cause of the derailling of the train, and as that steer escaped from the adjoining field through the defective fence, it may plausibly be argued that

the recovery in this case comes within the express language of the statute as being for damages done by reason of the escape of the steer from the adjoining field through the defective fence. But we do not care to rest our conclusions upon this technical construction. The purpose of fence laws of this character is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains and those who are traveling thereon is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company, if it fails to comply with this statutory duty." To the same effect, *Gill v. Louisville & N. R. Co.* (1908) 91 C. C. A. 613, 165 Fed. 438.

In Missouri a like doctrine prevails. *Dickson v. Omaha & St. L. R. Co.* (1894) 124 Mo. 140, 25 L.R.A. 320, 46 Am. St. Rep. 429, 27 S. W. 476. The court said: "We are taught by common experience that cattle and other animals, unless restrained, will stray upon the track of railroads and cause serious and dangerous obstructions to the operation of trains thereon, thereby imperiling the lives, not only of persons carried, but, to a greater degree, of each employee engaged in the duty of managing them. We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions, as to see that the ties and rails are sound, and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it by fences. So it has been held that if the want of a proper fence makes a railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent landowner. *Buxton v. North Eastern R. Co.* (1868) L. R. 3 Q. B. 549, 37 L. J. Q. B. N. S. 258, 18 L. T. N. S. 795, 16 Week. Rep. 1124, 9 Best. & S. 824. It is true that the statute requiring railroad

corporations to fence their tracks only in express terms gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public. *Briggs v. St. Louis & S. F. R. Co.* (1892) 111 Mo. 173, 20 S. W. 32, and cases cited."

Similarly in Illinois it is held that a railroad engineer killed by the derailling of his train by collision with a cow which strayed upon the track at a place where there was no fence is within the protection of Hurd's Stat. (Ill.) chap. 114, § 62, imposing on railroad companies an absolute duty to erect and maintain fences along their rights of way, and providing that if such fences are not made and kept in good repair the companies shall be liable for the damage to stock on the road. *Terra Haute & I. R. Co. v. Williams* (1898) 172 Ill. 379, 64 Am. St. Rep. 44, 50 N. E. 116, affirming (1897) 69 Ill. App. 392. In the court of appeals the general principle was relied upon that "whenever a duty arises, whether upon common-law or statutory grounds, an action will lie for a breach thereof in favor of any one injured by reason of such breach, though if a mere right is conferred by a statute, only those to whom it is specially given may avail themselves thereof." The reasoning of the supreme court was as follows: "It is true that the statute contains a provision that, if such fences or cattle guards are not made or kept in good repair, such railroad corporation shall be liable for all damages which may be done by the agents, engines, or cars of such corporation, to cattle, horses, sheep, hogs, or other stock thereon; but this provision cannot be held to exclude all other liability which may arise from a failure of the railroad company to fence and put in cattle guards, as required by law. It may be that the statute was primarily intended for the benefit of the owners of stock when their stock was killed on the railroad track, but, at the same time, the statute was doubtless intended for the benefit of all classes of persons who might need protection. The person whose business requires that he should take passage as a passenger on a train has a deeper interest in having the track protected from obstructions of every character than the owner of stock.

So, also, the employee on a railroad train has a deep interest. The lives of the passenger and employee are alike at stake when the railroad is not properly protected from obstructions which are likely to be upon the track where it is not properly fenced. It is, therefore, unreasonable to suppose that the legislature would provide a law for the protection of property, and make no provision whatever for the protection of life." To the same general effect, *Chicago & A. R. Co. v. Wise* (1903) 206 Ill. 453, 69 N. E. 500.

These decisions dispose of the doubt expressed in *Wabash R. Co. v. Brown* (1878) 2 Ill. App. 516, as to the right of a servant to sue under this statute.

Another authority for the same doctrine is *Fleming v. St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 448; but the action was held to be barred by the servant's knowledge of the want of fences, and consequent assumption of the resulting risk. The statute there construed (Minn. Rev. Stat. 1878, chap. 34, § 55) declared that railroad companies which failed to erect and maintain fences and cattle guards should be liable for all damages sustained by any person in consequence of such failure.

On the other hand, it has been held that the Virginia Code, § 1258, enacting that every railway company shall erect "on both sides of its roadbed, through all inclosed land or lots, lawful fences . . . and shall keep the same in proper repair, and with which the owners of adjoining lands may connect their fences at such places as they may deem proper," relates only to the protection of stock, and does not impose any additional liability as to passengers or employees. *Newson v. Norfolk & W. R. Co.* (1896) 81 Fed. 133, affirmed in (1897) 35 L.R.A. 135, 23 C. C. A. 669, 42 U. S. App. 282, 78 Fed. 94. Train was derailed by cattle straying on the track. In the circuit court of appeals the court said: "Had the legislature intended to provide an additional liability on railroad companies for injuries to persons brought about by the failure of such companies to construct fences at the places designated in said statute, it would certainly, concerning a matter of such universal importance, have used apt and unequivocal language. Indeed, we think it quite clear from a careful study of the legislation in question—from an examination of the orig-

inal act, its title, and the recitals in the first section thereof, in the nature of a preamble—that the legislature did not intend to make any change in the common law other than that relating to the compensation to the owners of the stock killed or injured on the tracks of railroads not fenced as required by said statute; and to hold otherwise we must give to the words used a meaning quite different from that usually accorded them. It is evident that the railroad company is only required to fence along its lines when the same pass through inclosed land, dividing it, and leaving part of such land of one owner on both sides of the roadbed. In such cases, the owner having already inclosed his land by lawful fences around its exterior limits, and finding his property, by virtue of the roadbed, virtually thrown open to the commons, his stock liable to stray away or be injured, or the stock of others to enter upon his premises and do him damage, the legislature says to him that the railroad company shall erect and keep in repair lawful fences along its line through his land, except that it shall not be required so to do along that part of its road located within the corporate limits of a city or town, or within an unincorporated town for the distance of one quarter of a mile either way from the company's depot, nor at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock, nor at any place if the company has compensated the owner of the adjoining inclosed land through which the railroad runs for making and keeping in repair said fencing. And so it follows, as we understand the said statute, that a railroad company can fully comply with the law, and yet, in fact, not construct a single panel of fence along its entire line. Surely this could not be if the legislative intent was to protect the public, the passenger, and employee, as well as to guard the stock and property on the inclosed land through which the road passes. If the public and those on the trains—passengers and others—were to have additional safety provided for it and then by the enactment, why was it that the fencing was not required along the entire line? Why was one mile of the line to be fenced, provided the owner of the land through which it passed did not contract to dispense

with it, and the next ten miles permitted to be without a fence for the reason that the land through which such part of the line passed was not inclosed? The inference is quite irresistible that the legislative mind was not considering the general public, and that it did not contemplate greater safety for passengers and employees. If the legislative intent was to change the common law in the manner referred to, as claimed by the plaintiff in error, the language employed was extremely unfortunate, and the actual result attained the most lamentable failure that has come to our attention in the history of legislative effort." The New York and Missouri cases above cited were distinguished as being decided with reference to statutes of a radically different tenor.

In *Snyder v. Pennsylvania R. Co.* (1903) 205 Pa. 619, 55 Atl. 778, a similar decision was rendered, and the court said: "As to the special act requiring fencing, there is no doubt, on the authorities cited, that in those states having general laws requiring all railroads to fence their right of way a very different degree of responsibility would be imposed, because there the fencing is required for the protection of the general public from injury; but here the special act is to provide for the payment to the owner of cattle his loss from neglect to fence."

For reasons analogous to those relied upon in the *Newson Case*, it has been held that the omission of a railway company to construct cattle guards in accordance with a statute requiring the company to fence both sides of its track for the protection of inclosures cannot be imputed to it as negligence by an employee injured by the derailment of a train, consequent upon its collision with trespassing cattle. *Word v. Bonner* (1891) 80 Tex. 168, 15 S. W. 805.

Acts Tenn. 1891, p. 220, chap. 101, §§ 2, 3, providing that railroad companies not maintaining suitable fences and cattle guards shall be liable for all live stock killed on the track, does not enure to the advantage of employees injured by collision with stock on the track. *Gill v. Louisville & N. R. Co.* (1908) 160 Fed. 260, affirmed in (1908) 91 C. C. A. 613, 165 Fed. 438.

(d) *Statutes requiring notice of blasts to be given.*—Maine Rev. Stat. chap. 17, §§ 23, 24, requiring that

seasonable notice of a blast shall be given so that all persons or teams approaching shall have time to retire to a safe distance, is not applicable as between workmen in quarries. *Hare v. McIntire* (1890) 82 Me. 240, 8 L.R.A. 450, 17 Am. St. Rep. 476, 19 Atl. 453.

(e) *Acts imposing liability upon municipal corporations for injuries caused by defects in streets.*—Under the South Carolina act of 1892 (21 Stat. at L. 91, Rev. Stat. § 1582), which provides that "any person who may receive bodily injury . . . by reason of defect or mismanagement of anything under the control of the corporation . . . may recover . . . damages," an action may be maintained by an employee engaged in repairing the streets, who is injured through the negligent management of a steam roller by the engineer in charge of it. *Barksdale v. Laurens* (1900) 58 S. C. 413, 36 S. E. 661. The court considered that, as the action was wholly statutory, it was unnecessary to consider whether the doctrine of co-service was applicable.

A statute giving an action against a town to "any" person injured by an obstruction, enures to the benefit of a foreman or other members of a civic fire brigade. *Coots v. Detroit* (1889) 75 Mich. 628, 5 L.R.A. 315, 43 N. W. 17. The court said: "Our statute giving damages to any person injured by reason of streets and highways not being in good repair, or in a condition reasonably safe and fit for travel, through the negligence of the city or township, makes also no exception of persons or their occupations; and there is no reason in the law or in good sense why an engine driver in the employ of the fire department, whether in or out of the line of his employment at the time of the injury, should suffer such injury without redress or recompense under the statute from and by reason of the city's negligence in the care of its streets, than should any other citizen. A fireman takes, like every other employee, certain risks by reason of his employment. He may be injured by his fellow firemen, by falling walls or building, or by a score of accidents that are liable to happen at a fire, or going to or from one. But the injury he receives from the negligence of the city in the care of the streets through which his employment takes him is no more one of the risks he voluntarily takes

1641. [638] Effect of such statutes considered with relation to the doctrine of common employment.—In cases where it has been determined or conceded that the given statute is one which enures to the benefit of servants of the class to which the injured person belongs, a second question will sometimes present itself for settlement, *viz.*, whether in view of the terminology of its provisions, and the circumstances under which the injury was received, the master can avail himself of the defense of common employment. The general principle

in his employment than would be an injury that he might receive from the negligence or wrong of some one of his fellow citizens of Detroit, as he was passing along the street. If this hole in the street, for instance, had been an excavation made by some abutting lot-owner on the street, and negligently left open, is there any sound reason why the plaintiff could not have recovered from such lot owner damages for his injuries, if such injuries were occasioned through no fault of plaintiff? The answer is obvious. The fact that plaintiff was a fireman would weigh no more in such case than if he was an express-wagon driver or of any other occupation."

To the same effect, see *Palmer v. Portsmouth* (1861) 43 N. H. 265. The court did not see any reason why an exception should be made in the case of a servant.

(f) *Statutes prescribing certain equipment for vessels.*—The owner of a slave hired to the owner of a vessel may recover for his loss by drowning, due to the failure of the owner of the vessel to provide it with a yawl, as prescribed by the 4th section of the act of Congress approved the 3d of August, 1852, relating to the equipment of vessels. *England v. Gripon* (1860) 15 La. Ann. 304.

(g) *Acts regulating locomotives on highway.*—The locomotive act of 1865 (28 & 29 Vict. chap. 83), as amended by the act of 1896 (59 & 60 Vict. chap. 36), requiring the presence of three men to accompany any traction engine upon a highway, does not enure to the benefit of one of the two men furnished by the owner. *M'Carten v. McRobbie* (1909) Sc. Sess. Cas. 1020. It further appears in this case that the breach of duty alleged in not having the third man had no possible connection with the accident.

(h) *Statutes forbidding employment of children under certain age.*—A child

employed under the statutory age has a cause of action under the statute, although it does not, in express terms, give such a cause of action. *Beauchamp v. Sturges & B. Mfg. Co.* (1911) 250 Ill. 303, 95 N. E. 204.

To the same effect was the decision in *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797, although the statute in question imposed a heavy penalty for its violation.

Under the statute (Gen. Stat. 1909, §§ 5095, 5098), providing that "no person under sixteen years of age shall be employed at any occupation nor at any place dangerous or injurious to life, limb, health, or morals," and providing a penalty for a violation of such provision, an employee less than sixteen years old, who is injured at such an occupation, may recover damages against his employer, although the statute does not in terms give him a right of action. *Casteel v. Pittsburg Vitriified Paving & Bldg. Brick Co.* (1910) 83 Kan. 533, 112 Pac. 145.

(i) *Statutes relating to mines.*—Section 18 of the act of March 2, 1891 (Burns's, Anno. Stat. 1901, § 7478), providing that the mine owners shall furnish persons to open and close the doors used in ventilating the mine, does not enure to the benefit of a driver who was injured while endeavoring to keep a door open while the car was passing through. *Indiana & C. Coal Co. v. Neal* (1906) 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424.

A similar decision was rendered in *Allen v. Kingston Coal Co.* (1905) 212 Pa. 54, 61 Atl. 572.

But in *Himrod Coal Co. v. Stevens* (1903) 203 Ill. 115, 67 N. E. 389, which dealt with a statute very similar in terms, the court held that the statute did enure to the benefit of drivers.

deducible from the authorities cited below would seem to be this,—that an intention on the part of the legislature to preclude him from relying upon that plea will not be inferred unless such intention is explicitly declared.¹

¹ (a) *Damage acts*.—In one or two early decisions the position was taken that the damage acts, by which the personal representatives of a decedent whose death was due to a tort are enabled to recover damages from the delinquent party, created a right of action which could not be defeated by showing that the decedent was a fellow servant of the culpable party, and therefore could not have maintained the action himself if he had survived. *The Highland Light* (1867) Chase, Dec. 150, Fed. Cas. No. 6,477; *Schultz v. Pacific R. Co.* (1865) 36 Mo. 13. See this note, *infra*.

But it is now settled by a great preponderance of authority that this defense is available to the master in any case in which, if death had not resulted from the injury, it would have barred an action by the injured person himself. It is difficult to understand how any other theory can ever have met with favor. The English act from which all the legislation in the United States is copied was passed simply for the purpose of remedying the anomalous situation which resulted from permitting the common-law maxim, *Actio personalis cum persona moritur*, to shield the culpable party in the very cases in which the damage done by him is most serious, and the propriety of requiring him to pay compensation is most apparent. The act gives no new cause of action to the relatives, but only a right in substitution for the right of action which the deceased would have had if he had survived. *Read v. Great Eastern R. Co.* (1868) L. R. 3 Q. B. 555, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 822, 16 Week. Rep. 1040, approved in *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 46 J. P. 711. The obvious and natural inference, therefore, is that the legislatures, in passing these acts, merely intended to put certain persons in the shoes of the decedent, so far as the right of action is concerned, and to leave the question whether there is any specific bar to the action to be decided by the principles which would have been con-

trolling if the injured person had survived, and was himself suing for an indemnity.

The effect of such a statute in this point of view was elaborately discussed in *Proctor v. Hannibal & St. J. R. Co.* (1876) 64 Mo. 112, where the court overruled *Schultz v. Pacific R. Co.* (1865) 36 Mo. 13 (see this note, *supra*), and adopted the opinion of two out of five judges in *Connor v. Chicago, R. I. & P. R. Co.* (1875) 59 Mo. 285. The contention of the plaintiff was that under § 2 of the Missouri damage act, providing that if a servant shall die from an injury resulting from, or occasioned by, the negligence of any officer, agent, or servant, whilst running, conducting, or managing any locomotive, car, or train of cars, his representative may sue and recover \$5,000 of the master, although the action of such servant, if he had survived the injury, would have been barred by the defense of coservice. "This conclusion," said Norton, J., "is reached from the language used in the act,—'when any person shall die,' etc. It is true that these words, in their literal signification, are comprehensive enough to include a servant or employee, and to these terms their plain and natural import should be given, unless absurd consequences follow, and inconsistencies in the act are brought to light by such meaning. Adopting the construction insisted upon by plaintiff, a servant injured by a fellow servant while operating a locomotive or train of cars, although he may be maimed, mangled, and disfigured, and may suffer for an indefinite period of time the most excruciating tortures, can have no action against the master or employer; yet if he die, his representative may recover of the employer \$5,000. Under the view of plaintiff the right to sue is not a transmitted right, but an original right, arising or appearing for the first time at the instant of the death of him or her through whom the right is derived. The very face of the 2d section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right. This is shown by the character of the parties

authorized to sue. They must be, first, either the husband or wife of the deceased; second, if there be no husband or wife, or he or she fails to sue in six months after the death, then the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother; or, if either be dead, then the survivor. It manifestly appears from these provisions,—for they apply to the injuries alluded to in § 3 as well as to those in § 2,—that it must have been in the mind and intention of the legislature only to confer upon the above classes of persons the right to sue in cases where the husband, wife, or child could have sued had not death been the result of the injury. If the suit is instituted by the husband for the death of the wife, he would be required to allege and approve the fact that at the time the injury was received, occasioning the death, he was her husband, before he would be entitled to recover. This would be the initial and necessary step in the case, for he might prove by a thousand witnesses the death and the occasion of it, yet it would avail him nothing unless the relationship of husband and wife was established. If the words ‘any person’ in the act are to be construed as including servants, then the inconsistent if not absurd conclusion follows that although under the common-law rule the master has committed no wrong against the servant, has violated no law and done nothing which imposes upon him a legal liability to answer in damages an action brought by the servant himself, yet upon his death a cause of action which never before had an existence is at once developed and brought to light, and is lodged in the representatives of the deceased. Not only is the above conclusion involved in the construction contended for by plaintiff, but also the further conclusion that the party receiving the injury, if he lives, say one year, may himself sue and recover, for the injury inflicted upon him, damages in any amount which the jury trying the case may give under the facts of the case; and if death afterwards ensues from the injury, his representatives may sue under § 2 of the statute, and recover an additional sum of \$5,000, thus holding the party liable in two actions of two different parties for the same wrong. . . . This reading of the section

also conclusively refutes the interpretation or meaning given by plaintiff to the words ‘any person’ in the 1st clause of the 2d section. According to the plaintiff’s interpretation of these words, the representatives of a servant, injured by the negligence of a fellow servant, while engaged in running and operating the road, without any fault of the master, could sue and recover against the master \$5,000, although the servant, had he lived, could not have sued at all for the injury; yet the representative of the servant whose death was occasioned by defective track or defective machinery could not sue for and recover anything under the 2d section, although the servant, had he lived, could have sued the master, and have recovered any damage which he may have sustained by reason of an injury inflicted upon him in consequence of a defective road or defective machinery used in operating it. It seems to us to be a manifest misinterpretation of the 2d section to construe it so as to say that the legislature in the 1st clause intended to give the representatives of a servant who would have had no cause of action had he lived, a right to sue and recover \$5,000, and in the 2d clause of the same section denied to the representative of a servant who would have had a cause of action had he lived the right to sue and recover damages under that section. And the fact that, in the 2d clause of this section, the legislature, by not extending the right, did deny the right of the representative of a servant dying from an injury received from a defective road or machinery to sue and recover under that section, is conclusive proof that they did not intend to include under the term ‘any person’ a fellow servant injured by the negligence of a fellow servant, without fault of the master.”

Henry, J., dissented in an elaborate opinion; the theory of the majority of the court, that the 3d section was the key to the meaning of the 2d, was, he considered, erroneous, as the 2d section was penal in its character, while the 3d was compensative and merely preserved common-law rights of action. As regards the argumentation *ad absurdum* (see above),—that under the plaintiff’s construction of the act a servant, however seriously injured, could recover no damages, while if he died his representatives could recover \$5,000,—he consid-

ered that there was no valid reason for asserting that, because the legislature may have thought it best that the common-law rule should remain in force as respects the servant himself, it should be concluded that the legislature did not intend that his representatives should have a right of action, when the language of the law was broad enough to give it. Another point made by the learned judge was that as the decision in the *Schultz Case* had been recognized as the law of the land for about ten years, it should be left to the legislature to say whether a new enactment should be passed, establishing another rule.

Other cases in which the same doctrine has been adopted are *Chapman v. Reynolds* (1896) 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274; *Lutz v. Atlantic & P. R. Co.* (1892) 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912.

In *Houd v. Mississippi C. R. Co.* (1874) 50 Miss. 178, counsel argued that the words "any person" included employees. The court decided against the plaintiff on general grounds, without any express comment as to this contention.

It is, of course, not disputed that, under any statute which permits the maintenance of an action for a death resulting from negligence, a personal representative of a servant who was killed can recover damages if the delinquent employee was, by virtue of the common-law doctrines prevalent in the particular jurisdiction where the accident occurred, not a fellow servant of the decedent. *Sullivan v. Missouri P. R. Co.* (1888) 97 Mo. 113, 10 S. W. 852 (applying the above doctrine between a trackwalker and a trainman); or where the negligence which caused the death was that of an employee of whose incompetency the defendant had notice. *Galveston, H. & S. A. R. Co. v. Davis* (1898) — Tex. Civ. App. —, 45 S. W. 956, (1898) 92 Tex. 372, 48 S. W. 570.

(b) *Acts imposing liability on tortfeasors generally.*—In *Hubgh v. New Orleans & C. R. Co.* (1851) 6 La. Ann. 496, 54 Am. Dec. 565, it was held that, under § 2294 of the Louisiana Code (similar to § 1382 of the Code Napoleon), which provides that every act that causes damage obliges him by whose fault it happened to repair it, an employer cannot be held liable for a fatal injury caused by a fellow servant of the

decedent, unless it was known, actually or constructively, to the employer, that the tortfeasor was incompetent.

(c) *Acts imposing liability for injuries caused by the negligence of common carriers.*—(See also subd. (f), *infra*.) Upon grounds very similar to those which have been deemed conclusive where the effect of the damage acts has been in question, the courts have determined that a statute which, in general language, requires a railway company or other common carrier to answer for the negligence of their agents in the operation of trains, etc., does not preclude them from relying on the plea that the delinquent was a coservant of the injured person.

By Mass. Pub. Stat. chap. 112, § 212, it is provided that, when the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger nor in the employment of such corporation, is lost "by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," certain damages might be recovered by indictment to the use of certain persons named. This provision was amended by the Statute of 1883, chap. 243, by adding the words "and if an employee of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner, and to the same extent, as it would have been if the deceased had not been an employee." In an action under this statute for the death of an employee, no recovery can be had if the only negligence shown is that of the fellow servants of the person injured. *Dacey v. Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437. The court said: "If the plaintiff's intestate had survived, he could not have maintained an action for his injury. The purpose of the statute is to permit the administrator to maintain an action for the death when the intestate could have maintained an action if he had recovered, and not otherwise. When his action would have been defeated by the defense of common employment if he had sued, the action of his administrator will be barred in the same way

in a suit brought on account of his death. This seems the only reasonable interpretation of the statute."

The transfer of freight by a railroad company from a vessel to its cars is a railroad operation, within the words of this statute. *Daley v. Boston & A. R. Co.* (1888) 147 Mass. 102, 16 N. E. 690.

Mere failure of an engineer to stop a train at a distance, on seeing men at work on the track trying to remove a telegraph pole, without evidence that he saw that the pole extended on the track, is not such "gross negligence" as will give a right of action for the death of one of the men, under this statute. *Chisholm v. Old Colony R. Co.* (1893) 159 Mass. 3, 33 N. E. 927.

In *Atchison, T. & S. F. R. Co. v. Farrow* (1883) 6 Colo. 498, the statute under discussion provided that "whenever any person shall die from an injury resulting from, or occasioned by, the negligence, unskilfulness, or criminal intent of any officer, . . . while running, . . . any locomotive, car, or train of cars, . . . and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car" the employer of the delinquent "shall forfeit and pay for every person and passenger so injured the sum of not exceeding \$5,000, and not less than \$3,000." The court said: "The act contains four other sections, but there is nothing therein giving a right of action for such injuries to the employee himself, if he survive the same. The position of appellee and the district court, therefore, is, that the legislature intended to say that the common-law rule depriving the employee injured, himself, of any remedy, unless his case be covered by one of the exceptions, shall remain in force; but that, if he die from the injury, a right of action in favor of some third person shall spring into existence; that, though he be rendered a helpless cripple and invalid, and a burden and expense to his friends, through the negligence of a coemployee, still he shall have no right of action against his employer, while, if he be instantly killed, his widow or heirs may recover \$5,000 from such employer. The legislature had the power to create this distinction, but their intent to do so should appear clearly from the context of the act itself; for, if there be doubt

about it, and the statute will bear another reasonable interpretation, one which is not in conflict with the common law, the latter should be adopted. The 1st section above quoted may be divided, with reference to the individual injured, into parts: First, where any person dies from an injury caused by the negligence, unskilfulness, or criminal intent of an officer, servant, or employee; and secondly, where the death of a passenger is occasioned by a defect or insufficiency of a railroad, locomotive, car, stage-coach, or other public conveyance. It would not be contended that the word 'passenger' includes employees, although they are upon the defective car or conveyance and receive fatal injuries through such defect. Why should the legislature discriminate between the two causes of death? Why should they say that a right of action shall be given to the widow when death results from the negligence of a fellow servant, but deny the same when it is due to defects in the car or conveyance upon which the servant is compelled to ride? The employer or master is no more at fault in one case than in the other. His responsibility and liability are, in law, no greater in the choosing of competent and careful servants than they are in the selection and purchase of safe machinery and appliances."

By the Mississippi Anno. Code of 1892, § 3557, it is provided that "every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of its agents, engineers, or clerks, or for the mismanagement of its engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight, the company shall not be liable except for the gross negligence or carelessness of its servants." This provision is not applicable to employees. *New Orleans, J. & G. N. R. Co. v. Hughes* (1873) 49 Miss. 258.

In *Carle v. Bangor & P. Canal & R. Co.* (1857) 43 Me. 269, it was argued that the common law had been modified by Me. Rev. Stat. chap. 81, § 21, providing that "every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the foregoing section, or of any other neglect of any of their servants, or by any mismanagement of their engines, in an ac-

tion on the case by the person sustaining such damages." This contention did not prevail. "The general purpose of this statute," said the court, "seems to be to fix and establish the rights and obligations of railroad corporations as between themselves and third persons not their servants, and the language relied on in the section cited has reference to the liabilities of such corporations for the neglects of their agents or servants. Notwithstanding its literal construction might entitle a negligent servant to recover for injuries sustained through his own fault, or any servant to recover for injuries occasioned by the fault of a fellow servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law. Considering the general design of this statute, we are of opinion that it was not the intention of the legislature to change the nature of, or the incidents connected with, any contracts between such corporations and their servants. If such had been the intention, we think it would have been more plainly or directly expressed. The words, any person, in that section of the statute relied on, must be limited in their application to such persons as were not the servants of the corporation, and who may have sustained damages without any contributing fault on their part; thus leaving such servants, who are presumed to have arranged their compensation with their eyes open, and to have assumed the relation with all its ordinary dangers and risks, without any remedy against the corporation for such injuries as may be incident to the service they have engaged to perform."

It has also been held that employees are not within the purview of the Maine statute which declares that when the life of a person is lost through the carelessness of a railroad corporation or its servants, compensation shall be made to the heirs of the deceased. *State v. Maine C. R. Co.* (1872) 60 Me. 490. "It is certain," said the court, "that the act of 1855, which is the basis of the existing law, did not apply to the employees of the corporation. The 1st section of the act applied only to passengers. The 2d section of the act applied to persons other than passengers, but expressly ex-

cluded the employees of the road. In the Revised Statutes, these several provisions are crowded into one section of only seven lines, and the language employed is more general. But there is nothing to lead us to believe that a change of the law was intended. Our conclusion, therefore, is that the existing statute is not applicable to the employees of the road. To hold otherwise would endanger the safety of travelers. Their safety requires that the persons in charge of a train of cars should be regarded as a unit; that each should feel responsible not only for his own conduct, but also for the conduct of all the others. They should be made to feel that it is their duty not only to be watchful of themselves, but to be watchful of each other. And this end will be best secured by making them the insurers of their own safety."

The Kansas act of March 2, 1870, providing that all railroads "shall be liable for all damages done to persons or property when done in consequence of any neglect on the part of the railroad companies" is applicable only where a railroad company, as a company, has been negligent; and has no application to a case where the negligence of an employee produces injury to a coemployee. *Kansas P. R. Co. v. Salmon* (1873) 11 Kan. 83.

The death of a steamboat employee on a steamboat, caused by the negligence of a fellow servant, is held not to be within R. I. Pub. Stat. chap. 204, § 15, making common carriers by steamboat liable for loss of life of "any person, whether a passenger or not, in the care of" such common carrier, caused by its negligence or that of its servants. *Miller v. Coffin* (1895) 19 R. I. 164, 36 Atl. 6.

(d) *Acts requiring warning signals on railway trains.*—The larger part of the cases which deal with the scope of statutes providing that warning signals shall be given when trains are approaching crossings have been determined without any direct reference to the availability of the defense of common employment. See § 1640, note 1, subd. (a), *ante*. In some of the cases referred to, as the conclusion was that the statute under discussion was not applicable at all to the servants, the investigation never reached the stage at which it might have become necessary to consider

the question whether that defense was a bar to the action. In the remainder of those cases,—those in which servants were held to be entitled to take advantage of the statute,—the courts seem to have tacitly proceeded upon the theory that the duty imposed was non-delegable.

But in some cases where a statute of this description was under discussion it has been expressly laid down that the mere fact that the railway company is declared to be liable to "any person" for a breach of the duty so imposed does not operate so as to supersede the general rule of law which exempts an employer from liability to his own servants for the fault of their fellow servants. *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 (a decision with reference to a statute of W. Va. 1873, chap. 88, § 31). The court cited *O'Donnell v. Providence & W. R. Co.* (1859) 6 R. I. 211; *Harty v. Central R. Co.* (1870) 42 N. Y. 468, as authorities for the doctrine that the main, if not the sole, object of the statute was to protect travelers on the highway, but suggested that it might, perhaps, include passengers on the trains, or strangers who were not trespassers on the line of the road.

(e) *Statutes defining liability of railway companies in connection with the procuring of rights of way.*—The Iowa act of 1853, "granting to railroad companies the right of way" provided (§ 14) that every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this act, or of any other neglect of their agents, or of any mismanagement of their engineers. It was held that this section did not cover damages accruing to a servant from the neglect of locomotive engineers after the road was built. Such a construction was deemed to be precluded because, first, no such object was indicated by the title; second, to ascribe to the law such an effect would render it partial, and not uniform, in its application. *Sullivan v. Mississippi & M. R. Co.* (1860) 11 Iowa, 421.

(f) *Kentucky statute imposing liability for wilful neglect.*—Under 2 Ky. Rev. Stat. 510 (act of March 10, 1854), a right of action was given to the personal representative of an employee in-

jured by the wilful neglect of the agents of a railroad company. The "wilful neglect" here mentioned is the creature of statute, and applies only in cases where death results from the injury. *Craddock v. Louisville & N. R. Co.* (1891) 13 Ky. L. Rep. 18, 16 S. W. 125.

The phrase has been said to imply "a reckless indifference to the safety of the public, or an intentional failure to perform a manifest duty." *Collins v. Cincinnati, N. O. & T. P. R. Co.* (1892) 13 Ky. L. Rep. 670, 18 S. W. 11, denying recovery in case where an employee was injured by the explosion of a gas tank, and the plaintiff sought to bring the case within the statute by contending that wilful neglect was indicated by evidence showing that a tar roof had been used instead of a slate or iron one on a gas house; that there was no vent in it for the escape of leaking gas; and that gas tanks which were 9½ feet outside the gas building, with a fire wall between them and the fires under the gas retorts, were too near those fires.

The statute has no application to an action against a steamboat owner for damages, where an employee on the steamboat was shot and killed by another employee. *Morgan v. Thompson* (1884) 82 Ky. 383, following *Spring v. Glenn* (1876) 12 Bush, 172, where it was laid down that the statute gives no right to the personal representative to maintain an action when the killing is malicious and intentional.

This statute has now been repealed by § 241 of the Kentucky Constitution, providing that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

This provision does not give a right of action for the death of a servant, caused by the negligence of a fellow servant of equal grade, in the same field of labor. *Linck v. Louisville & N. R. Co.* (1899) 107 Ky. 370, 54 S. W. 184. But it improves the position of a servant to this extent, that, whereas no action could be maintained before the change in the law for the negligence of a superior fellow servant unless that negligence was wilful, recovery may now be had for the death of a servant, caused

by the ordinary negligence of such a fellow servant. *Southern R. Co. v. Barr* (1900) 21 Ky. L. Rep. 1615, 55 S. W. 900; *Linck v. Louisville & N. R. Co.* (1899) *supra*. to an employee should not make any reference to wilful negligence. *Louisville N. R. Co. v. Foard* (1898) 104 Ky. 456, 47 S. W. 342.

It has been held in another case that the instructions in an action against a railroad company for personal injuries For a general review of the Kentucky cases regarding coservice, see § 1478, *ante*.

CHAPTER LXXII.

STATUTES ENACTED EXPRESSLY FOR THE BENEFIT OF SERVANTS. INTRODUCTORY CHAPTER.

A. CONSTRUCTION AND EFFECT OF SUCH STATUTES.

- 1641a. On what footing these statutes are construed.
- 1642. For what acts of coservants an employer is liable.
- 1643. When the statutory right of action accrues and is terminated.
- 1644. Necessity of proving knowledge on the defendant's part.

B. DEFENSES AVAILABLE IN ACTIONS UNDER STATUTES.

- 1646. Generally.
- 1647. Assumption of risks.
 - a. Ordinary risks assumed.
 - b. Possibility of future negligence on the part of statutory vice principal, not a risk assumed.
 - c. Extraordinary risks; how far assumed, in the absence of express provisions on the subject.
 - d. Effect of express provisions with regard to assumption of extraordinary risks.
- 1647a. Assumption of risk or *volenti non fit injuria* as a defense to the master's breach of a specific statutory duty. American decisions.
 - a. Generally.
 - b. Discussion of cases.
 - c. Statutes prohibiting the employment of minors under certain age.
- 1648. Contributory negligence.
 - a. Generally.
 - b. Availability of the defense, as dependent on the provisions of the statute sued upon.
 - c. Availability of defense inferred from language of statute.
 - d. Knowledge of risk, how far negligence is inferable from.
- 1649. Limits of the doctrine that contributory negligence is a bar to an action.
- 1650. *Volenti non fit injuria*.

The constitutionality of statutes imposing specific duties upon masters will be discussed in the concluding chapter of this treatise.

As to the conflict of laws in cases where a statute affecting the liability of an employer is an element, see chapter LXXXVI., *post*.

As to the necessity of showing that the breach of the statute, which is the gravamen of the complaint, was the proximate cause of the injury in suit, see chapter LXVII., and § 1670, *post*.

A. CONSTRUCTION AND EFFECT OF SUCH STATUTES.

1641a. [639] On what footing these statutes are construed.—(See § 1666, *post*).—What general canon of construction shall be applied in determining the effect of statutes of the class reviewed in this and the following chapters will depend upon whether their meaning is to be defined with reference to the consideration that they augment the common-law liability of employers, or with reference to the consideration that they are of a remedial character.

As regards statutes of the class which includes the English employers' liability act and those copied from it, it is scarcely possible to say that any fixed principle of construction has been generally and definitely adopted. But on the whole the tendency seems to be in the direction of treating them as enactments of a remedial character, and construing them in a sense favorable to the servant.¹

It has been laid down that the Massachusetts employers' liability act of 1887 (see chapter LXXIV., *post*) should be construed liberally in favor of employees.² [That the Indiana employers' liability act (Ind. Rev. Stat. § 7083) is to be construed liberally, as being remedial in nature, has been held by both a court in another state and by the supreme court of that state.³ A contrary rule prevails in New York in regard both to the factory act and to the employers' liability act

¹ In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, Lord Esher recognized that there had always been two schools of thought with regard to cases of injuries to servants, the one proceeding upon the theory that enactments with regard to masters and workmen should be construed as strictly as possible, the other taking the position that in construing such statutes the fact that a master and his servants are not on an equal footing should be taken into account, and that a liberal construction was appropriate. The learned judge de-

clared himself to be an adherent of the latter school.

A similar opinion was expressed by Lord Trayner in *Jackson v. Rodger* (1900) 2 Sc. Sess. Cas. 5th series, 533, in construing the factory act.

² *Ryalls v. Mechanics' Mills* (1889) 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, per Holmes, J.

³ *Cleveland, C. C. & St. L. R. Co. v. Austin* (1906) 127 Ill. App. 281.

"While the act is remedial, and, to the extent that the legislative purpose can be divined, is not to be construed in a spirit of narrowness, yet, to the

of 1902 (see chap. LXXIV., *post*).⁴ So it has been held that a statute prohibiting the employment of children of less than a certain age in a certain kind of work must be strictly construed, for the reason that it is in derogation of the common law.^{4a} But the conclusion that a statute of this type is essentially remedial, and should therefore receive a liberal construction, would seem to be strongly, if not decisively indicated by the consideration that it is intended to obviate certain serious evils which have been found by experience to result from the unrestricted employment of children.

It has been held that the Illinois statutes which provide for the health and safety of persons employed in mines are to be liberally construed.⁵ But a contrary rule has been applied in Pennsylvania.^{5a}

[And it has been held that the Missouri statute modifying the fellow-servant doctrine should be construed liberally.⁶ The Mississippi court has taken the same view of the Constitution of that state.⁷ So

extent that the legislative purpose is not expressed, we must follow the rule and reason of the common law." *American Rolling Mill Co. v. Hullinger* (1903) 161 Ind. 673, 67 N. E. 986, 69 N. E. 460.

⁴ *Bushitis v. Catskill Cement Co.* (1908) 128 App. Div. 780, 113 N. Y. Supp. 294, affirmed in (1910) 198 N. Y. 548, 92 N. E. 1079; *O'Neil v. Karr* (1906) 110 App. Div. 571, 97 N. Y. Supp. 148.

^{4a} *Murphy v. Bennett* (1896) 11 App. Div. 298, 42 N. Y. Supp. 61.

⁵ *Beard v. Skeldon* (1885) 113 Ill. 584; *Carterville Coal Co. v. Abbott* (1898) 81 Ill. App. 279.

^{5a} In *Reeder v. Lehigh Valley Coal Co.* (1911) 231 Pa. 563, 80 Atl. 1121, in discussing a statute requiring dangerous machinery in mines to be guarded, the court said: "When the legislature takes a step in advance of the common law and imposes additional burdens upon employer in order to meet the necessities of modern industrial growth, the new duties thus imposed should be so clearly set forth as to leave no doubt as to the legislative intention. There should be no such thing as a doubtful statutory duty."

⁶ In *Rice v. Wabash R. Co.* (1902) 92 Mo. App. 35, the court said: "Laws of this kind are of a remedial nature, and such an interpretation is and ought to be given to them as will best realize the purpose of the legislature to afford employees of railroad companies, who work

in dangerous positions and are exposed to the unusual hazards incident to a service in which their personal safety is jeopardized by the carelessness of numerous other employees over whom they have no control, and whose habits of work, in respect to being careful or careless, they have but slight chance to observe, redress for injuries sustained by the default of such other employees, unrestricted by the common-law doctrine in regard to injuries caused by the acts of fellow servants. Hence, attention is paid rather to the humane spirit of the law than to its exact words." This is quoted with approval in *Pratt v. Missouri P. R. Co.* (1909) 139 Mo. App. 502, 122 S. W. 1125.

And in *Peters v. St. Louis & S. F. R. Co.* (1910) 150 Mo. App. 721, 131 S. W. 917, the Springfield court of appeals, in discussing this same statute, said that it was of a remedial nature, and was passed by the legislature because it was dissatisfied with the common-law rule as it formerly existed. It was therefore to be construed with a view to the purpose of the legislature in enacting it, citing *Rice v. Wabash R. Co.* (1902) 92 Mo. App. 35.

But in *Gray v. Wabash R. Co.* (1911) 157 Mo. App. 92, 137 S. W. 324, the St. Louis court of appeals said that the statute, being penal in character, is to be both strictly construed and pursued.

⁷ *Southern R. Co. v. Cheaves* (1904) 84 Miss. 565, 36 So. 691.

one of the Federal courts, in construing the South Carolina Constitution, says that this provision is of a remedial character, and is entitled to that interpretation which reasonably accomplishes the object and benefit which its enactment was intended to subserve.⁸

A like ruling has been made in respect to the Texas statute (Rev. Stat. art. 4560f.).⁹

In some states the principle upon which statutes affecting the liability of employers are construed is settled by a special provision expressly declaring that the rule by which statutes in derogation of the common law are to be strictly construed shall not be applicable to certain statutes.¹⁰

In respect to the construction of the statutes imposing a specific duty upon the master in cases of criminal prosecution, see § 1915, *post*.

1642. [640] For what acts of coservants an employer is liable.—The effect of many of the statutes reviewed in the succeeding chapters is to render employers responsible for the acts of various employees who, under common-law doctrines, would be regarded as fellow servants of the persons for whose benefit the statutes have been enacted. This alteration in the status of such employees does not affect the operation of the general principle that a master is not liable for the torts of a servant which are entirely outside the scope of his functions as a servant, and therefore unauthorized. In other words, it is not deemed to have been the intention of the legislature to create, in favor of injured employees, a liability more extensive than that which they would incur to strangers under a similar showing of facts.¹

⁸ *Snipes v. Southern R. Co.* (1908) 91 C. C. A. 593, 166 Fed. 1.

⁹ *Texas & P. R. Co. v. Webb* (1903) 31 Tex. Civ. App. 498, 72 S. W. 1044.

¹⁰ See, for example, Tex. Rev. Stat. Gen. Prov. § 2; provision applied in *Turner v. Cross* (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578.

¹ Under the Iowa act (chapter LXXVI., *post*), a railroad company is not liable for an injury to a section hand from being thrown off a hand car in consequence of another employee's wilfully striking, while engaged in a political discussion, a third employee, who, in attempting to avoid the blow, pushed the former off the car. *Kincade v. Chicago, M. & St. P. R. Co.* (1899) 107 Iowa, 682, 78 N. W. 698.

Under the Wisconsin act (chapter

LXXVI., *post*), a railway company is not liable for the death of an employee through the negligence of a superintendent, of which he was guilty while he was assisting such employee outside of his duties. *Hartford v. Northern P. R. Co.* (1895) 91 Wis. 374, 64 N. W. 1033.

Under the Missouri act (chapter LXXVI., *post*), a railway company is not liable for the negligence of an engine wiper, who undertakes to operate an engine, and runs over a coservant. By the words "agents or servants" in the statute are meant coemployees acting in the course of their employment. *Bequette v. St. Louis, I. M. & S. R. Co.* (1900) 86 Mo. App. 601.

Under the Texas act (chapter LXXVI., *post*), the negligence of a fireman in jumping from a rapidly moving train

1643. [641] When the statutory right of action accrues and is terminated.—On the one hand the liability of an employer is determined by the law as it was at the time the injury was received, and is not affected by a statute passed while the servant's action is pending.¹ On the other hand, the repeal of an act does not affect the right of action for an injury received while it was in force.²

The cases in which certain acts were declared to take effect immediately are noticed in the sections in which those acts are dealt with.

1644. [642] Necessity of proving knowledge on the defendant's part.—In all cases where the establishment of an employer's statutory liability depends upon its being proved that he was guilty of negligence in the premises, the general rule of the common law is applicable that culpability cannot be inferred, unless it is shown that the defendant had actual or constructive knowledge of the conditions for which it is sought to make him responsible.¹ See chapters XL., XLI.,

upon a section hand standing several feet from the track cannot be imputed to the railroad company in the absence of anything to show that the fireman was acting within the scope of his employment. *Jackson v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 685, 37 S. W. 786.

For another affirmation of the doctrine in the text, see *Southern Cotton-Oil Co. v. De Vond* (1894) — Tex. Civ. App. —, 25 S. W. 43. See also *International & G. N. R. Co. v. Cooper* (1895) 88 Tex. 607, 32 S. W. 517 (hot-water hose turned in sport on a fellow servant); *Galveston, H. & S. A. R. Co. v. Currie* (1906) 100 Tex. 136, 10 L.R.A. (N.S.) 367, 96 S. W. 1073 (compressed-air hose turned in sport against fellow servant. For a case involving injuries caused in the same peculiar manner, see *Ballard v. Louisville & N. R. Co.* [1908] 128 Ky. 826, 16 L.R.A. [N.S.] 1052, 110 S. W. 296, cited in § 1399, note 2.)

In *Savannah Electric Co. v. Hodges* (1909) 6 Ga. App. 470, 65 S. E. 322, it was held that the conductor of a street car, injured by a blow aimed at him by another employee in a playful manner, could not recover from the railroad company. Although no statute is mentioned, it is clear that there could be no possible liability in the absence of a statute, since in that case the servant causing the injury would be a mere fellow servant of the conductor.

But, under the Minnesota fellow-servant statute, it was held in *Soderlund v. Chicago, M. & St. P. R. Co.* (1907) 102 Minn. 240, 13 L.R.A. (N.S.) 1193, 113 N. W. 449, that where a hand car was run at a high rate of speed in the spirit of fun, the railroad company was liable, for, in overspeeding the car, the men were engaged in the performance of the act for which they were employed.

¹ *Bloyd v. St. Louis & S. F. R. Co.* (1893) 58 Ark. 66, 41 Am. St. Rep. 85, 22 S. W. 1089. See also *Winfree v. Northern P. R. Co.* (1908) 164 Fed. 698, affirmed in 1909, — L.R.A. (N.S.) —, 97 C. C. A. 392, 173 Fed. 65 (Federal employers' liability act of 1908); *St. Louis & S. F. R. Co. v. Mathis* (1908) 101 Tex. 342, 107 S. W. 530.

But where the statute in question is merely declaratory of common-law principles so far as regards the obligations which it imposes on the employer, it is not prejudicial error for the trial judge to read its provisions to the jury as being part of the law applicable to the case. *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

² *International & G. N. R. Co. v. Culpepper* (1897) — Tex. Civ. App. —, 38 S. W. 818.

¹ In a California case it was contended that the provision of § 1970 of the Civil Code of that state, which exempts an employer from liability for the negligence of the fellow servant of the plain-

ante. This prerequisite to the maintenance of the action is covered by the express terms of the English employers' liability act of 1880, and the statutes copied therefrom. See § 1677, *post*.

Mutatis mutandis, a similar principle, is controlling where it is sought to establish negligence in regard to some detail of the work on the part of an employee whom a statute has converted into a vice principal. Such negligence is not inferable, unless the employee is proved to have had knowledge, actual or constructive, of the existence of the conditions which rendered the act in question dangerous to the complainant.² See, generally, chapter XLIII., *ante*.

tiff, unless he has failed to use ordinary care "in the selection" of such servant, did not apply to cases in which negligence in retaining only was shown; but the court declined to accept this view, remarking that, if necessary, it would not hesitate to construe the employer's acts, under such circumstances, as constituting a new selection of the negligent employee, but that this was not requisite, because § 1971 declared generally that the employer must "in all cases indemnify his employee for losses caused by his want of ordinary "care," and that such want might be shown as well by the retention of an unfit employee after knowledge of the fact, as by a failure to use due diligence at the time of his selection. *Gier v. Los Angeles Consol. Electric R. Co.* (1895) 108 Cal. 129, 41 Pac. 22.

With regard to the similar provision of Dak. Civ. Code, § 1131, it has been held to be culpable negligence on the part of a railroad company to allow machinery to remain out of repair, when its condition is brought to the notice of an officer [here a yard master] whose knowledge is imputed to the company, or might have been ascertained, upon proper inspection, by its agent charged with the duty of keeping them in repair. *Northern P. R. Co. v. Herbert* (1886) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

Where there is no reason but the lapse of time for supposing that repairs are needed in a structure, the failure to repair does not constitute "wilful neglect" within the purview of a statute (Ky. Gen. Stat. chap. 57, § 3) giving the widow, etc., of one killed by such negligence a right to recover punitive damages. *Reinder v. Black & P. Coal Co.* (1890) 12 Ky. L. Rep. 30, 13 S. W. 719.

Under the same statute, the fact that a car by which a brakeman was killed while coupling it with another was improperly loaded by reason of the fact that lumber projected over the end so as to interfere with the space necessary for coupling, or even the fact that the conductor knew that the car was improperly loaded, does not of itself show wilful neglect; but to constitute such neglect it must appear that the conductor or other person in charge of the train knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employee. *Louisville & N. R. Co. v. Brice* (1886) 84 Ky. 298, 1 S. W. 483.

Under the Missouri act of March 23, 1881, §§ 14, 16, giving a right of action for an injury caused by the "wilful failure" of the owner, etc., of a coal mine to keep a supply of timber for props, and send it down, when required, it is a condition of recovery that defendant had notice that the timber and props were required, and, with such notice, neglected and refused to supply them. *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308.

In an action under a damage act by the representative of a deceased servant, there can be no recovery unless knowledge is brought home to the defendant. *Elliott v. St. Louis & I. M. R. Co.* (1878) 67 Mo. 272.

² *Connell v. Surrey Dock Co.* (1887) 3 Times L. R. (Q. B. D.) 630; *Booker v. Hess* (1887) 3 Times L. R. (Q. B. D.) 618; *Kelly v. Davidson* (1900) 31 Ont. Rep. 521; *Caldwell v. Mills* (1893) 24 Ont. Rep. 462.

B. DEFENSES AVAILABLE IN ACTIONS UNDER STATUTES.

1646. [649] Generally.— [The various defenses open to the master are abrogated under certain conditions by many of those statutes which, to a certain extent, make the master an insurer of the servant's safety. See chapter LXXVII., *post*.]

At first the general theory upon which the courts proceeded was that, in the absence of language evincing a contrary intention on the part of the legislature, a statute which so far changes the common law as to impose upon a master duties to which he had not been before subject, or to render him liable for the negligence of certain classes of servants resulting in injury to other servants whose right of action would, if common-law doctrines were applied, be barred by the rule as to fellow employees, should not be construed in such a sense as to preclude the master from availing himself of any of those defenses which are based upon the fact that the injured person adopted a certain course of conduct with a full appreciation, actual or constructive, of the risk from which his injury eventually resulted. [But among the more recent decisions, there appears to be a decided tendency toward the view that such defenses are precluded where the injury was caused by the failure of the master to perform a duty specifically imposed upon him by statute.]

1647. [650] Assumption of risks.— [American decisions involving the doctrine of assumption of risk as a defense to an action based upon the master's breach of a specific statutory duty are discussed in § 1647a, *post*.]

a. Ordinary risks assumed.—In some instances the statutory provisions which are considered in this and the following chapters operate so as to convert what would be an ordinary risk under the common law into an extraordinary one. But unless this be their effect, they are not deemed to change in any way the rule that a servant assumes all the ordinary risks which are manifestly incident to the employment. This proposition of course amounts merely to an assertion, in a form applicable to the circumstances, of the general principle that proof of negligence on the employer's part is a prerequisite to the establishment of the servant's right to maintain an action.¹

¹ Under the Massachusetts act of 1887 (chapter LXXIV., *post*), it has been held, on the ground that the risk was an ordinary one, that the servant could not recover for injuries caused by the permanent construction of a building. *Hoard v. Blackstone Mfg. Co.* (1900) 177 Mass. 69, 58 N. E. 180. Nor for injuries caused by an imperfectly insulated wire belonging to another company, which used the same poles as the servants' own employers.

b. Possibility of future negligence on the part of statutory vice principal, not a risk assumed.—The possibility that an employee for whose acts and defaults a master is declared by a statute to be liable may at some future time be guilty of negligence in the discharge of

Chisholm v. New England Teleph. & Teleg. Co. (1900) 176 Mass. 125, 57 N. E. 383.

For the same reason it has been held, with reference to the Wisconsin act of 1893 (chapter LXXVI., *post*), that a railway servant could not recover, where his hand was caught while coupling cars, owing to their being suddenly moved. *Andrews v. Chicago, M. & St. P. R. Co.* (1897) 96 Wis. 348, 71 N. W. 372.

In other cases the right of action for an injury resulting from a mere accident has been denied. *Hunter v. Kansas City & M. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379; *Hamilton v. Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 46, 61 N. W. 415.

Under a contract by a minor of sufficient discretion to comprehend the dangers of the employment, made with his father's assent, both father and son assume all the risks incident to the service, and neither can recover against the employer for any injury resulting from negligence of a coemployee in and about the common service. This doctrine is not modified by Ala. Code, § 2588, or by the employee's act (Ala. Code, §§ 2590–2593; chapter LXXIV., *post*). *Lovell v. De Bardelaben Coal & I. Co.* (1889) 90 Ala. 13, 7 So. 756. The court said: "The question must be determined on the terms of that act (*i. e.*, employees) itself, and without reference to § 2588 of the Code (recovery for injuries causing death of minor), or any other statute. It relates to a class of cases in which, before, no cause of action existed,—to a class of injuries the damages for which, at common law, and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it. Giving its limitations the fullest interpretation, the broadest significance, they do not trench upon any right a father, who has consented to

his minor son's entering an employment in which he is injured by a coemployee, has to sue the employer for such injury, since he never had that right. In creating this new cause of action, it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative; but, in doing so, no existing right to sue was taken away from the parents. If the minor's employment was against the will of the father, he could maintain the action before the 'employees' act,' and afterwards, though not under it. If, with his consent, as in this case, he could sue neither before or after, nor under or without the statute, if we are to give any force whatever to § 2591, which designates the only person who may sue under the act, where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative. Why the lawmakers engrafted this limitation on the prosecution of the cause of action, created by the act, is not for us to inquire; it is wholly immaterial. It provides for all servants and employees,—infants, as well as adults. Had either class been omitted, that class would have been without remedy for the negligence of coservants. Neither class was omitted, either in giving the remedy, or in requiring suit, in case of death, to be brought by the personal representative. To avoid judicial legislation, we must and do hold that the father, under the averments of this complaint, has no standing in court to recover damages for the death of his minor son, resulting from the negligence of fellow servants. *Stewart v. Louisville & N. R. Co.* (1887) 83 Ala. 493, 4 So. 373."

The proposition enunciated in the text was the basis of the decision in *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 34 L.R.A. (N.S.) 163, 94 N. E. 431, Ann. Cas. 1912B, 156, which held the statute known as article 14a of the labor law, being chapter 674 of the Laws of 1910, invalid as being in violation of

his duties is not one of those risks which is undertaken by a servant who is within the protection of the statute. A different doctrine would manifestly have the effect to render such a statute ineffectual for the purpose for which it was framed.²

c. Extraordinary risks; how far assumed, in the absence of express provisions on the subject.—The inference that the injured servant assumed the risk in question will not be drawn in the case of an infraction of a statutory duty, any more than in the case of a common-law duty, where the evidence is not conclusive as to his appreciation of that risk.³ See § 1179, *ante*. Nor should the court take

the constitutional provision respecting due process of law. The purpose of the statute was to afford compensation to all workmen engaged in certain specified occupations concededly dangerous to life and limb, regardless of the negligence of the master. This statute was modeled more or less closely after the English workmen's compensation act, but the court held it unconstitutional because it did not require proof of negligence on the master's part as a prerequisite to the servant's right of recovery.

² *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070, per Holmes, J.; *Murphy v. City Coal Co.* (1898) 172 Mass. 324, 52 N. E. 503; *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145; *St. Louis, I. M. & S. R. Co. v. Touhey* (1899) 67 Ark. 209, 54 S. W. 577; *Georgia R. & Bkg. Co. v. Rhodes* (1876) 56 Ga. 645; *Pratt Consol. Coal Co. v. Davidson* (1911) — Ala. —, 55 So. 886.

In *Woodward Iron Co. v. Andrews* (1896) 114 Ala. 243, 21 So. 440, the court argues thus: "One theory of defense under these counts is that the plaintiff must be held to have assumed the risks incident to Neal's negligence by remaining on the hand car when Neal caused it to be run into this dangerous place. This idea is unsound. To sustain it would be to emasculate the employer's liability act in respect of its second, third, and fifth clauses, and to rehabilitate the common-law doctrine of fellow servants as applicable to the cases provided for in those clauses, when the clear purpose of the act is to destroy the defense of assumption of risk by the injured employee in the several cases stated in the counts referred to. An employee in such cases may be guilty of

such contributory negligence as will bar his recovery, but he does not assume the risks incident to the negligence of a superintendent, or of a person to whose orders he was bound to conform and did conform, or of a person in charge and control of a locomotive engine, car, etc." To the same effect, *Louisville & N. R. Co. v. Wynn* (1910) 166 Ala. 413, 51 So. 976.

In *Chicago G. W. R. Co. v. Crotty* (1905) 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913, in speaking of the Iowa fellow-servant statute the court says: "It abrogates, in respect of the 'use and operation of any railway,' the common-law rule that an employee, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant."

In *Hall v. Chicago, B. & Q. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239, the court refused to accept the contention of the defendant's counsel, that a servant assumes all the risks resulting from the negligence of other employees in violating the company's rules.

A danger owing wholly to an isolated act of carelessness on the part of a superintendent is not a danger which naturally grows out of the employment, or is necessarily incident to it, so that it is assumed by the servant, under the provisions of the statute. *McGlynn v. Pennsylvania Steel Co.* (1911) 144 App. Div. 343, 129 N. Y. Supp. 45; *Juve v. Pennsylvania Steel Co.* (1911) 144 App. Div. 903, 129 N. Y. Supp. 53.

³ *Peterson v. Johnson-Wentworth Co.* (1897) 70 Minn. 538, 73 N. W. 510 (unguarded machinery); *Connolly v. Booth* (1908) 198 Mass. 577, 84 N. E. 799; *Wingert v. Krakauer* (1902) 76 App. Div. 34, 78 N. Y. Supp. 664 (defective scaffolding); *Johansen v. East-*

the case from the jury, where it is a reasonable inference that the action of the servant in subjecting himself to the given risk was neither entirely voluntary, nor accompanied by a full appreciation of that risk.⁴ But when that appreciation is established it may be said that with the exception of statutes imposing specific duties upon the master the inability of the servant to recover becomes a peremptory conclusion of law unless the terms of the statute are such as to preclude the court from declaring the action to be barred on this ground;⁵ in respect to the statutes imposing a specific duty upon the master, there is a very decided conflict of authority especially among the American decisions. Upon this point, see § 1647a.]

man's Co. (1899) 44 App. Div. 270, 60 N. Y. Supp. 708, affirmed in (1901) 168 N. Y. 648, 61 N. E. 1130 (unguarded shafting).

And see the California statute containing express provisions to this effect, § 1752, *post*.

⁴ Where a boy twelve years old, employed as a messenger, is placed at work by his master in the factory of the latter, in violation of Laws 1897, chap. 415, § 70, the act of the child in working therein is not, as a matter of law, a waiver of the protection of the statute. *Marino v. Lehmaier* (1901) 62 App. Div. 43, 70 N. Y. Supp. 790.

⁵ (a) *General employers' liability acts*.—The doctrine in the text has frequently been held to be a bar to an action under the Massachusetts act of 1887 (chapter LXXIV., *post*). *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119; *Fisk v. Fitchburg R. Co.* (1893) 158 Mass. 238, 33 N. E. 510; *Gleason v. New York & N. E. R. Co.* (1893) 159 Mass. 68, 34 N. E. 79; *Daigle v. Lawrence Mfg. Co.* (1893) 159 Mass. 378, 34 N. E. 458; *Kleinest v. Kunhardt* (1893) 160 Mass. 230, 35 N. E. 458; *Cassady v. Boston & A. R. Co.* (1895) 164 Mass. 170, 41 N. E. 129; *O'Connor v. Whittall* (1897) 169 Mass. 563, 48 N. E. 844; *Dacey v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418; *McPhee v. Soull* (1895) 163 Mass. 216, 39 N. E. 1007; *Cunningham v. Lynn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 440; *Carrigan v. Washburn & M. Mfg. Co.* (1898) 170 Mass. 79, 48 N. E. 1079; *French v. Columbia Spinning Co.* (1897) 169 Mass. 531, 48 N. E. 269; *McCauley v. Springfield Street R. Co.* (1897) 169 Mass.

301, 47 N. E. 1006; *Flaherty v. Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463; *Ford v. Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L.R.A. 96, 52 N. E. 1065; *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066; *Scullane v. Kellogg* (1897) 169 Mass. 544, 48 N. E. 622; *Tenantry v. Boston Mfg. Co.* (1898) 170 Mass. 323, 49 N. E. 654; *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234, 35 N. E. 484; *Goudie v. Foster* (1909) 202 Mass. 226, 88 N. E. 663.

The doctrine of assumed risk is involved in cases arising under the Indiana act of 1895. *American Rolling Mill Co. v. Hullinger* (1903) 161 Ind. 673, 67 N. E. 986, 69 N. E. 460. This decision is based upon the theory that the statute makes the employer liable as to a stranger; and the doctrine would operate against a stranger where the defect was obvious, as in that case,—the danger of an unguyed truss falling. The court says that there is a distinction between statutes imposing definitive duties, and those which do not impose such duties.

In *Cleveland C. C. & St. L. R. Co. v. Bossert* (1909) 44 Ind. App. 245, 87 N. E. 158, it is said that the doctrine of assumed risk is read into and made a part of the employers' liability act of 1893 (Burn's Anno. Stat. 1901, § 7083), making railroad companies liable for injuries to an employee who, while in the exercise of due care, is injured by the negligence of any person in the employ of the company to whose orders the injured employee was bound to conform and did conform.

In *Cleveland, C. C. & St. L. R. Co. v. Gossett* (1909) 172 Ind. 525, 87 N. E. 723, it was held that the duty defined

The intention of the legislature to deprive employers of the benefit of this defense in so far as its rests upon the conception of an im-

and imposed by clause 4 of § 8017, Burns's Anno. Stat. 1908, upon railroad companies to answer to an employee who is injured without his fault by the negligence of a coemployee in charge of switch yard signal or locomotive engine cannot be waived or assumed. The language of this decision is opposed to the above Indiana cases, but it is possible that the court had in mind negligence of which the injured employee had no knowledge.

The servant was declared to have assumed the risk, in several decisions under the Alabama employers' liability act. But the language and reasoning of the court show that the defense really meant was contributory negligence. The decisions referred to are, therefore, collected in §§ 1648, 1649, *post*.

But in *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L.R.A. 457, 13 So. 8, it was expressly held that the employers' liability act (Code, § 2590) which is a substantial, if not an exact, copy of the English act of 1880, does not change the rule that an employee assumes the risk of defective appliances where he continues in employment with knowledge of the defects, even if they are known to the master. To the same general effect, *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547; *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368, 53 Am. St. Rep. 127, 17 So. 29; *Bridges v. Tennessee Coal, Iron & R. Co.* (1895) 109 Ala. 287, 19 So. 495; *Alabama G. S. R. Co. v. Davis* (1898) 119 Ala. 572, 24 So. 862.

It may also be mentioned here that a father who consents to the employment of his minor son in a dangerous service cannot recover in an action under the Texas statutes for the death of his son, resulting from his inexperience and the failure of the employer to instruct him against the dangers incident to the employment. *Missouri, K. & T. R. Co. v. Evans* (1897) 16 Tex. Civ. App. 68, 41 S. W. 80.

(b) *Acts imposing specific duties.*—See § 1647a, *post*.

(c) *Municipal ordinances.*—On the ground that the servant understood the risk caused by the violation of a municipal ordinance, recovery was denied in

the following cases: *Browne v. Siegel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815, affirming (1900) 90 Ill. App. 49; *Swift & Co. v. Fue* (1896) 66 Ill. App. 651 (guarding of machinery); *Martin v. Chicago, R. I. & P. R. Co.* (1901) — Iowa —, 87 N. W. 654 (undue speed of trains); *Munn v. L. Wolff Mfg. Co.* (1901) 94 Ill. App. 122 (unguarded machinery); *Chicago Packing & Provision Co. v. Rohan* (1892) 47 Ill. App. 640; *Martin v. Chicago, R. I. & P. R. Co.* (1902) 118 Iowa, 148, 59 L.R.A. 698, 96 Am. St. Rep. 371, 91 N. W. 1034 (violation of speed ordinance); *Camp v. Chicago G. W. R. Co.* (1904) 124 Iowa, 238, 99 N. W. 735 (violation of speed ordinance; on the facts, it appeared that the servant was not chargeable with knowledge, and consequently could recover); *Burns v. Nichols Chemical Co.* (1901) 65 App. Div. 424, 72 N. Y. Supp. 919 (guard rails to elevator opening); *Ives v. Wisconsin C. R. Co.* (1906) 128 Wis. 357, 107 N. W. 452 (undue speed).

(d) *Statutes abrogating the fellow-servant law.*—Under statutes abrogating the fellow-servant rule, it is frequently stated that the servant does not assume the risk of the negligence of a fellow servant. But all that is probably meant is that the common-law rule which prevented a recovery on the part of the servant if his injury was due to the negligence of a fellow servant is abrogated to the extent that the negligence of a fellow servant is put upon the same basis as the negligence of the master; and the risks thereof assumed only when known and appreciated by the servant; in other words, under the statute, the risk is no longer an ordinary risk, assumed by the very contract of employment.

Under the existing statutes in this state a railroad employee in the line of his duty does not assume the risk of negligence in a coemployee, except, perhaps, in a case where he knowingly, voluntarily, and unnecessarily submits himself thereto. *Hackett v. Wisconsin C. R. Co.* (1910) 141 Wis. 464, 124 N. W. 1018.

The statute of Iowa (Code 1897, § 2071) abrogates, in respect of the "use and operation of any railway," the

plied contract has been inferred in the case of a statute in which it is expressly declared that, under the circumstances specified, the

common-law rule that an employee, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule that, where an employee undertakes an act the danger of which is obvious or actually known to him, and is inherent in the act itself or in the particular manner in which it is to be performed, he assumes the risk of injury; and this, although the danger may have arisen from the prior negligence of a coemployee. *Chicago G. W. R. Co. v. Crotty* (1905) 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

In *Phinney v. Illinois C. R. Co.* (1904) 122 Iowa, 488, 98 N. W. 358, the court says that the recovery for injuries due to the negligence of a fellow servant is never precluded under Code 1897, § 2071, by any rule relating to assumption of risk. And in *Rhodes v. Des Moines, L. F. & N. R. Co.* (1908) 139 Iowa, 327, 115 N. W. 503, the court said that, as the negligence charged was that of a fellow servant, the doctrine of assumption of risk cannot avail the defendant. However, in *Pearl v. Omaha & St. L. R. Co.* (1902) 115 Iowa, 538, 88 N. W. 1078, the court undoubtedly stated the correct rule and what was intended to be expressed in the other Iowa cases; namely, that an employee never assumes the risk of the future unanticipated negligence of a fellow servant.

In *Chicago G. W. R. Co. v. Crotty*, *supra*, a case dealing with the Iowa statute, the court said that a careful examination of the case of *Phinney v. Illinois C. R. Co. supra*, and of the other Iowa cases, disclosed that the only effect of the statute is that of attributing the negligence of one of the servants embraced in the statute to the railroad company.

In *St. Louis, I. M. & S. R. Co. v. Ledford* (1909) 90 Ark. 543, 119 S. W. 1123, it was held that "under the statute, a servant who becomes aware of a dangerous situation created by the negligence of a fellow servant, and appreciates the danger, must be held to have assumed the risk of such danger when he continues in the service with such knowledge and appreciation, for

the negligence of the fellow servant is, by the statute, made the same as that of the master, so far as it affects the responsibility of the latter." To the same effect, *St. Louis Southwestern R. Co. v. Burd* (1910) 93 Ark. 88, 124 S. W. 239; *St. Louis, I. M. & S. R. Co. v. Booth* (1911) 98 Ark. 227, 135 S. W. 811; *St. Louis, I. M. & S. R. Co. v. Vann* (1911) 98 Ark. 145, 135 S. W. 816.

In several Massachusetts cases it is stated that, under the statute, the negligence of a superintendent is not one of the risks assumed by the servant by his contract of employment; thus implying that risk of such negligence may be assumed if, with knowledge thereof, the servant continues in the employment. *Murphy v. New York, N. H. & H. R. Co.* (1904) 187 Mass. 18, 72 N. E. 330; *Meagher v. Crawford Laundry Mach. Co.* (1905) 187 Mass. 586, 73 N. E. 853.

In *Pittsburgh, C. C. & St. L. R. Co. v. Rogers* (1909) 45 Ind. App. 230, 87 N. E. 28, the court says that the statute imputes to the company the negligence of certain fellow servants. If the negligence of those fellow servants is to be considered as the negligence of the company, then it may be assumed if known.

In the following cases it is stated generally that under the statutes of this character the servant no longer assumes the risk of a fellow servant's negligence: *Texas & P. R. Co. v. Putman* (1903) 57 C. C. A. 58, 120 Fed. 754; *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1899) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290; *Indianapolis Union R. Co. v. Waddington* (1907) 169 Ind. 448, 82 N. E. 1030; *Brooks v. Kinsley Iron & Mach. Co.* (1909) 202 Mass. 228, 88 N. E. 771; *Thompson v. Chappell* (1902) 91 Mo. App. 297; *Galveston, H. & S. A. R. Co. v. Henefy* (1909) — Tex. Civ. App. —, 115 S. W. 57.

To hold that an engineer assumed the risk of the negligence of another engineer "would establish in its full vigor the fellow-servant rule, which the statute was intended to abrogate as to the employees mentioned." *Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse* (1906) 168 Ind. 438, 78 N. E. 1033.

servant shall have the same right to compensation and remedies as if he were not in the service of the defendant.⁶

d. Effect of express provisions with regard to assumption of extraordinary risks.—The effect of such a provision as that which is found in § 2 of the North Carolina act of 1897 (chapter LXXVI., *post*) is manifestly to deprive the employee altogether of the benefit of a defense which presupposes that an agreement, whether it be express or implied, to waive the right of action for an injury resulting from the negligence of the master himself, or his agent, is valid and binding upon a servant.⁷ [But in a jurisdiction in which the con-

⁶ In *Weblin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597, it was ruled that the English employers' liability act of 1880 (chapter LXXIV., *post*) had taken away the general defense that the servant assumed the risks of his employment. This view was also adopted by all the Lords Justices in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 531, 35 Week. Rep. 555, 51 J. P. 516. Lord Esher stated his views as follows: "The first thing to consider is, What is the true construction of the employers' liability act 1880? It has been suggested that this act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defense. It was, no doubt, held that a servant could not sue a master for injuries arising from the negligence of a fellow servant, but it was also held that a man who went into any employment undertook to take all the ordinary risks incident thereto, unless they were concealed or were known to the master, and not to the servant. It seems to me clear that the act has taken away that defense from the master. I can see no difference between contracting to take a risk upon oneself and undertaking an employment to which risk attaches. No one ever suggested that there could be such a contract in the case of any person other than a servant, so that when a servant is put on a footing with other persons that defense of the master is gone. The case is reduced, therefore, to

a personal action founded on negligence."

The supreme court of Massachusetts has arrived at a different conclusion with regard to the effect of the similar statute of that state. See note 5, subd. (a), *supra*. See also *American Rolling Mill Co. v. Hullinger* (1903) 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, which is cited in the same subdivision of that note.

⁷ It has been laid down that the doctrine of assumption of risks "has no application, where the law requires the adoption of new devices to save life or limb (as, self-couplers), and the employee, either ignorant of that fact, or expecting daily compliance with the law, continues in service with the appliances formerly in use. *Greenlee v. Southern R. Co.* (1898) 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115 (failure to equip cars with automatic couplers); *Coley v. North Carolina R. Co.* (1901) 128 N. C. 534, 39 S. E. 43, 129 N. C. 407, 57 L.R.A. 817, 40 S. E. 195 (failure to equip car with grip irons); *Mott v. Southern R. Co.* (1902) 131 N. C. 234, 42 S. E. 601 (holding doctrine of assumption of risk inapplicable to servant injured through company's negligence while removing a tire from an engine); *Walker v. Carolina C. R. Co.* (1904) 135 N. C. 738, 47 S. E. 675 (defective sand drier); *Biles v. Seaboard Air Line R. Co.* (1905) 139 N. C. 528, 52 S. E. 129, second appeal (1906) 143 N. C. 78, 55 S. E. 512 (defective switch engine); *Boney v. Atlantic & N. C. R. Co.* (1907) 145 N. C. 248, 58 S. E. 1082 (defective hand car); *Lowe v. Southern R. Co.* (1910) 85 S. C. 363, 67 S. E. 460 (construing North Carolina act).

The defendant railroad company was

tractual basis of assumption of risk is repudiated it has been held that defense based upon the maxim *Volenti non fit injuria* is not taken away by such a provision.⁸]

In cases where the statute provides that an assumption of the risk shall not be inferred from the servant's continuance of work,⁹ or that knowledge by an employee of the unsafe character of an appliance shall be no defense to an action for injuries caused thereby,¹⁰ the intention of the legislature to exclude altogether the defense of an assumption of the risk would seem to be not an unreasonable infer-

also held to be deprived of the defense of assumption of risk in *Thomas v. Raleigh & A. Air Line R. Co.* (1901) 129 N. C. 392, 40 S. E. 201 (servant directed to assist in removing hand car from flat car standing on a high fill), and *Cogdell v. Southern R. Co.* (1901) 129 N. C. 398, 40 S. E. 202 (defective grate handle on engine).

⁸ In *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499, it was held that a statute prohibiting a master from contracting against the effects of his negligence does not affect the defense of assumption of risk, even to an action for the breach of a statutory duty, since that defense is based upon the maxim *Volenti non fit injuria*, and not upon contract. To the same effect, *Monson v. La France Copper Co.* (1911) 43 Mont. 65, 114 Pac. 778 (cage in mine not equipped with doors).

A statute making an employer liable for all injuries caused by his want of care does not take away the defense of assumption of risk. *Coulter v. Union Laundry Co.* (1906) 34 Mont. 590, 87 Pac. 973.

⁹ As, by § 8 of the act of Congress of March 2, 1893 (27 Stat. at L. 532, chap. 196, U. S. Comp. Stat. 1901, p. 3176), at which (§ 4) declares it to be "unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car, for greater security to men in coupling and uncoupling cars."

The Illinois statute (Laws of 1905, p. 350) is modeled after the Federal act. *Luken v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

The Alabama statute (Laws of 1907;

see chapter LXXIV., *post*) provides that in no event shall it be an assumption of the risk on the part of a servant to remain in the employment after knowledge of the defect or negligence causing the injury unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of.

Ohio Gen. Code 1910, § 9017, provides in substance that an employee of a railroad company who is killed or injured as a result of any defect in a locomotive, engine, car, hand car, rail, track, machinery or appliance required by the company to be used by its employees shall not be deemed to have assumed the risk thereof, although continuing in the employment of the company after knowledge of the defect.

¹⁰ As under the Constitutions of Mississippi, South Carolina, and Virginia. See chapter LXXV., *post*.

Section 2082 of the Iowa Code provides that an employee of a railroad shall not be considered as waiving his right to recover damages by continuing in the employment of the company with knowledge that the company had failed to provide its engines and cars with safety appliances, as required by the Code.

Or. Laws 1903, p. 20, § 1 (Or. Comp. Stat. § 6946) provides among other things: Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances, or structures shall not of itself be a bar to recovery for any injury or death caused thereby.

The provision of the Constitution of Mississippi was adopted verbatim by the Constitutional Convention in Virginia. *Norfolk & W. R. Co. v. Cheatwood* (1905) 103 Va. 356, 49 S. E. 489.

ence. But the decisions upon this subject are not entirely consistent.¹¹

¹¹ One of the Federal courts of appeals has held that the meaning of such a provision is that the knowledge of the defect in question is a circumstance which the jury should be directed to consider in determining whether the servant was guilty of contributory negligence, or intended to assume the risk of handling the appliance. *Cleveland, C. C. & St. L. R. Co. v. Baker* (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224, construing the statute referred to in note 9, *supra*.

The provision in the South Carolina Constitution (chapter LXXV., *post*) applies to an action by a section master for personal injuries by failure of the company to furnish a sufficient number of persons to perform the work. *Bodie v. Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715.

Under this provision a motion for a nonsuit on the ground that undisputed evidence showed that a brakeman suing a railroad for injuries resulting from defective mechanism saw the defects complained of before using such mechanism, and thereby assumed the risk, is properly denied, since the Constitution meant that such prior knowledge of defects would not defeat the action. *Youngblood v. South Carolina & G. R. Co.* (1901) 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232.

A requested charge in an action for injuries to a servant, that "knowledge, by an employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby,—such as injury resulting from a defective switch, coupler, or other appliance in use by railroad companies," was properly granted, since, except the last clause, which is illustrative and applicable to the case, it is in the language of § 15 of the Constitution. *Ibid*.

A requested instruction in an action for injuries to a servant, that a servant assumes all risks, except those arising from unsafe or defective machinery and keeping the same in repair, could not be complained of, as failing to state that risks from obvious defects in machinery were assumed, in the absence of a request to charge on the specific proposi-

tion, since the general proposition of law was correctly stated. *Ibid*.

The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893, § 2, might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of the statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence which would defeat any recovery, in lifting his head a little too high after being warned of the danger. *Schlemmer v. Buffalo, R. & P. R. Co.* (1907) 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

The Federal safety-appliance act abolishing the rule as to assumption of risk in case of failure to use automatic couplers does not apply to a case where automatic couplers were used, but were slightly defective. *Norman v. Southern R. Co.* (1907) 119 Tenn. 401, 104 S. W. 1088.

The Federal statute abolishing the defense of assumption of risk where automatic couplers are not used does not apply to a car loaded with rails, which, having been sent into the state, was, at the time that the injury occurred, being sent from point to point within the state, wherever the rails were needed. *Coley v. Kansas City Southern Co.* (1906) 43 Tex. Civ. App. 488, 95 S. W. 96.

The Virginia Constitution, § 162, and § 1294k of the Code, do away with the common-law doctrine of assumption of risk so far as it applies to knowledge "of the defective or unsafe character or condition of any machinery, ways, appliances, or structures" on the part of the servant of a railroad company; but these provisions have been held not to take away from the railroad company the right to carry on its business in its own way, or to adopt any method of constructing its switches which it might prefer, which was reasonably safe. *Potomac, F. & P. R. Co. v. Chichester* (1910) 111 Va. 152, 68 S. E. 404.

"When the plaintiff's decedent entered into the service of the defendant company, he assumed all the ordinary and

In some of the employers' liability acts discussed in chapter LXXIV., clauses are inserted which change the common-law doctrine of assumption of risk to the extent of making the availability of that defense a question for the jury, even though it may be shown clearly that he fully appreciated the given risk.¹²

[The Iowa statute provides that where an employee with knowl-

usual risks incident to the service (except those abolished by § 162 of the Constitution and § 1294k of the Code), including the risks incident to the manner in which he knew, or, in the exercise of ordinary care, ought to have known, the defendant conducted its business." *Southern R. Co. v. Foster* (1911) 111 Va. 763, 69 S. E. 972.

Under the Federal statute, it was held in *Chicago, M. & St. P. R. Co. v. Voelker* (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522, that a switchman did not assume the risk of injury from a car not equipped in accordance with the requirements of the statute, simply because the car was located on a track sometimes used to handle cars in need of repairs, but which was not a hospital track, and was used for actively handling trains.

In *York v. St. Louis, I. M. & S. R. Co.* (1908) 86 Ark. 244, 110 S. W. 803, it was held that where the death of a brakeman was due to failure of the railroad company to equip its cars in accordance with the requirements of the act, the question of assumption of risk was not at issue.

The defense of assumption of risk was not involved in an action based on the failure of a railroad to use automatic couplers, in accordance with the requirements of the Illinois statute. *Chicago & A. R. Co. v. Walters* (1905) 120 Ill. App. 152, affirmed in (1905) 217 Ill. 87, 75 N. E. 441; *Patten v. Faithorn* (1910) 152 Ill. App. 426.

In the following cases under the South Carolina Constitution, it was held that the doctrine of assumption of risk was not available to the master; *Youngblood v. South Carolina & G. R. Co.* (1900) 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232; *Bodie v. Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715; *Carson v. Southern R. Co.* (1903) 68 S. C. 55, 46 S. E. 525, affirmed in (1904) 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Davis v. North Western R. Co.* (1906) 75 S. C. 303, 55 S. E. 526;

Kitchens v. Southern R. Co. (1908) 80 S. C. 531, 61 S. E. 1016; *James v. Fountain Inn Mfg. Co.* (1908) 80 S. C. 232, 61 S. E. 391; See *Gilliland v. Charleston & W. C. R. Co.* (1910) 86 S. C. 137, 68 S. E. 186 (brakeman injured by defective coupling held not to have assumed the risk, although he knew of such defects); *Whisonant v. Atlanta & C. Air Line R. Co.* (1910) 86 S. C. 300, 68 S. E. 566; *Harrill v. South Carolina & G. Extension R. Co.* (1904) 135 N. C. 601, 47 S. E. 730 (construing Constitution of South Carolina).

¹² *New York*.—(See chapter LXXIV., subtitle A, post).

The ordinary or necessary risks of the service are assumed by the servant, the statute leaving to the jury the assumption of extraordinary risks only. *Loger-to v. Central Bldg. Co.* (1908) 123 App. Div. 840, 108 N. Y. Supp. 604.

The New York statute does not eliminate the defense, but the question whether the employee understood and assumed the risk must be submitted to the jury. *Kiernan v. Eidlitz* (1906) 115 App. Div. 141, 100 N. Y. Supp. 731.

Whether the plaintiff fully understood and appreciated the danger is, under the statute, a question solely for the jury. *Hurley v. Olcott* (1909) 134 App. Div. 631, 119 N. Y. Supp. 430, affirmed in (1910) 198 N. Y. 132, 28 L.R.A. (N.S.) 238, 91 N. E. 270.

Under the provision of the New York statute that the servant assumes the necessary risks of the service, and no other, a servant called upon by the master or his representative to do work outside the scope of his employment assumes none of the risks thereof. *Perrota v. Richmond Brick Co.* (1908) 123 App. Div. 626, 108 N. Y. Supp. 10.

In *Persons v. Bush Terminal Co.* (1910) 68 Misc. 573, 125 N. Y. Supp. 277, the court said that, under this statute, the new test of whether the servant assumed the risk was not the simple one, whether the risk was known or observed by the employee, but whether

edge of defects in the machinery or appliances has given a written notice to the employer, he shall not, "by reason of remaining in the

the circumstances were such as plainly to lead to the conclusion that the risk was understood and voluntarily assumed by the employee.

Under the New York statute it is error to charge the jury that the only risks which the servant assumes are those which remain after the master has done his full duty, it being for the jury to say whether the servant assumed the risk of dangers created by the master's negligence or not. *Wynkoop v. Ludlow Valve Mfg. Co.* (1906) 112 App. Div. 729, 98 N. Y. Supp. 1076.

Under the New York statute (Laws of 1902, p. 1748, chap. 600), a nonsuit on the ground of assumption of risk is error. *Kinney v. Rutland R. Co.* (1906) 114 App. Div. 286, 99 N. Y. Supp. 800; *Valentino v. Garvin Mach. Co.* (1910) 139 App. Div. 139, 123 N. Y. Supp. 959; *Vaughn v. Glens Falls Portland Cement Co.* (1907) 119 App. Div. 923, 104 N. Y. Supp. 1149.

So, also, a dismissal of the complaint on that ground is error. *Aken v. Barnett & A. Knitting Co.* (1907) 118 App. Div. 463, 103 N. Y. Supp. 1078, affirmed in (1908) 192 N. Y. 554, 85 N. E. 1105.

Even if the evidence is undisputed, it must be submitted to the jury. *Reynolds v. Seneca Falls Mfg. Co.* (1910) 137 App. Div. 446, 122 N. Y. Supp. 797.

The finding of a jury to the effect that a servant has not assumed the risk merely because he has continued in the employ with knowledge and appreciation of the danger may not be set aside by the court as against the evidence, merely on the ground that the two elements of knowledge and appreciation of the danger were present. *Chernick v. Independent American Ice Cream Co.* (1911) 72 Misc. 79, 129 N. Y. Supp. 694.

Under Laws of 1902, p. 1750, chap. 600, § 3, the court has no power to set aside a verdict as contrary to law upon the question of assumption of risk, although, if not satisfied with the verdict, it may set it aside as contrary to the evidence. *Clark v. New York C. & H. R. R. Co.* (1908) 191 N. Y. 416, 84 N. E. 397.

The verdict of the jury as to assumption of risk may be set aside if against the weight of evidence. *Kellogg v. New*

York Edison Co. (1907) 120 App. Div. 410, 105 N. Y. Supp. 398.

In *Wynkoop v. Ludlow Valve Mfg. Co.* (1906) 112 App. Div. 729, 98 N. Y. Supp. 1076, the finding that the plaintiff did not assume the risk was held to be against the weight of evidence, and was set aside.

But if the action is brought at common law, the question of assumption of risk is not necessarily one of fact for the jury, under Laws of 1902, p. 1748, chap. 600. *O'Neil v. Karr* (1906) 110 App. Div. 571, 97 N. Y. Supp. 148.

The special rules governing an action brought under the employers' liability act are not available to the plaintiff in a common-law action. *Welch v. Waterbury* (1910) 136 App. Div. 315, 120 N. Y. Supp. 1059; *Curran v. Manhattan R. Co.* (1907) 118 App. Div. 347, 103 N. Y. Supp. 351; *Bushtis v. Catskill Cement Co.* (1908) 128 App. Div. 780, 113 N. Y. Supp. 294, affirmed in (1910) 198 N. Y. 548, 92 N. E. 1079.

Where the notice required by the statute is insufficient, so that the plaintiff must rely upon the common-law remedies, the question of assumption of risk is not necessarily for the jury. *Jackson v. Greene* (1911) 201 N. Y. 76, 93 N. E. 1107, reversing (1909) 134 App. Div. 918, 118 N. Y. Supp. 930.

A contrary view was taken in *Ward v. Manhattan R. Co.* (1904) 95 App. Div. 437, 88 N. Y. Supp. 758, where it was held that § 3 of the act, which makes the question of assumption of risk one for the jury, is general, and applies to all actions by servants against their masters, whether under the statute or at common law; but this court subsequently changed its view, and said that, in order to secure the benefits of the statute, the action must be brought under it. *Curran v. Manhattan R. Co.* (1907) 118 App. Div. 347, 103 N. Y. Supp. 351.

The New York statute was involved in the following cases: *Guilmartin v. Solvay Process Co.* (1907) 189 N. Y. 490, 82 N. E. 725; *Smith v. Manhattan R. Co.* (1906) 112 App. Div. 202, 98 N. Y. Supp. 1; *Travis v. Haan* (1907) 119 App. Div. 138, 103 N. Y. Supp. 973; *Ortolano v. Degnon Contracting Co.* (1907) 120 App. Div. 59, 104 N. Y. Supp. 1064; *Onesti v. Central New Eng-*

employment with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair." ¹³

Section 202 of the New York labor law (as amended by Laws of 1910, chapter 352) provides that the fact that the employee continues in the employment with knowledge of danger from any cause, including open and visible defects, "shall not be, as matter of fact or matter of law, an assumption of the risk of injury therefrom." See chapter LXXIV., *post*.

The Texas statute (see chapter LXXVI., *post*) provides that in any suit for personal injuries against any person or corporation operating a railroad or street railroad the plea of assumption of risk, when based on the injured servant's knowledge or means of knowledge of the defect or danger, shall not be available where a person of ordinary care would have continued in the service with such knowledge, nor where the injured employee had an opportunity to notify the employer of the defect, and did so notify him. ¹⁴

land R. Co. (1907) 121 App. Div. 554, 106 N. Y. Supp. 233; *Anderson v. Milliken Bros.* (1908) 123 App. Div. 614, 108 N. Y. Supp. 61, affirmed in (1909) 194 N. Y. 521, 87 N. E. 1114; *Graves v. Gustave Stickley Co.* (1908) 125 App. Div. 132, 109 N. Y. Supp. 256, affirmed without opinion in (1909) 195 N. Y. 584, 89 N. E. 1101; *Quigg v. Post* (1909) 131 App. Div. 155, 115 N. Y. Supp. 147; *Wittmer v. Fairhurst* (1909) 134 App. Div. 305, 118 N. Y. Supp. 939; *Grishoff v. Marx* (1910) 140 App. Div. 886, 124 N. Y. Supp. 1083; *Larsen v. Lackawanna Steel Co.* (1911) 130 N. Y. Supp. 887.

New Jersey.—(See chapter LXXIV., subtitle A, *post*).

Oklahoma.—(See chapter LXXVI., *post*.)—Article 23, § 6, of the Oklahoma Constitution, provides that the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall at all times be left to the jury. See *Petroleum Iron Works Co. v. Wantland* (1911) 28 Okla. 481, 114 Pac. 717.

Ontario.—55 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160), § 6, cl. 3. (See chapter LXXIV., subtitle A, *post*.) That this provision, so far as regards its effect upon the servant's right of action, embodied the doctrine finally established in *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467,

40 Week. Rep. 392, 55 J. P. 660, was pointed out in *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117. But it should be remembered that the English case referred to was concerned, not with the availability of the defense of a contractual assumption of risks, but with the meaning and effect of the maxim, *Volenti non fit injuria*. See § 1294, *ante*, and § 1650, *post*.

In one case it was held that a verdict for the servant will not be set aside where, although he knew that the defect which caused the injury had not been remedied at the time he returned to work, after an interval, he did not appreciate the nature and extent of the risk. *Haight v. Wortman & W. Mfg. Co.* (1894) 24 Ont. Rep. 618. The contention of the counsel that the statutory provision only applied to cases in which the plaintiff had continued to work without any intermission was rejected.

British Columbia.—In this province the legislature has used the same language as that found in the Ontario statute. Acts of 1891, chap. 10 (B. C. Rev. Stat. 1897), § 6.

¹³ See *Barber Asphalt Paving Co. v. Austin* (1911) 108 C. C. A. 365, 186 Fed. 443.

¹⁴ "The effect of that law is to eliminate the plea of assumed risk in any case where an employee has an oppor-

The Federal employers' liability act (chapter LXXVI., *post*) provides that no employee shall be held to have assumed the risks of his employment in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The statutes of Texas and Georgia (chapter LXXVI., *post*) contain similar provisions.

In a number of statutes imposing specific duties upon the master it is provided that assumption of risk will not be available as a defense for the master's breach of such duty. These statutes will be discussed in chapters LXXVIII. *et seq.*, *post*.]

[1647a. Assumption of risk or *volenti non fit injuria* as a defense to the master's breach of a specific statutory duty. American decisions.—

a. *Generally*.—Although the defenses based upon the doctrine of the contractual assumption of risk and upon the maxim *Volenti non fit*

tunity, before being injured, to notify his employer or a superior given authority to remedy defects, of the existence of such defects, and does notify such employer or superior within a reasonable time. No notice is necessary when the employer or superior knows of the defect. It also destroys the force of a plea of assumed risk where a person of ordinary care would remain in the service of his employer with knowledge of such defect and danger." *El Paso & S. W. R. Co. v. Foth* (1907) 101 Tex. 133, 105 S. W. 322.

"Since the passage of the act of 1905, known as the 'assumed risk law,' an employee in railway service is not held to assume the risk of a defect and danger arising out of the negligence of the railway company, though known to him, where a person of ordinary care would continue in the service with knowledge of the defect and danger." *International & G. N. R. Co. v. Schubert* (1910) — Tex. Civ. App. —, 130 S. W. 708.

"As we understand the act, the rule is changed so that an employee of a railway company does not now, as a matter of law, in every case, assume the risk of a defect and danger which he knows of, but that whether he does or not depends on whether or not his proceeding with the work is reconcilable with ordinary care." *Texas Mexican R. Co. v. Trijerina* (1908) 51 Tex. Civ. App. 100, 111 S. W. 239.

"The act, while leaving contributory

negligence perfectly intact, practically abolished the defense of assumed risk by making the question one of contributory negligence in every case." *Texas & N. O. R. Co. v. Barwick* (1908) 50 Tex. Civ. App. 544, 110 S. W. 953.

Under this statute, an instruction stating the law of assumed risk substantially as it was before the statute is reversible error. *Currie v. Missouri, K. & T. R. Co.* (1908) 101 Tex. 478, 108 S. W. 1167.

See also *Houston & T. C. R. Co. v. Alexander* (1909) 102 Tex. 497, 119 S. W. 1135; *El Paso & S. W. R. Co. v. Foth* (1907) 45 Tex. Civ. App. 275, 100 S. W. 171; *Gulf, C. & S. F. R. Co. v. Dickens* (1909) 54 Tex. Civ. App. 637, 118 S. W. 612, 618; *El Paso & S. W. R. Co. v. Alexander* (1909) — Tex. Civ. App. —, 117 S. W. 927; *Rice v. Lewis* (1910) — Tex. Civ. App. —, 125 S. W. 961; *Ft. Worth & D. C. R. Co. v. Lynch* (1911) — Tex. Civ. App. —, 136 S. W. 580; *Ft. Worth & D. C. R. Co. v. Drew* (1912) — Tex. Civ. App. —, 140 S. W. 810; *Texas & P. R. Co. v. Johnson* (1908) 48 Tex. Civ. App. 135, 106 S. W. 773; *Missouri, K. & T. R. Co. v. Bailey* (1909) 53 Tex. Civ. App. 295, 115 S. W. 601; *International & G. N. R. Co. v. Clark* (1910) — Tex. Civ. App. —, 125 S. W. 959; *Missouri, K. & T. R. Co. v. Swearingen* (1910) — Tex. Civ. App. —, 127 S. W. 1192; *Chicago, R. I. & G. R. Co. v. Forrester* (1911) — Tex. Civ. App. —, 137 S. W. 162.

injuria are theoretically distinct, it is impossible to preserve that distinction in discussing the American cases where the cause of action rests upon the master's breach of a specific statutory duty. In many cases the court expressly says that assumption of risk is based on an implied contract; and in other cases the court specifically refers to the defense founded upon the maxim; but a very frequent form of statement is that the defense of assumption of risk is based upon the maxim, or, in some cases, even that it is based on contract and also upon the maxim; and from examination of a large number of cases involving the master's breach of a specific statutory duty it would seem that the courts, whether referring the defense to contract or to the maxim, have but one defense in view, and no case has been found which suggests that there are two distinct defenses, one of which might be open to the master, while the other was not. And it has consequently been thought permissible to treat all the cases of this character in one section, whether the court may make use of the technical terms of contractual assumption of risk or of the maxim *Volenti non fit injuria*. It is to be borne in mind that even if these defenses are to be considered as distinct defenses, or whether one is to be considered a specific form of the other, in either case the ground of the defense is the servant's knowledge of the danger, and his voluntary continuance in the service with such knowledge. And the cases embraced within this section are readily divisible into two great classes; namely, those which hold that continuance in the service with such knowledge is a defense to the action, and those holding that continuance in the service, even with such knowledge, is not a defense.

Some quotations given below show the manner in which the two defenses have been treated, the practical effect of which is to destroy any distinction between them.¹

1 "The first ground upon which this rule of law [assumption of risk] rests is the maxim, *Volenti non fit injuria*. . . . The second ground upon which assumption of risk is based is that every servant who enters or continues in the employment of a master without complaint thereby either expressly or impliedly agrees with him to assume the risks and dangers incident to the employment which a person of ordinary prudence, in his situation, would have known by the exercise of ordinary diligence and care, and to hold his master free from liability therefor. . . . The

unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk . . . rests in contract and upon the maxim, *Volenti non fit injuria*." St. *Louis Cordage Co. v. Miller* (1903) 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495.

In *Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986, the court, although it appeared to be of the opinion that the doctrine of assumption of risk was based upon the maxim, said that the distinction between a defense based upon the maxim and one based

b. *Discussion of cases.*—There is great conflict of opinion in the American decisions as to whether or not the continuance in the service with knowledge of the fact that the master has not complied with the statutory requirements is a defense to an action based upon such failure on the part of the master. The greater weight of authority (and this doctrine appears to be a growing one) is that a servant does not assume the risk of the master's breach of a statutory duty.²

Cases of this character generally hold that the doctrine of assump-

upon an implied contract was not of great importance in cases of this character, since there was no rule of public policy which prevents an employee from deciding to assume the obvious risks of the business, as well under the factory act as otherwise.

But in *Graves v. Gustave Stickley Co.* (1908) 125 App. Div. 132, 109 N. Y. Supp. 256, affirmed without opinion in (1909) 195 N. Y. 584, 89 N. E. 1101, the court called attention to the fact that since the *Knisley Case* arose, in 1891, the legislature had added a new section to the Penal Code, which provided that any person violating certain provisions of the labor law was guilty of a misdemeanor, and questioned whether or not, in view of the amendments to the Penal Code, a master would be allowed to contract to relieve himself of the consequences of his failure to conform to the requirements of the statute. This case is interesting as showing that the court considered the defense to be based upon an implied contract, although, in the *Knisley Case*, the court implied that the defense was based upon the maxim.

In *Boyd v. Brazil Block Coal Co.* (1898) — Ind. App. —, 50 N. E. 368, the court said that neither the doctrine of assumption of risk nor the maxim applied to a breach of a statutory duty on the part of the master.

In *Welsh v. Barber Asphalt Paving Co.* (1909) 93 C. C. A. 101, 167 Fed. 465, the court said: "But we do not deem it essential to the construction of the Oregon statute to decide whether the common-law doctrine of assumption of risk is implied in the contract of employment between the master and servant, or rests in the maxim, '*Volenti non fit injuria*.' If the former is the true theory, the statute enacted in the exercise of the police power of the state, to afford needed protection to a large

class of its inhabitants, and providing a penalty for its violation, takes from the employee the right to contract to waive the performance of the duty so imposed. To hold that he could do so would be to nullify the statute and thwart its purpose. On the other hand, if the latter is the true theory, we are confronted with the fact that the statute, in addition to denouncing a penalty for violation of the statute, expressly creates a cause of action on behalf of those who are injured through its violation. There would be no occasion to create such cause of action if it were not the legislative intention, thereby expressed, to deprive the master of the defense of assumption of risk when injury occurs as the result of a violation of the statute."

And see *Kilpatrick v. Grand Trunk R. Co.* (1902) 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531, as set out in note 5, *post*.

² For a detailed exposition of the cases upon this subject, see notes to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981; *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A. (N.S.) 646; *Hill v. Saugestad*, 22 L.R.A. (N.S.) 634; *Poli v. Numa Block Coal Co.* 33 L.R.A. (N.S.) 646; and *Fitzwater v. Warren* (1912) 206 N. Y. 355, 42 L.R.A. (N.S.) 1229, 99 N. E. 1042.

Unless otherwise noted, the negligence complained of was the failure to guard machinery.

Federal courts.—*Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298 (unblocked frogs); *Inland Steel Co. v. Kachwinski* (1907) 80 C. C. A. 571, 151 Fed. 219; *Welsh v. Barber Asphalt Paving Co.* (1909) 93 C. C. A. 101, 167 Fed. 465; *Carstens Packing Co. v. Swinney* (1911) 108 C. C. A. 152, 186 Fed. 50 (unguarded vat).

In *The Fullerton* (1908) 92 C. C. A.

463, 167 Fed. 1, it was held that a vessel, by going in an unseaworthy state, in violation of the statute (act of December 21, 1898, chap. 28, § 11, 30 Stat. at L. 758, U. S. Comp. Stat. 1901, p. 3095), assumed all the risks of danger which resulted therefrom, and that a seaman injured because of the unseaworthy condition of the vessel when it put to sea was not chargeable with the assumption of any risks due to that cause.

Arkansas.—*Johnson v. Mammoth Vein Coal Co.* (1908) 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722 (absence of props in mine); *Johnson v. Mammoth Vein Coal Co.* (1908) 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722 (failure to provide props in mine); *St. Louis, I. M. & S. R. Co. v. White* (1910) 93 Ark. 368, 125 S. W. 120 (defective headlight).

The decision in *Patterson Coal Co. v. Poe* (1907) 81 Ark. 343, 91 S. W. 538, that a servant might assume the risks of the failure of a mine owner to furnish props as required by the statute was expressly overruled in *Johnson v. Mammoth Vein Coal Co. supra*.

Illinois.—*Spring Valley Coal Co. v. Pating* (1904) 210 Ill. 342, 71 N. E. 371, affirming (1904) 112 Ill. App. 4 (absence of light in mine); *Waschow v. Kelly Coal Co.* (1910) 245 Ill. 516, 92 N. E. 303 (unsafe condition of mine); *Himrod Coal Co. v. Adaock* (1900) 94 Ill. App. 1 (mining act); *Mueller v. Jordan Shoe Co.* (1908) 143 Ill. App. 332; *Hamilton v. Spring Valley Coal Co.* (1909) 149 Ill. App. 10 (mining act); *Demereski v. Citizens' Coal Min. Co.* (1909) 149 Ill. App. 513 (mining act); *McCray v. Moweaqua Coal Min. & Mfg. Co.* (1909) 149 Ill. App. 565 (mining act); *Luken v. Lake Shore & M. S. R. Co.* (1910) 154 Ill. App. 550, affirmed in (1911) 248 Ill. App. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82 (automatic coupling); *Moore v. Centralia Coal Co.* (1908) 140 Ill. App. 291 (failure to keep "places of refuge" in mines); *Svengel v. Illinois Third Vein Coal Co.* (1910) 154 Ill. App. 409 (failure to furnish places of refuge).

The decision in *Chicago Packing & Provision Co. v. Rohan* (1892) 47 Ill. App. 640 (unguarded vat), which held that the defense was open to the master, is overruled by the later Illinois cases.

Indiana.—*Baltimore & O. S. W. R. Co. v. Peterson* (1901) 156 Ind. 364, 59

N. E. 1044 (violation of city ordinances as to the running of trains); *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492 (mining act; failure to provide props); *Monteith v. Kokomo Wood Enameling Co.* (1902) 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610; *Island Coal Co. v. Swagerty* (1903) 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026 (failure to provide signals for raising and lowering elevator in mine); *Green v. American Car & Foundry Co.* (1904) 163 Ind. 135, 71 N. E. 268; *Buehner Chair Co. v. Feulner* (1904) 164 Ind. 368, 73 N. E. 811; *Davis v. Mercer Lumber Co.* (1905) 164 Ind. 413, 73 N. E. 899; *Diamond Block Coal Co. v. Cuthbertson* (1906) 166 Ind. 290, 76 N. E. 1060 (mining act; absence of props); *Antioch Coal Co. v. Rokey* (1907) 169 Ind. 247, 82 N. E. 76 (failure to furnish props in mine); *Chicago & E. R. Co. v. Lawrence* (1906) 169 Ind. 319, 79 N. E. 363, 82 N. E. 768 (violation of ordinance requiring lights on locomotives); *Indianapolis Union R. Co. v. Waddington* (1907) 169 Ind. 448, 82 N. E. 1030 (failure of an engineer to ring a bell, as required by ordinance); *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69; *Cleveland, C. C. & St. L. K. Co. v. Powers* (1909) 173 Ind. 105, 88 N. E. 1073, rehearing denied in (1909) 173 Ind. 125, 89 N. E. 485 (violation of speed ordinance); *Balzer v. Warring* (1911) — Ind. —, — L.R.A. (N.S.) —, 95 N. E. 257 (unguarded revolving shaft); *Brower v. Locke* (1903) 31 Ind. App. 353, 67 N. E. 1015; *Blanchard-Hamilton Furniture Co. v. Colvin* (1904) 32 Ind. App. 398, 69 N. E. 1032; *Chamberlain v. Waymire* (1903) 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81 (failure to guard vat); *American Car & Foundry Co. v. Clark* (1904) 32 Ind. App. 644, 70 N. E. 828 (failure to guard vat); *Espenlaub v. Ellis* (1904) 34 Ind. App. 163, 72 N. E. 527; *Muncie Pulp Co. v. Hacker* (1906) 37 Ind. App. 194, 76 N. E. 770 (emery wheel not provided with exhaust fan); *Whiteley Malleable Castings Co. v. Wishon* (1908) 42 Ind. App. 288, 85 N. E. 832; *Paul Mfg. Co. v. Racine* (1909) 43 Ind. App. 695, 88 N. E. 529 (unguarded saw); *La Porte Carriage Co. v. Sullender* (1904) — Ind. App. —, 71 N. E. 922 (unguarded emery belt); *Indiana & C. Coal Co. v. Neal* (1906) — Ind. App. —, 75 N. E. 295, rehearing denied in

(1906) 76 N. E. 527 (failure to provide ventilation); *Boyd v. Brazil Block Coal Co.* (1898) — Ind. App. —, 50 N. E. 368 (mining act; failure to furnish props in mine); *United States Cement Co. v. Cooper* (1907) — Ind. App. —, 82 N. E. 981; *Miami Coal Co. v. Kane* (1909) 45 Ind. App. 391, 90 N. E. 13 (failure of mine operator to furnish props); *Muren Coal & Ice Co. v. Cope-land* (1910) 46 Ind. App. 230, 90 N. E. 489, rehearing denied in (1910) 46 Ind. App. 237, 91 N. E. 508 (failure to furnish timbers in mine); *Vandalia Coal Co. v. Yemm* (1910) 175 Ind. 524, 92 N. E. 49 (failure to sprinkle entries and roadways in mine); *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122 (failure to make mine safe before permitting miner to enter).

Indian territory.—*Bolan-Darnell Coal Co. v. Williams* (1907) 7 Ind. Terr. 648, 104 S. W. 867 (mining act; failure to provide proper ventilation).

Iowa.—*Poli v. Numa Block Coal Co.* (1910) 149 Iowa, 104, 33 L.R.A.(N.S.) 646, 127 N. W. 1105 (mining act; defective cage); *Stephenson v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 377, 130 N. W. 586.

In *Tyrrell v. Cain* (1910) — Iowa, —, 128 N. W. 536, although other decisions in that jurisdiction (see, for example, *Poli v. Numa Block Coal Co.* [1910] 149 Iowa, 104, 33 L.R.A.(N.S.) 646, 127 N. W. 1105, and *Stephenson v. Sheffield Brick & Tile Co.* [1911] 151 Iowa, 377, 130 N. W. 586) are apparently emphatic in holding that a servant does not assume the risks of the breach of the master's statutory duty, the court did not seem disposed to assert that rule to its full extent, it being held that to sustain the defendant's claim that the plaintiff assumed the risk involved in the failure of the defendant to comply with the statute, it was not sufficient to show merely that the plaintiff knew that there was danger in operating a machine without the safety devices, but also that she knew and appreciated the danger in operating such a machine without a safety appliance which it was the defendant's duty to furnish. In other words, a servant may know and appreciate the danger of working at a machine without assuming the risk thereof, if he does not happen to know that the master is required by law to lessen the

danger. This seems to be a very strained view to take, and the dissenting opinion asserts that it was taken to avoid passing upon the question whether a servant may assume the risk of the master's breach of a statutory duty. But *Poli v. Numa Block Coal Co. supra*, had already been decided, and in fact is cited upon this point in the prevailing opinion; and in that opinion the court says that the question was squarely presented, and that it was necessary to decide the question. In a subsequent decision (*Stephenson v. Sheffield Brick & Tile Co.*) the court unanimously reiterated the doctrine that such risks are not assumed by the servant.

Kansas.—*Western Furniture & Mfg. Co. v. Bloom* (1907) 76 Kan. 127, 11 L.R.A.(N.S.) 225, 123 Am. St. Rep. 123, 90 Pac. 821; *Kansas Buff Brick & Mfg. Co. v. Stark* (1908) 77 Kan. 648, 95 Pac. 1047; *Lewis v. Barton Salt Co.* (1910) 82 Kan. 163, 107 Pac. 783 (failure to safeguard salt pan); *Bailey v. Prime Western Spelter Co.* (1910) 83 Kan. 230, 109 Pac. 791.

Kentucky.—*Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 33 L.R.A.(N.S.) 656, 131 S. W. 1007 (failure to furnish props in mine).

Louisiana.—In Louisiana the failure of a railroad company to erect telltales or whip ropes at a little distance from an overhead bridge, to warn employees on the top of freight cars, was held to create a risk which the brakeman did not assume, although, in his written application for employment, he stated, in answer to a question therein, that he was aware of his exposure to injuries by being knocked off the cars by overhead bridges, and agreed to acquaint himself with such bridges. *Hailey v. Texas & P. R. Co.* (1904) 113 La. 533, 37 So. 131. The value of this decision is somewhat impaired by the fact that the court appears to question whether the employee's knowledge of the danger was such as to charge him with assumption of the risk.

Michigan.—*Sipes v. Michigan Starch Co.* (1904) 137 Mich. 258, 100 N. W. 447 (unguarded set screw); *Sterling v. Union Carbide Co.* (1905) 142 Mich. 284, 105 N. W. 755; *Murphy v. Grand Rapids Veneer Works* (1906) 142 Mich. 677, 106 N. W. 211 (unguarded elevator shaft); *Swick v. Aetna Portland Cement Co.* (1907) 147 Mich. 454, 111 N. W.

tion of risk is based upon an implied contract; and consequently it would be against public policy to permit the master to contract against

110 (unguarded belt); *Trombley v. McAfee* (1908) 152 Mich. 494, 116 N. W. 191 (failure to provide loose pulleys); *De Kallands v. Washtenaw Home Teleph. Co.* (1908) 153 Mich. 25, 116 N. W. 564, 15 Ann. Cas. 593 (*obiter*); *Little v. Bousfield & Co.* (1908) 154 Mich. 369, 117 N. W. 903 (unguarded shafting); *Kleinfelt v. J. H. Somers Coal Co.* (1909) 156 Mich. 473, 132 Am. St. Rep. 532, 121 N. W. 118 (failure to equip cage in mine); *Betterly v. Boyne City, G. & A. R. Co.* (1909) 158 Mich. 385, 122 N. W. 635 (failure to equip logging cars with automatic couplers); *Van Doorn v. Heap* (1910) 160 Mich. 199, 125 N. W. 11 (failure to guard saw); *Rivers v. Bay City Traction & Electric Co.* (1910) 164 Mich. 696, 128 N. W. 254, 131 N. W. 86 (failure to equip motor cars with electric or air brakes).

Missouri.—*Durant v. Lexington Coal Min. Co.* (1888) 97 Mo. 62, 10 S. W. 484 (defective cage in mine); *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678; *Bair v. Heibel* (1903) 103 Mo. App. 621, 77 S. W. 1017 (unguarded cogwheels); *Stafford v. Adams* (1905) 113 Mo. App. 717, 88 S. W. 1130; *McGinnis v. R. M. Rigby Printing Co.* (1907) 122 Mo. App. 227, 99 S. W. 4 (unguarded shafting); *Kirby v. Manufacturers' Coal & Coke Co.* (1907) 127 Mo. App. 588, 106 S. W. 1069 (mining act); *Collins v. Star Paper Mill Co.* (1910) 143 Mo. App. 333, 127 S. W. 641.

New York.—For the recent New York decisions adapting this view, see note on page 5091.

Ohio.—*Ziehr v. Maumee Paper Co.* (1905) 28 Ohio C. C. 342. (In this case, the court considered that the decision in *Krause v. Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886, was in reality based on contributory negligence, and not on assumption of risk); *Laidlaw-Dunn-Gordon Co. v. Miller* (1909) 31 Ohio C. C. 559.

Oklahoma.—*Sans Bois Coal Co. v. Janeway* (1908) 22 Okla. 425, 99 Pac. 153 (mining act; defective ventilation).

Oregon.—*Hill v. Saugested* (1908) 53 Or. 178, 22 L.R.A.(N.S.) 634, 98 Pac. 524.

Pennsylvania.—*Jones v. American Caramel Co.* (1909) 225 Pa. 644, 74

Atl. 613; *Valjago v. Carnegie Steel Co.* (1910) 226 Pa. 514, 75 Atl. 728; *Fegley v. Lycoming Rubber Co.* (1911) 231 Pa. 446, 80 Atl. 870.

Vermont.—*Kilpatrick v. Grand Trunk R. Co.* (1902) 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531.

Washington.—*Green v. Western American Co.* (1902) 30 Wash. 87, 70 Pac. 310 (failure to furnish timbers in mine); *Hall v. West & S. Mill Co.* (1905) 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587 (unguarded machinery); *Whelan v. Washington Lumber Co.* (1905) 41 Wash. 153, 111 Am. St. Rep. 1006, 83 Pac. 98 (failure to provide proper belt shifters in sawmill); *Hoveland v. Hall Bros. Marine R. & Shipbuilding Co.* (1906) 41 Wash. 164, 82 Pac. 1090 (unguarded shaftings, couplings, etc.); *Erickson v. E. J. McNeeley & Co.* (1906) 41 Wash. 509, 84 Pac. 3 (unguarded sawmill); *Rector v. Bryant Lumber & Shingle Mill Co.* (1906) 41 Wash. 556, 84 Pac. 7 (unguarded machinery); *Thomson v. Issaquah Shingle Co.* (1906) 43 Wash. 253, 86 Pac. 588 (unguarded sawmill); *Miller v. Union Mill Co.* (1907) 45 Wash. 199, 88 Pac. 130 (unguarded cogs); *Pachko v. Wilkeson Coal & Coke Co.* (1907) 46 Wash. 422, 90 Pac. 436 (failure to furnish timbers in mine); *Johnson v. Far West Lumber Co.* (1907) 47 Wash. 492, 92 Pac. 274 (unguarded saw); *Gustafson v. A. J. West Lumber Co.* (1908) 51 Wash. 25, 97 Pac. 1094 (unguarded saw); *Anderson v. Pacific Nat. Lumber Co.* (1910) 60 Wash. 415, 111 Pac. 337; *Dukette v. Northwestern Woodensaw Co.* (1910) 61 Wash. 95, 111 Pac. 1065 (unguarded saw); *Cook v. Danaher Lumber Co.* (1910) 61 Wash. 118, 112 Pac. 245 (unguarded saw); *Young v. Aloha Lumber Co.* (1911) 63 Wash. 600, 116 Pac. 4.

In *Johnston v. Northern Lumber Co.* (1906) 42 Wash. 230, 94 Pac. 627, the Washington doctrine as to the non-assumption of risks due to the master's breach of a statutory duty was recognized, but it was held that it was not applicable where the master had made an effort to guard the machine, and the servant was injured in a very unusual way. See also *Daffron v. Majestic Laundry Co.* (1905) 41 Wash. 65,

the effects of a violation of the statute.³ It is a necessary inference from this view that a statutory duty imposes obligations upon the master superior to those imposed by the common law; this view is expressly taken in at least one case^{3a} but cases are not lacking which hold to the contrary.⁴ The more rational view would seem to be that to permit a servant to assume such a risk would have the practical result of nullifying the beneficial effect of the statute, for it would be possible for the master merely to notify the servant of his failure to perform the statutory duty in order to avoid any liability to the servant for such failure.⁵

82 Pac. 1089 (improperly guarded mangle in laundry).

The fact that the guards had been removed from time to time by other servants will not admit the defense under the Washington rule, if, as a matter of fact, the saw was not properly guarded at the time the injured servant was put at work, and he was injured because of the defective guarding. *Benner v. Wallace Lumber & Mfg. Co.* (1909) 55 Wash. 679, — L.R.A.(N.S.) —, 105 Pac. 145 (unguarded saw).

³ The leading case of this character is *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298, opinion by Judge Taft. The view taken in this decision is that assumption of risk is a term of the contract of employment expressed or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk; and the courts will not enforce or recognize an agreement, express or implied, on the part of the servant, to waive the performance of a statutory duty imposed on the master for the protection of the servant. "It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that."

In *Sans Bois Coal Co. v. Janeway* (1908) 22 Okla. 425, 99 Pac. 153, the court said that to permit employers to avail themselves of the defense in an action for the breach of a statute imposing a penalty for its violation would be in effect to enable them to nullify a

penal statute, and that is against public policy.

^{3a} The degree of diligence required of the owner of dangerous machinery, in guarding it as directed by statute, is greater than is ordinarily required of a master to see that appliances furnished by him are free from defects. *Brown v. Douglas Lumber Co.* (1910) 113 Minn. 104, 129 N. W. 61 (headnote by court).

⁴ "A statutory duty is no more imperative in law than a common-law duty." *Langlois v. Dunn Worsted Mills* (1904) 25 R. I. 645, 57 Atl. 910.

"A statutory obligation of employer to employee is on the same footing, and no more than, a common-law obligation." *Travis v. Haan* (1907) 119 App. Div. 138, 103 N. Y. Supp. 973.

The liability consequent upon the negligent violation of a duty created by statute is not necessarily superior to the relevant common law defenses thereto. *Gombert v. McKay* (1911) 201 N. Y. 27, — L.R.A.(N.S.) —, 94 N. E. 186, affirming (1909) 134 App. Div. 970, 119 N. Y. Supp. 1126.

In *St. Louis Cordage Co. v. Miller* (1903) 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, the court held that the negligence of the master in failing to guard his machinery, as required by statute, was of the same nature as his negligence in providing a reasonably safe floor or appliances; and there was no reason why an action for resulting injury should not be subject to the defense of assumption of risk in the one case to the same extent as in the other, in the absence of some express provision of the statute, taking away such defense.

⁵ In *Poli v. Numa Block Coal Co.* (1910) 149 Iowa, 104, 33 L.R.A.(N.S.) 646, 127 N. W. 1105, the court says

The other view is that, if the servant has knowledge of the master's breach of a statutory duty, he may assume the risks of such breach

that to say that the legislature, in enacting these measures of protection, which, in some degree, equalize the advantages of employer and employee, and afford a needed protection to the persons and lives of the latter, intended that a master might violate the statute to the injury or death of his servant, and then escape liability by pleading and proving that his offense against the law was habitual, obstinate, and notorious, is inconsistent with justice, and, it is hardly extravagant to say, repugnant to good morals.

"To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the statute." *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298.

"The general assembly has deemed it proper in this act to require protection in this particular, as in many others reaching to the safety of the men engaged in this hazardous work, and has thereby evinced the public policy of the state in this regard. And for a breach of such statutes the defense of assumption of risk is not applicable to the violator of the statute." *Johnson v. Mammoth Vein Coal Co.* (1908) 88 Ark. 243, 19 L.R.A.(N.S.) 646, 114 S. W. 722, 123 S. W. 1180.

"To hold that the employee, by continuing in the employ of the master under such circumstances, cannot recover against the master, notwithstanding such statute, is to practically abrogate and wipe out the statute." *Ziehr v. Maumee Paper Co.* (1905) 28 Ohio C. C. 342 (guarding machinery).

In *Jones v. American Caramel Co.* (1909) 225 Pa. 644, 74 Atl. 614, the court said: "The act of 1905 will become a dead letter if an employer who has failed to properly guard his ma-

chinery can relieve himself from that duty by the plea that the danger was so obvious that his injured employee ought to have been aware of it, and was not entitled to any warning against it."

"To hold, in the absence of a special contract on sufficient consideration, that plaintiff's intestate, at the time of entering defendant's service, or by afterwards remaining in that service, assumed the risk of defendant's default in the observance of the statute, or of negligence in superintendence under the employer's liability act, would emasculate those statutes by defeating their clear purpose." *Pratt Consol. Coal Co. v. Davidson* (1911) 173 Ala. 667, 55 So. 886.

In *St. Louis Cordage Co. v. Miller* (1903) 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, Judge Thayer, in his dissenting opinion, says of the Missouri factory act: "The statute in question is not only a wise measure of legislation, but was prompted by a humane spirit. For these reasons it should not be so applied or construed by the courts as to defeat the objects which the legislature had in view, nor in such a way as to render it less efficient than it was intended to be in the promotion of such objects."

The purpose of the act of Congress of July 1, 1902, chap. 1356, 32 Stat. at L. 631, requiring the owners or managers of every mine to provide an adequate amount of ventilation and proper appliances or machinery to force air through such mine to the face of each and every working place, so as to dilute and render harmless, and expel therefrom, the noxious and poisonous gases, was to protect the employees of such owners or managers from a well-known danger of their service, the risk from which, from the nature of their employment, they were compelled to assume; and, although an employee impliedly waives a compliance with the statute, and agrees to assume the risk from defective appliances by continuing in the service, a court will not recognize or enforce such agreement. To permit owners or managers of mines to avail themselves of such an assumption of risk by their employees would be, in effect, to enable them to nullify a penal statute;

the same as he would assume any other breach of duty on the part of the master.⁶

and that is against public policy. *Sans Bois Coal Co. v. Janeway* (1908) 22 Okla. 425, 99 Pac. 153.

In *Kilpatrick v. Grand Trunk R. Co.* (1902) 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531, a railroad corporation violated a statute which required it, under penalty, to maintain ladders on freight cars, either inside the car or at the end, and not on the sides, and also gave a cause of action to an employee injured by its failure so to do. The court, after asserting that the doctrine of assumption of risk may be regarded as only one phase of the broader doctrine expressed by the maxim *Volenti non fit injuria*, said: "The ordinary doctrine of assumption of risk does not apply to a case where the negligence of the employer consists in the disregard of a statutory duty imposed upon him for the protection of his employees; certainly not when an action is expressly given for the breach. And this is exactly the difference between cases of negligence arising from the disregard of a statutory obligation, like the present, and cases of negligence arising from the failure of the employer to fulfill his common-law duty of providing safe appliances,—that in the latter case the common-law duty is to be applied in connection with the common-law rule of the assumption of risk; while in the former, the statutory rule is accompanied by the bestowal of a right of action for the breach of it, in favor of those who must necessarily be deprived of any action by the application of the common-law rule of the assumption of risk; and consequently the common-law rule is inconsistent with the statute, and falls to the ground."

The court further said that if the doctrine of assumption of risk was to be regarded as purely a matter of contract, it would be easy to thwart the whole purpose of the legislature by holding that the class of employees sought to be protected by the statute not only might formally contract away their protection, and relieve the road of the public duty thus imposed, but that the very fact of their using the ladder, seeing and knowing that it was on the side of the car, as they must, if they used it, would constitute in law such a contract.

⁶ For a detailed exposition of the

cases upon this subject, see notes to *Denver & R. G. R. Co. v. Norgate*, 6 L.R.A. (N.S.) 981; *Johnson v. Mammoth Vein Coal Co.* 19 L.R.A. (N.S.) 646; *Hill v. Saugestad*, 22 L.R.A. (N.S.) 634; *Poli v. Numa Block Coal Co.* 33 L.R.A. (N.S.) 646; and *Fitzwater v. Warren* (1912) 206 N. Y. 355, 42 L.R.A. (N.S.) 1229, 99 N. E. 1042.

Unless otherwise noted, the negligence complained of was the failure to guard machinery.

Federal courts.—*E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Terry v. Schmidt* (1902) 54 C. C. A. 83, 116 Fed. 627 (unguarded airshaft); *Glenmont Lumber Co. v. Roy* (1903) 61 C. C. A. 506, 126 Fed. 524; *St. Louis Cordage Co. v. Miller* (1903) 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495 (unguarded cogs); *Denver & R. G. R. Co. v. Norgate* (1905) 6 L.R.A. (N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 Ann. Cas. 448 (unblocked guard rails); *Federal Lead Co. v. Swyers* (1908) 88 C. C. A. 547, 161 Fed. 687; *Erdman v. Deer River Lumber Co.* (1910) 104 C. C. A. 482, 182 Fed. 42 (unguarded saw and machinery); *Maki v. Union P. Coal Co.* (1911) 109 C. C. A. 221, 187 Fed. 389.

In *Nottage v. Sawmill Phoenix* (1904) 133 Fed. 979, it was held that the Washington statute (Wash. Laws, 1903, p. 40, chap. 37) forbidding the use of certain machinery unless guarded, and prescribing a penalty for the violation of the statute, was a penal statute, and did not, in the absence of any provision affecting the rules of law applicable to civil actions, take away the defense of assumption of risk.

Arkansas.—See note 2, *supra*.

California.—*Sweeney v. Central P. R. Co.* (1880) 57 Cal. 15 (railway not fenced).

Colorado.—*Denver & R. G. R. Co. v. Gannon* (1907) 40 Colo. 195, 11 L.R.A. (N.S.) 216, 90 Pac. 853 (failure to block switches).

Illinois.—As to the servant's assumption of the risk of the violation of speed ordinances in this state, see § 1647, note 5, subd. c. *ante*. See note 2, *supra*.

Indiana.—*Bodell v. Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E.

For the most part the cases taking this view assert that the doctrine of assumption of risk is not based upon contract, but is based upon

856 (uncovered cage in mine; expressly overruled in *American Car & Foundry Co. v. Clark* [1904] 32 Ind. App. 644, 70 N. E. 828).

The owner of a coal mine is not liable for an injury to an employee, caused by a fall of top coal from the roof of the mine at the place where he was at work, where he was an experienced miner, and had thoroughly tested the roof shortly before the fall and believed it to be perfectly safe, although Ind. Rev. Stat. 1894, § 7472, makes it the duty of the mining boss to examine every working place in the mine as often as every alternate day, and see that the same is properly secured by props or timber, and that safety is in all respects assured. *Island Coal Co. v. Greenwood* (1898) 151 Ind. 476, 50 N. E. 36.

But see the later Indiana cases in note 2, *supra*.

Iowa.—*Sutton v. Des Moines Bakery Co.* (1907) 135 Iowa, 390, 112 N. W. 836 (absence of safety hood on dough mixer).

But see the later Iowa cases in note 2, *supra*.

Maine.—*Gillin v. Patten & S. R. Co.* (1899) 93 Me. 80, 44 Atl. 361 (blocking of frogs).

Massachusetts.—*Keenan v. Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366 (guard to elevator shaft); *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234, 35 N. E. 484; *Marshall v. Norcross* (1906) 191 Mass. 568, 77 N. E. 1151 (no flooring in building in process of erection); *Simoneau v. Rice* (1909) 202 Mass. 82, 88 N. E. 433 (failure to provide trap-door for elevator well).

Minnesota.—*Fleming v. St. Paul & D. R. Co.* (1880) 27 Minn. 111, 6 N. W. 448 (railway not fenced); *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630; *Hermann v. Clark* (1903) 89 Minn. 132, 94 N. W. 436; *Spoonick v. Backus-Brooks Co.* (1903) 89 Minn. 354, 94 N. W. 1079; *Swenson v. Osgood & B. Mfg. Co.* (1904) 91 Minn. 509, 98 N. W. 645; *McGinty v. Waterman* (1904) 93 Minn. 242, 101 N. W. 300, 3 Ann. Cas. 39; *Seely v. Tennant* (1908) 104 Minn. 354, 116 N. W. 648; *Glockner v. Hardwood Mfg. Co.* (1909) 109 Minn. 30, 122 N. W. 465, 18 Ann. Cas. 130, rehearing in (1909)

109 Minn. 35, 123 N. W. 807, 18 Ann. Cas. 132; *Skarpmoen v. Cloquet Box Factory* (1911) 114 Minn. 278, 130 N. W. 1106 (failure to provide belt shifters).

Missouri.—*Spiva v. Osage Coal & Min. Co.* (1885) 88 Mo. 68 (elevator shaft not protected by doors; this, however, is probably a case of contributory negligence).

But see the later Missouri cases in note 2, *supra*.

Montana.—*Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499 (cage in mine not properly equipped); *Monson v. La France Copper Co.* (1911) 43 Mont. 65, 114 Pac. 778 (cage in mine not equipped with doors).

New Jersey.—*Mika v. Passaic Print Works* (1908) 76 N. J. L. 561, 70 Atl. 327.

New York.—*Knisley v. Pratt* (1896) 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; *Jenks v. Thompson* (1904) 179 N. Y. 20, 71 N. E. 266 (insufficient scaffold); *Gombert v. McKay* (1911) 201 N. Y. 27, — L.R.A. (N.S.) —, 94 N. E. 186, affirming (1909) 134 App. Div. 970, 119 N. Y. Supp. 1126 (insufficient scaffold); *Shields v. Robins* (1896) 3 App. Div. 582, 38 N. Y. Supp. 214 (elevator not covered); *Graves v. Brewer* (1896) 4 App. Div. 327, 38 N. Y. Supp. 566 (same statute); *De Young v. Irving* (1896) 5 App. Div. 499, 38 N. Y. Supp. 1089 (cleaning machinery while in motion); *Horton v. Vulcan Iron Works* (1897) 13 App. Div. 508, 43 N. Y. Supp. 699 (act requiring set screws in shafts to be guarded); *Monzi v. Friedline* (1898) 33 App. Div. 217, 53 N. Y. Supp. 482 (minor employee permitted to grease an elevator cable while in motion); *Johansen v. Eastman's Co.* (1899) 44 App. Div. 270, 60 N. Y. Supp. 708, affirmed without opinion in (1901) 168 N. Y. 648, 61 N. E. 1130 (*obiter*); *Thompson v. Cary Mfg. Co.* (1901) 62 App. Div. 279, 70 N. Y. Supp. 1086; *Burns v. Nichols Chemical Co.* (1901) 65 App. Div. 424, 72 N. Y. Supp. 919 (unguarded elevator opening); *Mull v. Curtice Bros. Co.* (1902) 74 App. Div. 561, 77 N. Y. Supp. 813 (defective belt shifter); *McCarthy v. Emerson* (1902) 77 App. Div. 565, 79 N. Y. Supp. 180 (defective scaffold); *Sitts v. Waiontha*

the maxim *Volenti non fit injuria*; and in consequence thereof the question of public policy mentioned above is not involved.⁷ The fundamental principle underlying cases of this character is that, in the absence of an express provision taking away such defense, the courts cannot read such a provision into a statute, as the statutes, being in derogation of the common law, must receive a strict construction.⁸

There are many subsidiary elements which enter into the dis-

Knitting Co. (1904) 94 App. Div. 38, 87 N. Y. Supp. 911 (unguarded rollers of laundry mangle); *Klein v. Garvey* (1904) 94 App. Div. 183, 87 N. Y. Supp. 998; *Kiernan v. Eidlitz* (1905) 109 App. Div. 726, 96 N. Y. Supp. 387, s. c. on subsequent appeal (1906) 115 App. Div. 141, 100 N. Y. Supp. 731 (defective scaffold); *Bushtis v. Catskill Cement Co.* (1908) 128 App. Div. 780, 113 N. Y. Supp. 294, affirmed in (1910) 198 N. Y. 548, 92 N. E. 1079 (unguarded opening in floor); *Ostermann v. Ware* (1909) 135 App. Div. 119, 119 N. Y. Supp. 981 (unguarded saw); *Sabatino v. Roebling Constr. Co.* (1910) 136 App. Div. 217, 120 N. Y. Supp. 956 (elevator shaft unguarded); *Fitzgerald v. Elsas Paper Co.* (1900) 30 Misc. 438, 62 N. Y. Supp. 597.

The mere fact that the plaintiff is a minor does not affect the question of assumption of risk of the breach of a statutory duty. *Stevens v. Gair* (1905) 109 App. Div. 621, 96 N. Y. Supp. 303 (unguarded cogwheels).

The decision in *Simpson v. New York Rubber Co.* (1894) 80 Hun, 415, 30 N. Y. Supp. 339, which was to the contrary, must be considered as overruled.

For very recent decisions in this state adopting a contrary view, see page 5091.

Ohio.—*Krause v. Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886 (mining act; ventilation); *Cleveland & E. R. Co. v. Somers* (1902) 24 Ohio C. C. 67 (failure to use automatic couplers); *Johns v. Cleveland, C. C. & St. L. R. Co.* (1902) 13-23 Ohio C. C. 442, affirmed without opinion in (1903) 69 Ohio St. 532, 70 N. E. 1124 (unblocked frogs).

But see the later Ohio cases in note 2, *supra*.

Rhode Island.—*Langlois v. Dunn Worsted Mills* (1904) 25 R. I. 645, 57 Atl. 910 (unguarded gearing); And see *Pierce v. Contreaville Mfg. Co.* (1903) 25 R. I. 512, 56 Atl. 778 (servant did not appreciate the danger).

Wisconsin.—*Abbot v. McCadden* (1892) 81 Wis. 563, 29 Am. St. Rep. 910, 51 N. W. 1079 (servant knew of custom of running trams at an unlawful rate of speed); *Thompson v. Johnston Bros. Co.* (1893) 86 Wis. 576, 57 N. W. 298; *Powell v. Ashland Iron & Steel Co.* (1897) 98 Wis. 35, 73 N. W. 573 (elevator shaft not guarded); *Helmke v. Thilmany* (1900) 107 Wis. 216, 83 N. W. 360; *Williams v. J. G. Wagner Co.* (1901) 110 Wis. 456, 86 S. W. 157 (uncovered gears); *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

Compare also cases cited in § 1648, note 4, *post*.

⁷ But a contrary view of the effect of the maxim has been taken. In *Baddeley v. Granville* (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822, Wills, J., said: "If the supposed agreement between the deceased [servant] and the defendant [his master], in consequence of which the principle of *Volenti non fit injuria* is sought to be applied, comes to this,—that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself,—such an agreement would be in violation of public policy and ought not to be listened to." This, however, is probably not the prevailing view in the English courts. See § 1650, *post*.

⁸ Thus, in *Mike v. Passaic Print Works* (1908) 76 N. J. L. 561, 70 Atl. 327, the court says: "Nothing contained in the statute provides that assumed risk on the part of the servant shall not be presented as a defense where one violating the statute is sued by this servant by reason of such violation. The statute provides a penalty

cussion of this question, such as provisions in the statute expressly giving the employee a right of action, provisions imposing a penalty upon the master for violation thereof, etc., but it is not deemed necessary to note what the courts say upon these matters, since they do not apparently in any case determine the final conclusion of the court, but the cases are determined according as the court lays the greater stress upon the principle that the admission of the defense would practically nullify the statute, or upon the view that the court is not permitted to read into the statute the abrogation of the defense not expressly provided for by the terms of the statute itself.⁹

alone for its violation, and nothing is contained in the act referring to or concerning civil liabilities."

"We take the position that an old and well-established rule of the common law cannot be lawfully repealed, except by the lawmaking power; and that any attempt of the courts to do so is a plain usurpation of a legislative function." *Denver & R. G. R. Co. v. Norgate* (1905) 6 L.R.A.(N.S.) 981, 72 C. C. A. 365, 141 Fed. 247, 5 Ann. Cas. 448.

In *St. Louis Cordage Co. v. Miller* (1903) 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, the court, in holding that the factory act of Missouri (2 Rev. Stat. 1899, § 6433) did not abolish the defense of assumption of risk in cases which fell under its provisions, said that the safety-appliance act of Congress especially took away the defense of assumption of risk, and that had the legislature of Missouri intended to eliminate that defense, it could have very easily made that intent apparent in the language of the statute.

It has been held that a court will not presume that a statute is intended to change the rule of law in regard to the assumption of risk unless such an intent appears. *Pierce v. Contreaville Mfg. Co.* (1903) 25 R. I. 512, 56 Atl. 778, and *Langlois v. Dunn Worsted Mills* (1904) 25 R. I. 645, 57 Atl. 910.

In *Gombert v. McKay* (1911) 201 N. Y. 27, — L.R.A.(N.S.) —, 94 N. E. 186, affirming (1909) 134 App. Div. 970, 119 N. Y. Supp. 1126, the court, in discussing the New York statute relative to the character of scaffolds to be furnished to employees, says: "The common-law doctrines, in so far as they oppose the provisions of the statute, are superseded; but, in so far as they do not oppose them, remain and must be applied. The statute must be given a fair and reason-

able meaning which will neither extend it beyond nor withdraw it from its intended effect. Although it imposes upon the employers personal responsibility and a positive prohibition, it does not, in terms, impose absolute and irresistible liability from their default or disobedience; nor is the liability consequent upon the negligent violation of a duty created by a statute necessarily superior to the relevant common-law defenses thereto."

⁹ That these subsidiary elements are subordinated to the two general views stated in the text is shown by the attitude taken by different courts in respect to the fact that the statute before the court imposed a penalty for its violation.

"A penalty may be imposed upon the offender for a breach of statute, but it does not change the relations between the parties, except to the extent that one entering the employ of another may assume, in absence of knowledge, that the terms of the statute have been complied with." *Langlois v. Dunn Worsted Mills* (1904) 25 R. I. 645, 57 Atl. 910.

"The statute provides a penalty alone for its violation, and nothing is contained in the act referring to or concerning civil liabilities." *Mika v. Pas-saic Print Works* (1908) 76 N. J. L. 561, 70 Atl. 327.

That failure to observe the requirements of the statute is made a crime does not affect the availability of the defense. *Bushtis v. Catskill Cement Co.* (1908) 128 App. Div. 780, 113 N. Y. Supp. 294, affirmed in (1910) 198 N. Y. 548, 92 N. E. 1079.

On the other hand, in *Sans Bois Coal Co. v. Janeway* (1908) 22 Okla. 425, 99 Pac. 153, the court said that to permit employers to avail themselves of the

In a number of cases, it has been held that if the defense of assumption of risk is not available, the defense of common employment is also unavailable.¹⁰

c. Statutes prohibiting the employment of minors under certain age.—Where the statute prohibits the employment of minors under a prescribed age, the great majority of the cases hold that the defense of assumption of risk is not available to a master who violates such a statute.¹¹ In a few cases the question of assumption of risk in

defense in an action for the breach of a statute imposing a penalty for its violation would be in effect to enable them to nullify a penal statute, and that is against public policy.

"This statute was passed for the protection of employees; it is a penal statute; and to hold that the employee, by continuing in the employ of the master under such circumstances, cannot recover against the master, notwithstanding such statute, is to practically abrogate and wipe out the statute." *Ziehr v. Maumee Paper Co.* (1905) 28 Ohio C. C. 342 (guarding machinery).

¹⁰ *Stevenson v. Avery Coal & Min. Co.* (1910) 152 Ill. App. 565, affirmed in (1910) 246 Ill. 609, 93 N. E. 40 (mining act); *Frenci v. Tazewell Coal Co.* (1910) 157 Ill. App. 477; *Layzell v. J. H. Sommers Coal Co.* (1908) 156 Mich. 268, 117 N. W. 179, 120 N. W. 996; *Capeling v. Saginaw Coal Co.* (1908) 156 Mich. 437, 117 N. W. 182, 121 N. W. 475; *Kleinfelt v. J. H. Somers Coal Co.* (1909) 156 Mich. 473, 132 Am. St. Rep. 532, 121 N. W. 118.

Where the question of assumption of risk is eliminated, by statute or otherwise, no question of fellow servants can arise. *Spring Valley Coal Co. v. Rowatt* (1902) 196 Ill. 156, 63 N. E. 649.

The fellow-servant doctrine has no application where the action is founded on the wilful violation of duties imposed by statute. *Moore v. Centralia Coal Co.* (1908) 140 Ill. App. 291.

¹¹ *Swift & Co. v. Miller* (1908) 139 Ill. App. 192; *Mueller v. Jordan Shoe Co.* (1908) 143 Ill. App. 332; *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 87 N. E. 229; *Thomas Madden, Son & Co. v. Wilcox* (1910) 174 Ind. 657, 91 N. E. 933; *Lenahan v. Pittston Coal Min. Co.* (1907) 218 Pa. 311, 12 L.R.A. (N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642; *Sullivan v. Hanover Cordage Co.* (1908) 222 Pa. 40, 70 Atl. 909;

Nairn v. National Biscuit Co. (1906) 120 Mo. App. 144, 96 S. W. 679; *Syneszewski v. Schmidt* (1908) 153 Mich. 438, 116 N. W. 1107; *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; *Sterling v. Union Carbide Co.* (1905) 142 Mich. 284, 105 N. W. 755.

A minor employed under the statutory age does not assume the risks of the employment. *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. 348, 133 Am. St. Rep. 884, 74 Atl. 215.

In *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 576, Ann. Cas. 1912 B, 797, the court, in discussing the statute forbidding the employment of children under the statutory age, said: "The statute has, however, the further effect of preventing the defendant from shielding himself behind the defense of contractual assumption of risk. The reason for this is that this branch of the doctrine of assumption of risk rests upon an implied term of the contract of employment, to the effect that the employee assumes all the obvious risks of the business, apparatus, and place of his work. . . . The contract of employment, however, in the case at bar, was absolutely prohibited by the terms of the statute, and was therefore an illegal act on the part of the defendant. The defendant cannot be permitted to show an illegal contract and his own consequent criminal guilt in order to interpose a defense."

In *Syneszewski v. Schmidt* (1908) 153 Mich. 438, 116 N. W. 1107, the court said that an employer cannot be permitted to say that one who, because of his age, cannot be his servant by the terms of positive law, is a fellow servant of his servants.

If the employment is unlawful, the servant cannot be held to have assumed the risks incident thereto, including the

such cases is held to be one of fact only, and not one of law to be determined by the court.^{12]}

1648. [651] Contributory negligence.—*a. Generally.*—The doctrine established by the decided preponderance of authority is that a servant who is seeking indemnity for injuries alleged to have resulted from a breach of a statutory duty or from the negligence of a statutory vice principal cannot recover, if the evidence shows that he was himself wanting in ordinary care, and that he contributed by the carelessness to the injuries complained of.

b. Availability of the defense, as dependent on the provisions of the statute sued upon.—In some instances the conclusion just stated necessarily follows from the language of the statute itself, the absence of contributory negligence being explicitly declared to be a condition precedent to recovery.¹

[In the New York employers' liability act (Laws of 1902, chap.

risk of injury by fellow servants. *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A. (N.S.) 504, 69 S. E. 857 (child employed under statutory age).

In *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863, the court, in dealing with a case where a minor under the statutory age was employed, said: "There is no lawful contractual relationship in such a case, and consequently assumption of risk does not apply."

¹² A child whose employment in a factory is forbidden by statute because of his immature age is not, as matter of law, chargeable with contributory negligence, or with having assumed the risk of employment, in case he is injured while so employed. *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; *Dragotto v. Plunkett* (1906) 113 App. Div. 648, 99 N. Y. Supp. 361; *Rahn v. Standard Optical Co.* (1906) 110 App. Div. 501, 96 N. Y. Supp. 1080.

In the earlier New York case of *Monzi v. Friedline* (1898) 33 App. Div. 217, 53 N. Y. Supp. 482, it was held that a minor employed under the statutory age might waive the protection of the statute by entering the employment with full knowledge of all the facts.

In *Bromberg v. Evans Laundry Co.* (1907) 134 Iowa, 38, 111 N. W. 417, it was held that it was a question for

the jury, and not for the court, to determine whether the defendant had shown that the employee, although within the protected age, nevertheless had sufficient capacity to recognize and appreciate the risks.

¹ A provision to this effect is inserted in the employers' liability acts of the following states:

Florida.—(See chapter LXXVI., *post.*) The Florida statute of June 7, 1887 (chap. 3744), having been adopted from the Code of Georgia, the construction placed upon that Code by the courts of the latter state has been followed in Florida. (See next subdivision.) An employee of a railway company, therefore, cannot recover for an injury caused by the fault of a coemployee, unless he was himself entirely free from negligence. *Duval v. Hunt* (1894) 34 Fla. 85, 15 So. 876. To the same effect, *Louisville & N. R. Co. v. Wade* (1903) 46 Fla. 197, 35 So. 863; *Louisville & N. R. Co. v. Jones* (1905) 50 Fla. 225, 39 So. 485; *Atlantic Coast Line R. Co. v. Ryland* (1905) 50 Fla. 190, 40 So. 24; *Ryland v. Atlantic Coast Line R. Co.* (1909) 57 Fla. 143, 49 So. 745.

The provisions in the 2d section of the statute of May 4th, 1891, chapter 3741 (being a substantial re-enactment of the 1st section of the earlier act), relating to the apportionment of damages, have no application to such cases. *Florida C. & P. R. Co. v. Mooney* (1898) 40 Fla. 17, 24 So. 148.

600) the question of the servant's contributory negligence by remaining at work "with knowledge of the risk of injury shall be one

In *Bookman v. Seaboard Air Line R. Co.* (1907) 81 C. C. A. 612, 152 Fed. 686, the court, in construing § 2345 of the Revised Statutes of Florida, 1892, which is the same as the 2d section of the statute of May 4, 1891, said that it practically eliminated contributory negligence. The court in this case, however, failed to note the construction placed upon the statute by the several decisions in the state court, cited *supra*, and ignored the distinction in the statute between actions by third persons and actions by employees.

Georgia.—(See chapter LXXVI., *post*). It is declared by the Civil Code that an employee of a railway company may recover for an injury caused by the negligence of a co-employee, and "without fault or negligence on the part of the person injured."

Construing this provision in connection with that which declares, with respect to strangers, that "no person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence," and that "if the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," the supreme court has held that the only distinction between an injured employee and other persons is that the employee must be wholly blameless to authorize a recovery, while others may recover though partly at fault. *Thompson v. Central R. & Bkg. Co.* (1875) 54 Ga. 509.

That the injured employee cannot recover unless he was wholly free from fault was also declared in the following cases: *Rowland v. Cannon* (1866) 35 Ga. 105; *Atlanta & R. Air Line R. Co. v. Ayers* (1874) 53 Ga. 12; *Sears v. Central R. & Bkg. Co.* (1875) 53 Ga. 630; *Campbell v. Atlanta & R. Air Line R. Co.* (1874) 53 Ga. 488 (1876) 56 Ga. 586; *Marsh v. South Carolina R. Co.* (1876) 56 Ga. 274; *Georgia R. & Bkg. Co. v. Goldwire* (1876) 56 Ga. 196; *Central R. & Bkg. Co. v. Kenney* (1877) 58 Ga. 485, (1878) 61 Ga. 590; *Central R. & Bkg. Co. v. Sears* (1877) 59 Ga. 436 (1878) 61 Ga. 279; *Central*

R. Co. v. Mitchell (1879) 63 Ga. 173; *Central R. & Bkg. Co. v. Henderson* (1882) 69 Ga. 715; *McDade v. Georgia R. Co.* (1878) 60 Ga. 119; *East Tennessee, V. & G. R. Co. v. Maloy* (1886) 77 Ga. 237, 2 S. E. 941; *Central R. & Bkg. Co. v. Lanier* (1889) 83 Ga. 587, 10 S. E. 279; *Countryman v. East Tennessee, V. & G. R. Co.* (1892) 89 Ga. 835, 16 S. E. 84; *Georgia R. & Bkg. Co. v. Hicks* (1894) 95 Ga. 301, 22 S. E. 613; *Baker v. Western & A. R. Co.* (1882) 68 Ga. 699; *Southern R. Co. v. Salmon* (1909) 132 Ga. 753, 65 S. E. 70; *Smith v. Western & A. R. Co.* (1910) 134 Ga. 216, 67 S. E. 818; *Louisville & N. R. Co. v. Bradford* (1910) 135 Ga. 522, 69 S. E. 870; *Southern R. Co. v. Freeman* (1909) 6 Ga. App. 55, 64 S. E. 129.

To entitle an injured employee to recover, he must have been free from negligence immediately, remotely, directly, or indirectly contributing to the injury. *Walker v. Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30 S. E. 503.

This rule does not mean that, in order to entitle him to recover, the employee must have been absolutely faultless in the discharge of duties wholly disconnected with the catastrophe, but merely that he must be faultless in respect to something which contributed to produce the catastrophe. "If he immediately or remotely, directly or indirectly, caused it, or any part of it, or contributed to it at all, then he cannot recover; but though he had been at fault about something wholly disconnected with the transaction, or was at the time at fault about a matter that had nothing to do with the catastrophe, then he may recover." *Central R. Co. v. Mitchell* (1879) 63 Ga. 173. See, generally, §§ 1237, 1238, *ante*.

As the Code makes no distinction between the different classes or grades of employees, it is error for a court to give an instruction which would permit plaintiff to recover, although negligent, provided his injury was caused by his obedience to an order of a superior officer to whose authority he was subject, and by whom he was liable to be discharged for disobedience. *Western & A. R. Co. v. Adams* (1875) 55 Ga. 279.

In the trial of an action against a railway company for the homicide of

of fact," subject to the power of the judge to set aside a verdict as against the weight of evidence.²]

an employee, resulting from an act in which deceased participated, a charge so worded as to convey to the jury the idea that they would be authorized to find for the plaintiff solely on account of the defendant's negligence, without regard to the question of the exercise of ordinary care by the deceased in getting into a dangerous position, is erroneous. *Western & A. R. Co. v. Jackson* (1901) 113 Ga. 355, 38 S. E. 820.

The rule of comparative negligence is not applicable in cases of master and servant. *Warfield v. Sanburn* (1911) 9 Ga. App. 321, 71 S. E. 703.

But under the act of Aug. 16, 1909 (Acts 1909, p. 160), this provision of the statute is made applicable to cases of master and servant as well as to other negligence cases. See chapter LXXVI., *post*.

Indiana.—(See chapter LXXIV., *post*.) Under this act it has been laid down that an employee of a corporation is not relieved from the obligation of using that degree of care which is required by the common law. *Whitcomb v. Standard Oil Co.* (1899) 153 Ind. 513, 55 N. E. 440.

Recovery has been denied on the ground of the servant's failure to use such care, in *Dixon v. Western U. Teleg. Co.* (1895) 68 Fed. 630; *American Carbon Co. v. Jackson* (1900) 24 Ind. App. 390, 56 N. E. 862; *Corning Steel Co. v. Pohlplatz* (1902) 29 Ind. App. 250, 64 N. E. 476.

Massachusetts.—(See chapter LXXIV., *post*.) Contributory negligence has been held to be a bar to the action in the following cases: *Shea v. Boston & M. R. Co.* (1891) 154 Mass. 31, 27 N. E. 672; *Cunningham v. Lynn & B. Street R. Co.* (1898) 170 Mass. 298, 49 N. E. 440; *Flaherty v. Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463; *Scullane v. Kellogg* (1897) 169 Mass. 544, 48 N. E. 622; *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179; *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890; *Regan v. Lombard* (1906) 192 Mass. 319, 78 N. E. 476; *Sievers v. Eyre* (1903) 122 Fed. 734 (construing Massachusetts law); *Allen v. New York, N. H. & H. R. Co.* (1909)

98 C. C. A. 253, 174 Fed. 779 (Massachusetts act).

Minnesota.—(See chapter LXXVI., *post*.) The qualification of the company's liability by the insertion of the words, "without contributory negligence on his part," is not intended to change the rule of evidence or burden of proof. This proviso was added from motives of caution, that it might not be supposed that the declared liability of the master was intended to be absolute, and without regard to any negligence of the complainant contributing to the result. The language recited simply preserves, as an express limitation of the declared liability, the recognized principle of the common law as to the effect of contributory negligence.

Missouri.—(See chapter LXXVI., *post*.) Contributory negligence is retained in so many words as a complete defense in the fellow-servant act. *Hamlett v. Chicago & A. R. Co.* (1901) 89 Mo. App. 354.

New York.—(See chapter LXXIV., *post*. See also note 2, *infra*.) The employers' liability act of New York (Laws of 1902, p. 1748, chap. 600) expressly provides that an action under it may be maintained only where the injured servant was himself in the exercise of due care. *Chisholm v. Manhattan R. Co.* (1906) 116 App. Div. 320, 101 N. Y. Supp. 622; *Kennedy v. New York Teleph. Co.* (1908) 125 App. Div. 846, 110 N. Y. Supp. 887.

Texas.—Act of 1897. (See chapter LXXVI., *post*.)

Wisconsin.—See chapter LXXVI., *post*.)
² The statute does not eliminate the defense of contributory negligence, but it becomes a question of fact. *Kiernan v. Eidlitz* (1905) 109 App. Div. 726, 96 N. Y. Supp. 387.

Even if the evidence is undisputed upon the question of contributory negligence, the case must be submitted to the jury. *Reynolds v. Seneca Falls Mfg. Co.* (1910) 137 App. Div. 446, 122 N. Y. Supp. 797.

The verdict was set aside as being against the plain weight of evidence in *Vaughn v. Glens Falls Portland Cement Co.* (1905) 105 App. Div. 136, 93 N. Y. Supp. 979.

c. Availability of defense inferred from language of statute.—In other instances the same inference has been drawn from the fact that the servant is given a right of action for an injury “caused” or “occasioned” by an abnormally dangerous condition of the plant, or by the negligence of certain classes of coemployees. Evidence which shows that the servant was guilty of contributory negligence necessarily implies that the negligence complained of was not the proximate cause of the accident.³

But in order to let in this defense, it is not necessary that the statute relied upon should contain words which, either expressly or

The statute was construed or discussed in the following cases: *Berthelson v. Gabler* (1906) 111 App. Div. 142, 97 N. Y. Supp. 421; *Onesti v. Central New England R. Co.* (1907) 121 App. Div. 554, 106 N. Y. Supp. 233; *McBride v. New York Tunnel Co.* (1905) 101 App. Div. 448, 92 N. Y. Supp. 282, second appeal (1906) 113 App. Div. 821, 99 N. Y. Supp. 571; *Travis v. Haan* (1907) 119 App. Div. 138, 103 N. Y. Supp. 973; *Aken v. Barnet & A. Knitting Co.* (1907) 118 App. Div. 463, 103 N. Y. Supp. 1078, affirmed in (1908) 192 N. Y. 554, 85 N. E. 1105.

³ (a) *Employers' liability acts.*—The construction mentioned in the text was that which has been put upon the English employers' liability act of 1880 (chapter LXXIV., *post*). *Martin v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. 216. Other English and Colonial cases in which the inability of a negligent servant to recover under that act or one of those copied from it has been recognized, though not always with explicit reference to its terminology, are *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516; *Iles v. Abercan Welsh Flannel Co.* (1886) 2 Times L. R. (Q. B. D.) 547; *Ayres v. Bull* (1889) 5 Times L. R. 202; *Bunker v. Midland R. Co.* (1883) 47 L. T. N. S. 476, 31 Week. Rep. 231; *M'Shane v. Baxter* (1890) 7 Times L. R. (Q. B. D.) 58; *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706; *M'Evoy v. Waterford S. S. Co.* (1886) Ir. Rep. 18 C. L. 159; *Truman v. Rudolph* (1895) 22 Ont. App. Rep. 250; *O'Brien v. Sanford* (1892) 22 Ont. Rep. 137; *Patterson v. Stevens* (1890) 11 New South Wales L. R. (L.) 83; *Eureka Ext. Co. v. Allen*

(1883) 9 Vict. L. R. (L.) 341; *Davidson v. Wright* (1887) 13 Vict. L. R. (L.) 351 (error not to submit question of contributory negligence to jury, where plaintiff's own evidence shows that he ought to have observed the defect which caused his injury).

That contributory negligence is a bar to an action under the Alabama statute, which is couched in the same words as those just mentioned (see chapter LXXIV., *post*), has been frequently held, *Annisson Pipe Works v. Dickey* (1890) 93 Ala. 418, 9 So. 720; *Hissong v. Richmond & D. R. Co.* (1890) 91 Ala. 514, 8 So. 776; *Birmingham Furnace & Mfg. Co. v. Gross* (1892) 97 Ala. 220, 12 So. 36; *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701; *Mobile & O. R. Co. v. George* (1891) 94 Ala. 200, 10 So. 145; *Southern R. Co. v. Harbin* (1900) 110 Ga. 808, 36 S. E. 218 (a decision as to an accident which occurred in Alabama); *Louisville & N. R. Co. v. Sharp* (1911) 171 Ala. 212, 55 So. 139.

Contributory negligence is an absolute defense under the Massachusetts employers' liability act. *Regan v. Lombard* (1906) 192 Mass. 319, 78 N. E. 476; *McCarty v. Clinton Gaslight Co.* (1906) 193 Mass. 76, 78 N. E. 739.

See also cases cited in note 5, *infra*.

(b) *Statutes imposing specific duties.*—In a case where one of the mining acts was being construed, it was held that the injury was not “occasioned” by a breach of its provisions, where there had been contributory negligence on the plaintiff's part. But such cases are usually decided with reference to the more general principle exemplified by the authorities cited in the next note. *Spiva v. Osage Coal & Min. Co.* (1885) 88 Mo. 68.

by implication, make the absence of contributory negligence a prerequisite to success in the action. A large number of cases have been decided upon the theory that, in the absence of language indicative of a contrary intention, a statute which deprives an employer, either wholly or partially, of the protection afforded by the doctrine of common employment, or which subjects him to a new duty for the benefit of his servants, does not preclude him from availing himself of the plea that the injured person was himself negligent, and that his negligence was a proximate cause of his injury.⁴

⁴ (a) *Statutes declaratory of common-law principles.*—It has been held that the Minnesota act set out in chapter LXXIII., *post*, does not change the rule as to contributory negligence. *Lundberg v. Shevlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078; *Soutar v. Minneapolis International Electric Co.* (1897) 68 Minn. 18, 70 N. W. 796; *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

(b) *Statutes affecting the operation of the doctrine of common employment.*—The rule in the text has been applied under several of the statutes reviewed in chapter LXXVI., *post*. *Hoben v. Burlington & M. River R. Co.* (1866) 20 Iowa, 562; *Way v. Illinois C. R. Co.* (1875) 40 Iowa, 341; *Kansas P. R. Co. v. Peavey* (1885) 34 Kan. 472, 8 Pac. 780; *Chicago, K. & N. R. Co. v. Brown* (1890) 44 Kan. 384, 24 Pac. 497 (fact that servant's negligence was slight, held to be immaterial); *Hancock v. Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. 679; *Nelson v. New Orleans & N. E. R. Co.* (1900) 40 C. C. A. 673, 100 Fed. 731 (Missouri act); *Aluminum Co. v. Ramsey* (1909) 89 Ark. 522, 117 S. W. 568; *Chicago G. W. R. Co. v. Crotty* (1905) 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 147 (Iowa statute).

(c) *Statute imposing specific duties.*—In the following decisions with reference to statutes imposing specific duties upon the master, contributory negligence has been held to be a good plea. (Unless otherwise noted, the negligence complained of consisted of failure to guard machinery): *Clarke v. Holmes* (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47

Week. Rep. 87; *Pringle v. Grosvenor* (1894) 21 Sc. Sess. Cas. 4th series, 532; *Finlay v. Miscampbell* (1890) 20 Ont. Rep. 29 (unguarded opening in floor); *Headford v. McClary Mfg. Co.* (1893) 23 Ont. Rep. 335 (unguarded opening); *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425; *Street v. Canadian P. R. Co.* (1908) 18 Manitoba L. Rep. 334 (unlocked frog); *Lake Erie & W. R. Co. v. Craig* (1896) 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642 (unlocked frog); *E. S. Higgins Carpet Co. v. O'Keefe* (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Gilbert v. Burlington, C. R. & N. R. Co.* (1904) 63 C. C. A. 27, 128 Fed. 529, affirming (1903) 123 Fed. 832 (Federal safety-appliance act); *Denver & R. G. R. Co. v. Arrighi* (1904) 63 C. C. A. 649, 129 Fed. 347 (Federal safety-appliance act); *Toledo, St. L. & W. R. Co. v. Gordon* (1910) 100 C. C. A. 572, 177 Fed. 152 (same act); *Erdman v. Deer River Lumber Co.* (1910) 104 C. C. A. 482, 182 Fed. 42; *Carstens Packing Co. v. Swinney* (1911) 108 C. C. A. 152, 186 Fed. 50; *Pratt Consol. Coal Co. v. Davidson* (1911) — Ala. —, 55 So. 886 (failure to provide ventilation in mine); *Mammoth Vein Coal Co. v. Bubliss* (1907) 83 Ark. 567, 104 S. W. 210 (mine owner failed to furnish props); *York v. St. Louis, I. M. & S. R. Co.* (1908) 86 Ark. 244, 110 S. W. 803 (Federal safety-appliance act); *Mammoth Vein Coal Co. v. Johnson* (1910) — Ark. —, 127 S. W. 971, first appeal (1908) 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722, 123 S. W. 1180 (mine owner failed to furnish props); *Victor Coal Co. v. Muir* (1894) 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378 (mining act; provision as to props); *Cleveland, C. C. & St. L. R. Co. v. Curtis* (1907) 134

d. Knowledge of risk, how far negligence is inferable from.—Whether the mere fact of the servant's knowledge of the danger

- Ill. App. 565, affirmed in (1909) 240 Ill. 218, 88 N. E. 548 (Federal safety-appliance act); *Luken v. Lake Shore & M. S. R. Co.* (1910) 154 Ill. App. 550, affirmed in (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82; (automatic coupling); *Wabash, St. L. & P. R. Co. v. Thompson* (1884) 15 Ill. App. 117; *Munn v. L. Wolff Mfg. Co.* (1900) 94 Ill. App. 122; *Rush v. Coal Bluff Min. Co.* (1891) 131 Ind. 135, 30 N. E. 904 (mining act); *Balzer v. Warring* (1911) — Ind. —, 95 N. E. 257; *Island Coal Co. v. Risher* (1895) 13 Ind. App. 98, 40 N. E. 158 (mining act); *Bodell v. Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856 (uncovered cage in mine); *L. T. Dickason Coal Co. v. Unverferth* (1903) 30 Ind. App. 546, 66 N. E. 759 (mining act); *L. T. Dickason Coal Co. v. Peach* (1903) 32 Ind. App. 33, 69 N. E. 189 (mining act); *Baltimore & O. S. W. R. Co. v. Cavanaugh* (1904) 35 Ind. App. 32, 71 N. E. 239; *Robbins v. Ft. Wayne Iron & Steel Co.* (1908) 41 Ind. App. 557, 84 N. E. 514 (unguarded machinery; servant disobeyed instruction not to do certain work before machinery had stopped); *Reynolds v. Hindman* (1871) 32 Iowa, 146 (unboxed tumbling rod on threshing machine); *Sutton v. Des Moines Bakery Co.* (1907) 135 Iowa, 390, 112 N. W. 836; *Stephenson v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 371, 130 N. W. 586; *Goins v. North Jellico Coal Co.* (1910) 140 Ky. 323, 131 S. W. 28 (mining act, failure to furnish props); *Low v. Clear Creek Coal Co.* (1910) 140 Ky. 754, 33 L.R.A. (N.S.) 656, 131 S. W. 1007 (failure to furnish props in mine); *Interstate Coal Co. v. Baxavanie* (1911) 144 Ky. 172, 137 S. W. 859 (failure to ventilate mine); *Keenan v. Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366 (no automatic gates to elevator); *Grand v. Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 834 (unlocked switch); *Swick v. Aetna Portland Cement Co.* (1907) 147 Mich. 454, 111 N. W. 110; *Schulte v. Pfaudler Co.* (1907) 150 Mich. 427, 113 N. W. 1120; *Gehl v. Pittsburg Coal Co.* (1910) 163 Mich. 285, 128 N. W. 209; *Anderson v. C. N. Nelson Lumber Co.* (1896) 67 Minn. 79, 69 N. W. 630 (unguarded saw); *Parker v. Pine Tree Lumber Co.* (1901) 85 Minn. 13, 88 N. W. 261 (unguarded saw); *Swenson v. Osgood & B. Mfg. Co.* (1904) 91 Minn. 509, 98 N. W. 645; *Seely v. Tennant* (1908) 104 Minn. 354, 116 N. W. 648; *Healy v. Hoy* (1910) 112 Minn. 138, 127 N. W. 482 (hoisting apparatus used in construction of building not properly guarded); *Farguher v. Alabama & V. R. Co.* (1900) 78 Miss. 193, 28 So. 850 (trains run at unlawful speed); *Huss v. Heydt Bakery Co.* (1908) 210 Mo. 44, 108 S. W. 63; *Williams v. Ransom* (1911) 234 Mo. 55, 136 S. W. 349 (insufficient scaffold); *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486 (mining act; provision as to props); *Millsap v. Beggs* (1906) 122 Mo. App. 1, 97 S. W. 956; *Dressie v. St. Louis. K. C. & C. R. Co.* (1910) 145 Mo. App. 163, 129 S. W. 1012; *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499 (failure to equip cages in mines with doors); *White v. Wittemann Lithographic Co.* (1892) 131 N. Y. 631, 30 N. E. 236; *Fitzgerald v. New York C. & H. R. Co.* (1891) 59 Hun, 225, 12 N. Y. Supp. 932 (no warning signals near low bridge); *Fortune v. Hall* (1907) 122 App. Div. 250, 106 N. Y. Supp. 787, affirmed in (1909) 195 N. Y. 578, 89 N. E. 1100 (failure of employer to procure certificate for employment of minor; latter was a few days over the age absolutely prohibited); *Guenther v. Lockhart* (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717 (no automatic doors on elevator); *Krause v. Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886 (failure to keep mine free from gas); *McDonald v. Rockhill Iron & Coal Co.* (1890) 135 Pa. 1, 19 Atl. 797 (mining act); *Christner v. Cumberland & E. L. Coal Co.* (1891) 146 Pa. 67, 23 Atl. 221 (uncertified mining boss employed); *Solt v. Williamsport Radiator Co.* (1911) 231 Pa. 585, 80 Atl. 1119 (failure to provide belt shifter); *Langlois v. Dunn Worsted Mills* (1904) 25 R. I. 645, 57 Atl. 910; *Smith v. Atchison, T. & S. F. R. Co.* (1905) 39 Tex. Civ. App. 468, 87 S. W. 1052 (engineer remained at work more hours than permitted by statute, and

caused by that particular breach of a statutory duty to which his injury was attributable will render him chargeable, as a matter of law, with negligence, is a question the answer to which has been in some instances determined partially, at least, by the phraseology

was injured because of his exhausted condition); *Kilpatrick v. Grand Trunk R. Co.* (1902) 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531 (statute forbade the maintenance of side ladders on cars); *Hunter v. Washington Pipe & Foundry Co.* (1906) 43 Wash. 167, 86 Pac. 171; *Bundy v. Union Iron Works* (1907) 46 Wash. 231, 89 Pac. 545; *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584 (mining act); *Holum v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 299, 50 N. W. 99 (unblocked frog); *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523, 62 N. W. 527. Following *Curry v. Chicago & N. W. R. Co.* (1878) 43 Wis. 665 (fence statute), and distinguishing *Quackenbush v. Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519, on the ground that the statute there construed created an absolute liability for injuries occasioned, "in whole or in part," by the failure to fence; *Helmke v. Thilmann* (1900) 107 Wis. 216, 83 N. W. 360; *Lind v. Uniform Stave & Package Co.* (1909) 140 Wis. 183, 120 N. W. 839 (unguarded vat); *Pulk v. Churchill* (1911) 146 Wis. 477, 131 N. W. 906.

A brakeman violating the rules of the railroad company, which he knew and had assented to, by entering between cars in motion to uncouple them, knowing also that they are passing over an unblocked "split" switch, in which his foot becomes fastened, causing him to be run over and killed, is guilty of contributory negligence which will prevent any liability of the company for his death, under a statute requiring switches to be blocked, even though the statute applies to "split" switches, which cannot be blocked without destroying their efficiency. *Grand v. Michigan C. R. Co.* (1890) 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 834.

Contributory negligence on the part of a boy injured in an unlawful employment may avail the employer as a defense, unless it be the same that must reasonably be anticipated as a probable consequence of the nonobservance of the law. *Norman v. Virginia-Pocahontas*

Coal Co. (1910) 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857. These views were reiterated in *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863.

In *Leahy v. United States Cotton Co.* (1907) 28 R. I. 252, 66 Atl. 572, it was held that a statute providing that the mere continuance in the employment with knowledge of the failure of the master to obey the statutory requirement to equip an elevator with safety devices does not enable a servant to recover for injuries caused by his stepping into the shaft without looking.

Although the Pennsylvania act, April 18, 1877 (Pub. Laws, 56, § 6), requires a traveling way at the bottom of the shaft for miners to pass, yet if a miner fails to look and listen before stepping under a descending cage, he cannot recover. *McDonald v. Rockhill Iron & Coal Co.* (1890) 135 Pa. 1, 19 Atl. 797.

A statute requiring railway companies to construct safe crossings and cattleguards, and declaring them to be liable for all damages caused by their neglect or refusal to do so, and providing that in order that the injured party may recover, it is only necessary for him to prove such neglect or refusal, does not by implication exclude any defense which would ordinarily be available. Such a provision merely affects the burden of proof. *Ford v. Chicago, R. I. & P. R. Co.* (1894) 91 Iowa, 179, 24 L.R.A. 657, 59 N. W. 5.

Where plaintiff was injured by a fall of part of the roof of a coal mine in which he was employed, and he had no control over the roof of the mine, and had been directed not to remove any slate therefrom, he was not guilty of contributory negligence for failing to prop the roofs, under McClain's (Iowa) Code, § 2463, making it a misdemeanor for a miner to fail to prop the roofs and entries under his control in the mine where he is working. The statute has no application to such a case. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

An instruction that the question of

of the provision imposing the duty infringed. But on the whole it may be said that the evidential significance of this element in each jurisdiction depends upon the doctrine which is applied in common-law actions.⁵

contributory negligence is not in the case is erroneous, where, although it is proved that the defendant company had violated a statute requiring that all its own cars should have ladders at the ends, and not at the sides, the evidence is also susceptible of the inference that the plaintiff was negligent in trying to mount the train at night while it was moving at a dangerous rate of speed. *Kilpatrick v. Grand Trunk R. Co.* (1900) 72 Vt. 263, 47 Atl. 827.

In the following cases the defense was held to be a bar to an action for injuries caused by a breach of a municipal ordinance: *Chicago Packing & Provision Co. v. Rohan* (1892) 47 Ill. App. 640 (servant, owing to want of "proper safeguards," fell into vat containing a hot liquid); *Pitrovsky v. J. W. Reedy Elevator Mfg. Co.* (1894) 54 Ill. App. 253 (plaintiff injured by revolving shaft which should have been covered); *Swift & Co. v. Fue* (1896) 66 Ill. App. 651 (same point).

⁵In the earlier decisions regarding the Alabama employers' liability act (chapter LXXIV., *post*), the position was taken that, provided the employer knew of the defect which caused the injury complained of, the servant did not forfeit his right of action under the statute merely because he continued to work with knowledge of that defect. *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146; *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357. The theory propounded in the latter case was that this doctrine was a proper implication from the provision in the last paragraph of § 2590 of the Code of 1886, pronouncing the master not to be liable if the servant knew of a defect and failed to notify the master thereof in a reasonable time. It was, however, recognized in the latter case that he could not recover if the injury was so imminent and impending that a prudent man would not have continued in the service under like circumstances.

In another case the court again recognized the principle that, if the known danger to be encountered is so imminent

that a reasonable and prudent man would not venture upon it, he is not free from negligence if he continues in the employment. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360.

In a somewhat earlier case the obligation of the servant to quit the employment within a reasonable time, if the master fails to remedy a defect of which he has been notified by the servant, had also been affirmed. *Columbus & W. R. Co. v. Bradford* (1888) 86 Ala. 574, 6 So. 90.

The qualified doctrine thus formulated was explicitly discarded in *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L.R.A. 457, 13 So. 8, where it was laid down that the statute has left unchanged the rule that a servant's knowledge of a risk precludes recovery for an injury caused by it. To the same effect, see *Louisville & N. R. Co. v. Stutts* (1894) 105 Ala. 368, 53 Am. St. Rep. 127, 17 So. 29 (engineer lost control of his engine while switching cars on a high and short trestle, the consequence being that the engine was precipitated over the end of the trestle,—danger held to be a patent one); *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547 (low overhead bridge about which servant had been warned).

But in *Pratt Consol. Coal Co. v. Davidson* (1911) — Ala. —, 55 So. 886, it was held that the doctrine of *Birmingham R. & Electric Co. v. Allen* was greatly modified by the addition to § 3910 of the following proviso: "That in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of."

The mere fact that, when an accident occurred to a minor, he was at a place where his duties did not require him to be, will not necessarily preclude him from recovering. In such a case, charges which ignore the fact of the in-

It has already been mentioned in this section that some statutes expressly provide that the servant's knowledge shall not of itself be sufficient to prevent recovery. The effect of such a provision is manifestly to preclude a court from declaring, as a matter of law, that the servant was negligent, unless something more is shown than his knowledge of the abnormal conditions which caused his injury.⁶

[In a few cases it has been held that the mere continuance of the servant at work under conditions forbidden by the statute is not sufficient to show contributory negligence.⁷

testate's tender age and childish instincts, and that he was put to work, not only in a dangerous place, but in proximity to other dangers, are erroneous, and properly refused. *Tutwiler Coal, Coke & I. Co. v. Enslin* (1900) 129 Ala. 336, 30 So. 600.

In the following cases the plaintiff's knowledge was held not to be conclusive proof of negligence: *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706 (employers' liability act of 1880); *Durant v. Lexington Coal Min. Co.* (1888) 97 Mo. 62, 10 S. W. 484, (mining act); *Eureka Ext. Co. v. Allen* (1883) 9 Vict. L. Rep. (L.) 341 (regulation of mines statute of 1877).

⁶ It has been so held under the provisions of the South Carolina, Mississippi, and Virginia Constitutions (chap. LXXV., *post*). *Youngblood v. South Carolina & G. R. Co.* (1900) 60 S. C. 9, 85 Am. St. Rep. 824, 38 S. E. 232; *Bodie v. Charleston & W. C. R. Co.* (1901) 61 S. C. 468, 39 S. E. 715; *Barksdale v. Charleston & W. C. R. Co.* (1903) 66 S. C. 204, 44 S. E. 743; *Carson v. Southern R. Co.* (1903) 68 S. C. 55, 46 S. E. 525, affirmed on other grounds in 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; *Yazoo & M. Valley R. Co. v. Parker* (1906) 88 Miss. 193, 40 So. 746 (holding that a section foreman was not a conductor within the meaning of § 193 of the Constitution, so as to be deprived of recovery because he knew of the defects); *Yazoo & M. Valley R. Co. v. Scott* (1909) 95 Miss. 43, 48 So. 239; *Welch v. Alabama & V. R. Co.* (1892) 70 Miss. 20, 11 So. 723; *Buckner v. Richmond & D. R. Co.* (1895) 72 Miss. 873, 18 So. 449; *Illinois C. R. Co. v. Bowles* (1894) 71 Miss. 1003, 15 So. 138; *Illinois C. R. Co. v. Ihlenberg* (1896) 34 L.R.A. 393, 21 C. C. A. 546, 43 U. S. App. 726, 75 Fed. 873 (Mississippi statute); *Southern R.*

Co. v. Blanford (1906) 105 Va. 373, 54 S. E. 1; *Hedrick v. Southern R. Co.* (1904) 136 N. C. 510, 48 S. E. 830 (construing Virginia statute).

Conductors and engineers are expressly excluded from the provision of the Mississippi Constitution. *Illinois C. R. Co. v. Emmerson* (1906) 88 Miss. 598, 40 So. 818.

Section 162 of the Constitution of Virginia (Va. Code 1904, page cclix.) was taken verbatim from the Mississippi Constitution. *Norfolk & W. R. Co. v. Cheatwood* (1905) 103 Va. 356, 49 S. E. 489.

The Alabama statute (Laws of 1907; see chapter LXXIV., *post*) provides that in no event shall it be contributory negligence on the part of the servant to remain in the employment after knowledge of the defect or negligence causing the injury unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of. See the *Davidson Case* cited in note 5, *supra*.

Ohio Gen. Code 1910, § 9017, provides among other things that continuance in the employment after knowledge by the employee of a defect in a locomotive, engine, car, hand car, rail, track, machinery or appliance required by such company to be used by its employees shall not be deemed an act of contributory negligence.

⁷ A miner of long experience, who was injured by a rock which fell from the roof of a mine, had a right to rely upon performance by his master of the duty imposed by statute to inspect and keep the roof of entries propped to prevent such an accident, and was not guilty of contributory negligence because he did not notice that the rock was loose. *Little v. Norton Coal Co.* (1910) 83 Kan. 1032, 109 Pac. 768.

The mere fact that the employee con-

But if the act itself is forbidden, then a different result ensues. See §§ 1240, and 1278, *ante*.]

A statute which expressly declares that the action of a servant injured by a breach of its provisions is not barred by the defense of an assumption of the risk manifestly does not prevent the master from relying on the defense of contributory negligence.⁸

As to the effect of a promise to remedy defects, see chapter LV., *ante*.

tinues to work in or about a machine which is required by the act to be, but which is not, guarded, does not charge him with contributory negligence.

United States Cement Co. v. Cooper (1907) — Ind. App. —, 82 N. E. 981.

The mere fact that a brakeman used the link and pin coupling, retained by the defendant in violation of the statute, does not show contributory negligence on his part. *Denver & R. G. R. Co. v. Arrighi* (1905) 72 C. C. A. 400, 141 Fed. 67.

The mere fact that a servant continued to work at a saw which he knew was unguarded, in violation of law, does not render him guilty of contributory negligence. *Tucker & D. Mfg. Co. v. Staley* (1907) 40 Ind. App. 63, 80 N. E. 975.

⁸ See note to *Dumphy v. New York, N. H. & H. R. Co.* 13 L.R.A.(N.S.) 1152.

Several decisions asserting this rule have been handed down in regard to the act of Congress respecting the use of safety appliances on railway cars. *Schlemmer v. Buffalo, R. & P. R. Co.* (1903) 207 Pa. 198, 56 Atl. 417 (reversed in [1906] 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, upon the ground that the servant was not negligent); *Cleveland, C. C. & St. L. R. Co. v. Baker* (1889) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224 (grap irons); *Gilbert v. Burlington, C. R. & N. R. Co.* (1904) 63 C. C. A. 27, 128 Fed. 529 (automatic couplers); *Denver & R. G. R. Co. v. Arrighi* (1904) 63 C. C. A. 649, 129 Fed. 347 (writ of certiorari denied in [1904] 194 U. S. 636, 48 L. ed. 1161, 24 Sup. Ct. Rep. 859), second appeal (1905) 72 C. C. A. 400, 141 Fed. 67; *Norfolk & W. R. Co. v. Hazlerigg* (1909) 95 C. C. A. 637, 170 Fed. 551; *Cleveland, C. C. & St. L. R. Co. v. Curtis* (1907) 134 Ill. App. 565, affirmed in (1909) 240 Ill. 218, 88 N. E.

548 (Federal safety-appliance act); *Southern P. Co. v. Allen* (1907) 48 Tex. Civ. App. 66, 106 S. W. 441.

But under this statute a servant cannot be denied a recovery on the ground of contributory negligence, merely because of his knowledge of the condition of the cars. *Chicago Junction R. Co. v. King* (1909) 94 C. C. A. 652, 169 Fed. 372.

In *Hairston v. United States Leather Co.* (1906) 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698, it was held that the failure of a manufacturing company which operated a short line of railroad about 14 miles in length, to use automatic couplings required by the Federal statute, closed to the defendant the defenses both of assumption of risk and of contributory negligence, unless, perhaps, the negligent conduct of the injured employee should amount to recklessness.

Other decisions involve statutes modeled after the Federal statute: *Winkler v. Philadelphia & R. R. Co.* (1901) 4 Penn. (Del.) 80, 53 Atl. 90 (automatic coupler); *Dumphy v. New York, N. H. & H. R. Co.* (1907) 196 Mass. 471, 13 L.R.A.(N.S.) 1152, 82 N. E. 675 (automatic coupler).

In North Carolina the law provides that a person injured while in the employ of a railroad, by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against the company, and that any contract or agreement waiving such right shall be void. In *Coley v. North Carolina R. Co.* (1901) 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195, the court held that this act deprived all the railroad companies operating in the state of the defense of assumption of risk; but that the intent of the statute re-

1649. [652] Limits of the doctrine that contributory negligence is a bar to an action.—Contributory negligence is in many cases held to be no defense to an action for a breach of a statute which amounts to a wilful, wanton, or intentional wrong.¹ But in order to bring a

lated simply to the contractual relation existing, expressly or by implication, between the parties, and that it did not intend to preclude the plea of contributory negligence. To the same general effect were the decisions in *Thomas v. Raleigh & A. Air-Line R. Co.* (1901) 129 N. C. 392, 40 S. E. 201; *Cogdell v. Southern R. Co.* (1901) 129 N. C. 398, 40 S. E. 202; *Walker v. Carolina C. R. Co.* (1904) 135 N. C. 738, 47 S. E. 675; *Biles v. Seaboard Air Line R. Co.* (1905) 139 N. C. 528, 52 S. E. 129.

To the same effect: *Lowe v. Southern R. Co.* (1910) 85 S. C. 363, 67 S. E. 460 (case arose in North Carolina).

The defense of contributory negligence is not barred by a statutory provision that continuance of a servant in his employment with knowledge that the employer has failed to guard his machinery, as required by law, shall not operate as a defense to an action for injuries due to such omission *Klotz v. Power & Min. Machinery Co.* (1908) 136 Wis. 107, 17 L.R.A.(N.S.) 904, 116 N. W. 770. To the same effect, *Lind v. Uniform Stave & Package Co.* (1909) 140 Wis. 183, 120 N. W. 839 (unguarded vat of boiling water); *West v. Bayfield Mill Co.* (1910) 144 Wis. 106, — L.R.A.(N.S.) —, 128 N. W. 992; *Willette v. Rhinelander Paper Co.* (1911) 145 Wis. 537, 130 N. W. 853.

¹*Louisville & N. R. Co. v. York* (1900) 128 Ala. 305, 30 S. E. 676; *Alabama G. S. R. Co. v. Williams* (1904) 140 Ala. 230, 37 S. E. 255.

In Illinois the position has been taken that the effect of the provision in the mining act by which owners and operators are declared to be liable for a "wilful violation" of the duties which it imposes on them is that an injured servant may recover, even though he may have been guilty of contributory negligence. *Barlett Coal & Min. Co. v. Roach* (1873) 68 Ill. 174; *Litchfield Coal Co. v. Taylor* (1876) 81 Ill. 590; *Catlett v. Young* (1892) 143 Ill. 74, 32 N. E. 447 (a ruling under the act of 1872); *Carterville Coal Co. v. Abbott* (1899) 181 Ill. 495, 55 N. E. 131, affirming (1899) 81 Ill. App. 279; *Odin*

Coal Co. v. Denman (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, affirming (1899) 84 Ill. App. 190; *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335, affirming (1901) 95 Ill. App. 95; *Pawnee Coal Co. v. Royce* (1900) 184 Ill. 402, 56 N. E. 621, reversing (1898) 79 Ill. App. 469; *Illinois Fuel Co. v. Parsons* (1890) 38 Ill. App. 182; *Girard Coal Co. v. Wiggins* (1893) 52 Ill. App. 69; *Carterville Coal Co. v. Abbott* (1899) 181 Ill. 496, 55 N. E. 131; *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335, affirming (1900) 95 Ill. App. 95; *Spring Valley Coal Co. v. Rovatt* (1902) 196 Ill. 156, 63 N. E. 649; *O'Fallon Coal & Min. Co. v. Laquet* (1902) 198 Ill. 125, 64 N. E. 767; *Riverton Coal Co. v. Shepherd* (1904) 207 Ill. 395, 69 N. E. 921, affirming (1902) 100 Ill. App. 546; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Joseph Taylor Coal Co. v. Dawes* (1905) 122 Ill. App. 389, judgment affirmed in (1906) 220 Ill. 145, 77 N. E. 131; *Henrietta Coal Co. v. Martin* (1906) 221 Ill. 460, 77 N. E. 902, affirming (1905) 122 Ill. App. 354; *Davis v. Illinois Collieries Co.* (1908) 232 Ill. 284, 83 N. E. 836; *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743; *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 166, affirming (1908) 143 Ill. App. 370; *Waschow v. Kelly Coal Co.* (1910) 245 Ill. 516, 92 N. E. 303; *Hougland v. Avery Coal & Min. Co.* (1910) 246 Ill. 609, 93 N. E. 40, affirming (1910) 152 Ill. App. 573; *Hougland v. Avery Coal & Min. Co.* (1910) 246 Ill. 609, 93 N. E. 40; *Sunnyside Coal Co. v. Center* (1902) 100 Ill. App. 546; *Donk Bros. Coal & Coke Co. v. Stroff* (1902) 100 Ill. App. 576, affirmed in (1903) 200 Ill. 483, 66 N. E. 29; *Riverton Coal Co. v. Shepherd* (1903) 111 Ill. App. 294, affirmed in (1904) 207 Ill. 395, 69 N. E. 921; *Athens Min. Co. v. Carnduff* (1905) 123 Ill. App. 178, affirmed in (1906) 221 Ill. 354, 77 N. E. 571; *Marquette Third Vein Coal Co. v. Allison* (1907) 132 Ill. App. 221; *Maplewood*

Coal Co. v. Graham (1907) 134 Ill. App. 277; *Illinois Collieries Co. v. Haveron* (1907) 137 Ill. App. 22; *Moore v. Centralia Coal Co.* (1908) 140 Ill. App. 291; *Hollingshead v. Wabash Coal Co.* (1908) 142 Ill. App. 641; *Hamilton v. Spring Valley Coal Co.* (1909) 149 Ill. App. 10; *Kedes v. Christian County Coal Co.* (1909) 149 Ill. App. 434; *McCray v. Mouveagua Coal Min. & Mfg. Co.* (1909) 149 Ill. App. 565; *Elam v. Majestic Coal & Coke Co.* (1910) 155 Ill. App. 375; *Frenci v. Tazewell Coal Co.* (1910) 157 Ill. App. 477; *Wilkinson v. Willis Coal & Min. Co.* (1910) 158 Ill. App. 620; *Pate v. Gus Blair Big Muddy Coal Co.* (1910) 158 Ill. App. 578; *Chicago-Coulterville Coal Co. v. Fidelity & C. Co.* (1904) 130 Fed. 957 (following Illinois decisions).

A Federal court is bound by a construction given by the courts of the state in which it is sitting, to a statute imposing liability upon mine owners for death of employees, to the effect that it takes away the defense of contributory negligence. *Fulton v. Wilmington Star Min. Co.* (1904) 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 193 (Illinois statute).

The Illinois rule was followed in *Bolen-Darnall Coal Co. v. Williams* (1907) 7 Ind. Terr. 648, 104 S. W. 867 (mine owner violated act of Congress, July 1, 1902, chap. 1356, 32 Stat. at L. 631, requiring mines to be ventilated, etc.).

But this view has been rejected by the courts of other states in which the mining acts contain substantially similar provisions. See *Spiva v. Osage Coal & Min. Co.* (1885) 88 Mo. 68; *Victor Coal Co. v. Muir* (1894) 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; *Krause v. Morgan* (1895) 52 Ohio St. 662, 44 N. E. 1140; *Bodell v. Brazil Block-Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856.

In *Chicago, W. & V. Coal Co. v. Peterson* (1891) 39 Ill. App. 114, the court seems to assume that contributory negligence is a valid defense; if so, the decision is contrary to the other Illinois cases.

In *Paietta v. Illinois Zinc Co.* (1910) 153 Ill. App. 506, it was held that in order that a wilful violation of the mining act should give a cause of action to the person injured, the violation of the statute must have been the cause of the injury.

In one Illinois decision it is conceded that wilful negligence on the part of the injured person himself is a bar to an action. *Litchfield Coal Co. v. Taylor* (1876) 81 Ill. 590.

In *Victor Coal Co. v. Muir* (1894) 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378, the decision was that wilful negligence on the part of the plaintiff in disregarding his own statutory duties debarred him from recovery, and the court does not make it altogether plain whether any lesser degree of negligence would have defeated the action.

In actions under the Kentucky statute of 1854 (now repealed—see § 1641, ante), which provided that punitive damages might be recovered where the life of one person had been lost owing to the "wilful neglect" of another, a servant who was merely lacking in ordinary care was held not to be precluded from recovery. *Louisville, C. & L. R. Co. v. Mahony* (1870) 7 Bush, 235 (citing *Louisville & N. R. Co. v. Yandell* [1856] 17 B. Mon. 586; *Louisville & N. R. Co. v. Sickings* [1868] 5 Bush, 1, 96 Am. Dec. 320; *Louisville & N. R. Co. v. Collins* [1865] 2 Duv. 114, 87 Am. Dec. 486; *Louisville & N. R. Co. v. Robinson* [1868] 4 Bush, 507; *Louisville & N. R. Co. v. Filbern* [1869] 6 Bush, 574, 99 Am. Dec. 690); *Derby v. Kentucky C. R. Co.* (1887) 9 Ky. L. Rep. 153, 4 S. W. 303; *Needham v. Louisville & N. R. Co.* (1887) 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; *Owen v. Louisville & N. R. Co.* (1888) 87 Ky. 626, 9 S. W. 698; *Newport News & M. Valley Co. v. Dentzel* (1890) 91 Ky. 42, 14 S. W. 958; *Louisville & N. R. Co. v. Hurst* (1892) 14 Ky. L. Rep. 632, 20 S. W. 817.

The fact that he was himself guilty of wilful negligence was deemed to be a good defense. But an employee of a railroad company, in the discharge of whose duty of taking the numbers of cars upon a side track it is customary, convenient, and necessary to stand upon the main track, is not guilty of wilful negligence in so standing while taking such numbers, after the passage of an engine which has been detached from a train for the purpose of hauling such cars, without looking out for the cars forming such train. *Louisville & N. R. Co. v. Pott* (1891) 92 Ky. 30, 17 S. W. 185.

case within the scope of this principle something more than the mere breach of a duty imposed by a statute or municipal ordinance must be shown.²

The position has been taken that, where the abnormal conditions are the result of a breach of a statutory duty, a servant is entitled to presume that the company will proceed to perform its duty without any unnecessary delay, and is, therefore, not necessarily negligent in continuing to work.³

Some of the more recent cases have held that one who employs a minor contrary to the provisions of a statute cannot invoke the defense of contributory negligence, and this would seem to be the better view to take of statutes of this character; but the courts are not agreed upon the point, as will be seen from the cases cited below.⁴ A qualification of this doctrine has been laid down in one

² *Browne v. Siegel, C. & Co.* (1901) 191 Ill. 226, 60 N. E. 815, affirming (1900) 90 Ill. App. 49, where contributory negligence was held to be a good defense to an action for injuries caused by noncompliance with an ordinance.

The statement in the text is also supported by the language used in *Girard Coal Co. v. Wiggins* (1893) 52 Ill. App. 69.

³ *Quackenbush v. Wisconsin & M. R. Co.* (1885) 62 Wis. 411, 22 N. W. 519.

In *Elmore v. Seaboard Air Line R. Co.* (1902) 130 N. C. 506, 41 S. E. 786, the court said: "It is the duty of the defendant to use automatic couplers; and if, on failure so to do, injury occurs to an employee which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans*."

⁴ See notes to *Lenahan v. Pittston Coal Min. Co.* 12 L.R.A.(N.S.) 461, and *Strafford v. Republic Iron & Steel Co.* 20 L.R.A.(N.S.) 876.

In the following cases contributory negligence was held to be no defense where the master employed a child under the age prescribed by statute: *Morris v. Stanfield* (1898) 81 Ill. App. 264; *Jefferson Theatre Program Co. v. Crejczyk* (1906) 125 Ill. App. 1; *Frorer v. Baker* (1907) 137 Ill. App. 588; *Swift & Co. v. Miller* (1908) 139 Ill. App. 192; *Fortier v. The Fair* (1910) 153 Ill. App. 200; *Nairn v. National Biscuit Co.* (1906) 120 Mo. App. 144, 96 S. W.

679; *Sullivan v. Hanover Cordage Co.* (1908) 222 Pa. 40, 70 Atl. 909; *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. 348, 133 Am. St. Rep. 884, 74 Atl. 215; *Missouri, K. & T. R. Co. v. Turner* (1911) — Tex. Civ. App.—, 138 S. W. 1126; *Glucina v. F. H. Goss Brick Co.* (1911) 63 Wash. 401, — L.R.A.(N.S.) —, 115 Pac. 843.

"The employer of a child in violation of a specific statute cannot screen itself from liability for an injury sustained by the child in its service, because the injury was occasioned through such negligence, imprudence, or childish traits as gave rise to the statute." *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 87 N. E. 229.

"If plaintiff was injured while absent from the post of duty, or while violating his orders, or if it was carelessness or negligence for him to run between the sides of the moving cars and the mine wall, still, in our judgment, those facts would not prevent a recovery under the second count. The statute absolutely forbids the employment of a child of that age in a mine. One reason, no doubt, is that immature children are liable not to understand the significance and importance of the regulations prescribed for the mine and the employees therein; they may thoughtlessly disobey orders, or expose themselves to peril, or do acts which would be careless in an adult. The company which violates this statute ought not to be allowed to screen itself from liability because the child has been

case.⁵ In New York and some other states the court has adopted the view that in every case the contributory negligence of a minor employed under the statutory age is for the jury.⁶ Other cases apply

injured by reason of those childish traits which give rise to the statute." *Marquette Third Vein Coal Co. v. Dielie* (1903) 110 Ill. App. 684, affirmed in (1904) 208 Ill. 116, 70 N. E. 17.

The contributory negligence of a child employed in violation of the terms of a statute is no defense to an action against the master for personal injuries received by him in consequence of such employment, although he had temporarily abandoned the work he was employed to do, and was attempting to perform work which he had been forbidden to do. *Strafford v. Republic Iron & Steel Co.* (1909) 238 Ill. 371, 20 L.R.A.(N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358. The court further held that a master is not relieved from liability for injury to a child employed in violation of the terms of a statute because the statute does not, in express terms, provide for such liability.

"A boy employed in violation of a statute is not chargeable with contributory negligence." *Lenahan v. Pittston Coal Min. Co.* (1907) 218 Pa. 311, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885, 67 Atl. 642.

In *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 87 N. E. 229, the court said: "A causal connection between the unlawful employment and the injury of which complaint is made must be shown. If the child should die of some organic disease, or be injured by a stroke of lightning, or some other intervening act beyond the master's control, and not reasonably to be foreseen and anticipated, the master could not be held liable."

⁵ In *American Car & Foundry Co. v. Armentraut* (1905) 214 Ill. 509, 73 N. E. 766, affirming (1904) 116 Ill. App. 121, the court said: "So long as the child continued in the performance of the work he had been directed to do, appellant would be liable for any injury resulting to him, even though the negligence of the child may have contributed to the accident. If the child left the task which he had been directed to perform, and, while not engaged in doing work which he had been directed to do by his master, was injured through an

accident to which his own negligence contributed while he was still in or upon the premises of the master, a different question would present itself."

⁶ *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, affirming (1901) 65 App. Div. 609, 72 N. Y. Supp. 1118. To the same effect, *Sitts v. Waiontha Knitting Co.* (1904) 94 App. Div. 38, 87 N. Y. Supp. 911; *Lowry v. Anderson Co.* (1904) 96 App. Div. 465, 89 N. Y. Supp. 107; *Rahn v. Standard Optical Co.* (1906) 110 App. Div. 501, 96 N. Y. Supp. 1080; *Dragotto v. Plunkett* (1906) 113 App. Div. 648, 99 N. Y. Supp. 361; *Lee v. Sterling Silk Mfg. Co.* (1906) 115 App. Div. 589, 101 N. Y. Supp. 78; second appeal (1909) 134 App. Div. 123, 118 N. Y. Supp. 852; *Kircher v. Iron Clad Mfg. Co.* (1909) 134 App. Div. 144, 118 N. Y. Supp. 823, judgment affirmed in (1911) 200 N. Y. 587, 94 N. E. 1095; *Regling v. Lehmaier* (1906) 50 Misc. 331, 98 N. Y. Supp. 642; *White v. Wittemann Lithographic Co.* (1892) 131 N. Y. 631, 30 N. E. 236.

The doctrine of the Marino case is approved and followed in *Bromberg v. Evans Laundry Co.* (1907) 134 Iowa, 38, 111 N. W. 417; *Sterling v. Union Carbide Co.* (1905) 142 Mich. 284, 105 N. W. 755.

The jury are the only judges as to the capacity of a boy under fourteen, employed in violation of a statute, and whether he was guilty of such contributory negligence as would defeat his action. *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863.

A middle course was taken in *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857, the court holding that contributory negligence on the part of a boy injured in the unlawful employment may avail the employer as a defense, unless it be the same that must reasonably be anticipated as a probable consequence of the nonobservance of the law. There were vigorous dissenting opinions by two of the judges, who asserted the belief that to admit any contributory negligence as a defense would be to defeat the purpose of the statute.

In the following cases it was held that

the ordinary rules of law as to contributory negligence, thus practically nullifying the beneficial purposes of the statute.⁷

Under the employers' liability act (act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1909, p. 1172; see chapter LXXVI., *post*), the defense of contributory negligence "is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury."⁸

the contributory negligence of the minor was for the jury, but whether the court intended to hold that it is always a question of fact does not clearly appear: *Wool v. Nauman Co.* (1905) 128 Iowa, 261, 103 N. W. 785; *Smith v. National Coal & I. Co.* (1909) 135 Ky. 671, 117 S. W. 280; *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912 B, 797; *Nairn v. National Biscuit Co.* (1906) 120 Mo. App. 144, 96 S. W. 679; *Peters v. Gille* (1908) 133 Mo. App. 412, 113 S. W. 706; *Rolin v. R. J. Reynolds Tobacco Co.* (1906) 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 Ann. Cas. 638; *Leathers v. Blackwell Durham Tobacco Co.* (1907) 144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11; *Queen v. Dayton Coal & I. Co.* (1895) 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460 (employment of boy under twelve in a coal mine).

In *Perry v. Tozer* (1903) 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, it was held that the evidence showed that the plaintiff had exercised due care, thus entitling him to recover under instructions that the *prima facie* case made out by showing the illegal employment might be rebutted by other evidence that the plaintiff contributed to the injury by his own negligence. Whether such instructions were correct is not determined.

⁷ Whilst the violation by the master of the provisions of a statute regulating the employment of his servant is negligence *per se*, and actionable, if injuries are sustained by the servants in consequence thereof, such provisions are not to be so construed as to abrogate the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless the latter is so worded as to leave no doubt that such defense is to be excluded. *Darsam v. Kohlmann* (1909) 123 La. 164, 20 L.R.A.(N.S.) 881, 48 So. 781 (minor disobeyed instructions).

In *Borck v. Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254, it was held that the failure of an employer to secure the written consent of the parents of a minor twelve years of age before employing him, as required by statute, was not the proximate cause of injuries received by him by coming in contact with unguarded machinery while scuffling with another boy. Under the broader view taken by other cases noted above, this form of accident was one that might have been anticipated when a boy twelve years of age was employed near dangerous machinery; it certainly was one of the evils aimed at by the legislation in question.

In *Beghold v. Auto Body Co.* (1907) 149 Mich. 14, 14 L.R.A.(N.S.) 609, 112 N. W. 691, it was held that the master is not liable for injuries to a minor servant who, understanding the consequences, puts his hand in the way of revolving knives, supposing they have stopped, when he knows that it is hard to determine by looking at them whether they are in motion, and that he can tell absolutely by a glance at the belt, although the employment is in violation of a statute forbidding the employment of minors in dangerous business.

In *Monzi v. Friedline* (1898) 33 App. Div. 217, 53 N. Y. Supp. 482, it was held that a minor, by attempting to do the prohibited act, waived the protection of the statute, and the complaint was dismissed. This decision is in effect overruled by the *Marino Case*, *supra*.

And see *Belles v. Jackson* (1892) 4 Pa. Dist. R. 194; *Evans v. American Iron & Tube Co.* (1890) 42 Fed. 519 (charge to jury).

⁸ The general effect of this act was discussed in *Mondou v. New York, N. H. & H. R. Co.* (1912) 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, which reversed a decision of the Connecticut supreme court (82 Conn. 373, 73 Atl. 762). This decision also in effect reversed *Hoxie v. New York, N. H. & H.*

The statutes of Georgia and Texas are modeled after the Federal act. See chapter LXXVI, *post*.

Under the Kansas factory act (chap. 356, Laws of 1903, Gen. Stat. 1909, § 4680) providing that "if any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages," it has been held that contributory negligence is not a defense to an action founded on the statute.⁹

Miss. Code 1906, § 4046, provides that mere contributory negligence which does not amount to a reckless, deliberate, and voluntary exposure to danger, is not a defense, where the action is based upon a violation of a statute.¹⁰

Under Mo. Rev. Stat. 1909, § 3164, it is provided that proof of contributory negligence or carelessness on the part of any employee or other person who is injured, maimed, or killed by reason of the failure of a railroad company to use and maintain the best known appliances or inventions to fill or block all switches, frogs, and guard rails on their roads, as required by § 3163, shall not relieve such railroad company from liability.

The provision in Missouri Rev. Stat. 1899, § 1125 (blocking of switches), which declared contributory negligence not to be a defense to an action for injuries caused by a violation of the law, was originally embodied in a statute which was pronounced invalid on the ground that the act was passed at a special session, and that this subject was not specially designated in the proclamation of the gov-

R. Co (1909) 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

See also *Johnson v. Great Northern R. Co.* (1910) 102 C. C. A. 89, 178 Fed. 643.

⁹ *Caspar v. Lewin* (1910) 82 Kan. 604, 109 Pac. 657; *Bailey v. Prime Western Spelter Co.* (1910) 83 Kan. 230, 109 Pac. 791. In the former of these decisions the court expressly overruled *Madison v. Clippinger* (1906) 74 Kan. 700, 88 Pac. 260, and *Henschell v. Union P. R. Co.* (1908) 78 Kan. 411, 96 Pac. 857, which took a contrary view of the statute; and *Lewis v. Barton Salt Co.* (1910) 82 Kan. 163, 107 Pac. 783, must also be considered as over-

ruled by implication, since it was decided upon the authority of *Madison v. Clippinger*.

In *Caspar v. Lewin*, *supra*, the court says: "No exception to liability is made when the workman's negligence contributes to the injury. The legislature having chosen not to impose such a condition upon recovery, the judiciary is powerless to do so."

It should be noted that an appeal from *Caspar v. Lewin* to the United States Supreme Court was dismissed on the stipulation of counsel.

¹⁰ *Driver v. Southern R. Co.* (1908) 93 Miss. 190, 46 So. 824.

error calling the session.¹¹ Being afterwards introduced into the Revised Statutes without re-enactment, the supreme court held that it was void, as there was no authority for incorporating it in the Revised Statutes.¹²

Under 98 Ohio Laws, p. 75, the defense of contributory negligence is not available if the defendant railroad has violated any provision of the act.¹³

In Tennessee it has been held that a statute requiring railroad companies to have some person keeping a lookout continually on locomotives, and providing that a company which fails to have this precaution observed "shall be responsible for all damages to persons or property, occasioned by, or resulting from, any accident or collision that may occur," precludes a company from pleading contributory negligence, though it may be considered in mitigation of damages.¹⁴

The employers' liability acts of New York and New Jersey (see chapter LXXIV., *post*) provide that the question of the employee's contributory negligence shall be, in all cases, a question for the jury.

In the statutes of North Dakota, South Dakota, and Wisconsin, which are set out in chapter LXXVI., *post*, there are clauses providing that the question of negligence and contributory negligence shall be for the jury.

In an action by a government inspector for a breach of the English factory act, which provides that the whole or any part of the fine inflicted may be applied for the benefit of the injured person, it was held that the fact of the injury's having been occasioned by the act

¹¹ *Wells v. Missouri P. R. Co.* (1892) 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530.

¹² *Brannock v. St. Louis, M. & S. E. R. Co.* (1906) 200 Mo. 561, 118 Am. St. Rep. 695, 98 S. W. 604.

¹³ Where an employee of a railway company, whose duty is to cause cars in use by said company in moving state traffic to be coupled, and which cars are not equipped with couplers coupling automatically by impact, as required by said § 2, is killed or injured in attempting to cause said cars to be coupled, the railroad company is liable in damages for a violation of said section, and, according to § 7 of said act, the employee

is not deemed to have assumed the risk occasioned by the neglect of the company, nor shall he be held to have contributed to his death or injury where the company has violated the provisions of said § 2, which violation contributed to the death or injury of such employee. *McGarvey v. Detroit, T. & I. R. Co.* (1911) 83 Ohio St. 273, 94 N. E. 424.

¹⁴ *Nashville & C. R. Co. v. Smith* (1871) 6 Heisk. 174; *Chattanooga R. Co. v. Walker* (1872) 11 Heisk. 383; *Nashville & C. R. Co. v. Nowlin* (1878) 1 Lea, 523; *Illinois C. R. Co. v. Jordan* (1904) 117 Ky. 512, 78 S. W. 426 (construing Tennessee statute).

of the plaintiff in taking up a forbidden position would not prevent recovery.¹⁵

In a number of jurisdictions statutes have been enacted which re-establish the doctrine of comparative negligence:

United States.—See § 1766, *post*.

Georgia.—See § 1774, *post*.

Nebraska.—See § 1786, *post*.

North Dakota.—See § 1790, *post*.

Ohio.—See § 1791, *post*.

Oregon.—See § 1759, *post*.

South Dakota.—See § 1793, *post*.

Texas.—See § 1796, *post*.

Wisconsin.—See § 1801, *post*.

1650. [652a] *Volenti non fit injuria*.—In §§ 1293, 1294, *ante*, it has been shown that, in all the decisions, it is assumed that, where a servant is suing under the English employers' liability act of 1880, or any of the statutes modeled thereon, the maxim is available as a defense, and that the only essential point upon which a conflict of opinion exists is the extent of the power of a court to declare the servant to have been *volens* in regard to the risk in question.

As regards the operation of the maxim in cases where the master has violated a statute which prescribes certain specific precautions and safeguards in the construction, arrangement, or use of particular instrumentalities, the authorities, as they stand, exhibit a somewhat curious conflict of opinion. In one English case it was held that the servant was not necessarily debarred from recovering by the fact that he knew of the danger created by the breach of a legislative obligation of this description.¹ By none of the judges who took part

¹⁵ *Blenkinsop v. Ogden* [1898] 1 Q. B. 783, 67 L. J. Q. B. N. S. 537, 78 L. T. N. S. 554, 46 Week. Rep. 542. Assuming that the conduct of the servant here adverted to was culpable, this decision creates a somewhat curious situation, since it seems to enable a servant, by the indirect means of a governmental prosecution, to obtain compensation under circumstances which would preclude recovery if he were to seek indemnity in a civil action. See cases cited in § 1648, note 3, subd. (c), *ante*.

¹ *Britton v. Great Western Cotton Co.* (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525. (See § 1294, *ante*.)

See also *Scott v. Brookfield Linen M. & S. Vol. V.*—319.

Co. [1909] 2 I. R. 509, where it was held that the defense, *Volenti non fit injuria*, does not apply to a cause of action dependent on statutory liability.

The maxim, *Volenti non fit injuria*, does not apply where the injury is caused by the breach of the master's statutory duty. *McClement v. Kilgour Mfg. Co.* (1911) 3 Ont. Week. News 446, 20 Ont. Week. Rep. 770 (unguarded set screw).

In *Davis v. Langdon* (1911) 11 New South Wales St. Rep. 149, it was apparently taken for granted that the maxim is available, but, under the facts, it was held that the servant did not fully appreciate the danger.

in that decision was it intimated that the master was altogether precluded from relying upon the maxim. In fact it is clear that they fully recognized his right to avail himself of this defense, provided the evidence was adequate to establish voluntary action on the servant's part. But a subsequent statement of two members of the court of appeal,² to the effect that, where a person has a statutory right to protection, the defendant does not discharge his legal obligations by merely affecting the plaintiff with knowledge of a danger, which, but for the former's breach of duty, would not have existed, was soon afterwards construed by two judges in the Queen's Bench Division as being an affirmation of the doctrine that the maxim does not apply at all, if the injury resulted from the breach of a specific statutory obligation. By one of those judges this doctrine was considered to be sustainable upon grounds of public policy, which is concerned in the discouragement of agreements between two persons, the effect of which is that one of them shall be at liberty to break a law enacted for the protection of the other.³ This exclusion of the maxim as an element in such cases is certainly not justified either by the statement relied upon, or by the decision with reference to which that statement was made.⁴ The suggested construction of the expressions used by the court of appeal is singularly forced, and is, moreover, quite inconsistent with the general tenor of the opinions delivered. The consequence of adopting that con-

² *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516 (Bowen and Fry, LL. J.)

³ In *Baddeley v. Granville* (1887) L. R. 19 Q. B. Div. 423, Wills, J., said: "If the supposed agreement between the deceased [servant] and the defendant [his master], in consequence of which the principle of *Volenti non fit injuria* is sought to be applied, comes to this—that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself,—such an agreement would be in violation of public policy and ought not to be listened to."

⁴ The case cited by the court of appeal as an illustration of this theory was *Clarke v. Holmes* (1862) 7 Hurlst.

& N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, which, according to Bowen, L. J., had been so explained in subsequent decisions. These are not cited by name; but one of those referred to is apparently *Indermaur v. Dames* (1866) L. R. 1 C. P. 274, 287, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586. 1 Harr. & R. 243. It seems to be fairly open to question, however, whether the actual rationale of the ruling in *Clarke v. Holmes* is not simply that the promise of the master to remedy the defective conditions prevented the inference that would otherwise have been drawn from the servant's continuance of work. See chapter LV., *ante*. And in any event it was certainly not intended to propound the doctrine that the servant's knowledge of the master's breach of duty, and the risks to which that breach exposes him, cannot, under any circumstances, operate as a bar to his claim.

struction is that the court must be assumed to have taken the position that, while the master is entitled to avail himself of the maxim as a defense if the suit is brought under a general employers' liability act, he is, so far as the effect of the maxim is concerned, absolutely liable, if the servant is claiming damages under an act imposing some specific duty. Such a distinction would be purely arbitrary, so far as can be seen, and cannot reasonably be deduced from the language used by the lords justices.

In view of the fact that the American courts have not preserved the distinction between the defense embodied in the maxim and the defense based on an implied contract, but in many cases apparently use the terms interchangeably, the cases involving the defenses have been discussed together in § 1647a, *ante*.

That the maxim, considered as an embodiment of the principle that a plaintiff is debarred from recovery if his own negligence contributed to his injury (see § 1288, *ante*), constitutes a valid defense, even where the duty violated is statutory, has for a long time been an established doctrine in England.⁵

⁵ *Caswell v. Worth* (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116 (person lawfully on the premises of another, who wrongfully set ma-

chinery in motion, was held unable to take advantage of a statute requiring such machinery to be fenced).

Note.—(See pages 5064 and 5069). After section 1647a was written and the treatise had gone to press, the writer's attention was called to several New York decisions handed down after the date on which the gathering of material for the treatise had stopped, which seem to adopt the view that the servant does not assume the risk of the master's breach of a statutory duty. In *Fitzwater v. Warren* (October 22, 1912) 206 N. Y. 355, 42 L.R.A. (N.S.) 1229, 99 N. E. 1042, the language of Cullen, Ch. J., speaking for the majority of the court, appears to admit of no other conclusion. The *Narrumore Case* (see § 1647a, notes 2, 5) is approved, while the *Knisley Case* (see § 1647a, note 5) is said to have been largely qualified, if not overruled, by subsequent decisions of the court. No reference is made to the decision in *Gombert v. McKay* (see § 1647a, note 8), which was decided in the preceding year, and which expressly takes the other view. It is, however, impossible to determine the exact value of the *Fitzwater Case*, since the court gave as an additional reason for reversing a nonsuit the fact that the court could not say, as a matter of law, that the servant's appreciation of the danger had been established. However, in *Wynkoop v. Ludlow Valve Mfg. Co.* (1912) 153 App. Div. 507, 138 N. Y. Supp. 482, the court evidently took the view that the court of appeals had changed its position, and another division of the same court, in *Grady v. National Conduit & Cable Co.* (1912) 153 App. Div. 401, 138 N. Y. Supp. 549, says that if the *Knisley* and *Gombert Cases* on the one hand, and the *Fitzwater Case* on the other, cannot stand together, they feel constrained to follow the later decision of the court.

In view of these recent decisions it would seem entirely safe to say that this has become an open question in this state, and these decisions support the writer's statement on page 5061, that the doctrine that a servant does not assume the risk of the master's breach of a statutory duty appears to be a growing one.

CHAPTER LXXIII.

STATUTES DECLARATORY OF COMMON-LAW DOCTRINES.

A. CONNECTICUT.

1650a. Text of statute.

B. MINNESOTA.

1651. Text of statute.

1652. Effect of this statute.

C. CALIFORNIA AND DAKOTA.

1653. Text of statutes.

1654. Effect of these statutes.

D. GEORGIA.

1654a. Text of statute.

1654b. Effect of this statute.

E. NEW MEXICO.

1654c. Text of statute.

A. CONNECTICUT.

1650a. Text of statute.—Connecticut Gen. Stat. § 4702 (Laws 1901, chap. 155), provides as follows:

It shall be the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers; to exercise reasonable care in the appointment or designation of a vice principal, and to appoint as such vice principal a fit and competent person. The default of a vice principal in the performance of any duty imposed by law on the master shall be the default of the master.

B. MINNESOTA.

1651. [652b] Text of statute.—Gen. Laws 1895, chap. 173, provides as follows:

Sec. 1. Every master or employer in this state shall use reasonable care to provide the person or persons in his employ with reasonably safe, suitable, and

sufficient tools, implements, and instrumentalities with which to do the master's work, and also use reasonable care to provide a reasonably safe and suitable place for his servants to perform the duties assigned to them by the master.

It shall also be the master's duty to use reasonable care to establish safe and suitable rules and regulations or methods for the performance of the work required of his servants, and to direct and supervise the performance of the work in a reasonably safe and prudent manner.

Sec. 2. Whenever a master or employer delegates to anyone the performance of his duties, which he, as master or employer, owes to his servants, or any part or portion of such duties, the person so delegated, while so acting for his master or employer, shall be considered the vice principal and representative of the master.

Sec. 3. This act shall take effect and be in force from and after its passage. Approved April 23, 1895.

1652. [653] Effect of this statute.—This statute is merely declaratory of the common law.¹ In an action under it, just as in an action at common law, the nature of the duties or services an employee performs, and not his rank or his authority over other employees, determines whether he is a vice principal or fellow servant.²

C. CALIFORNIA AND DAKOTA.

1653. [653½] Text of statutes.—By the Civil Codes of California and Dakota it is provided as follows:

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee. Cal. Civil Code, § 1970; Dak. Civil Code, § 1130; S. D. Civil Code, § 4942; N. D. Civil Code, § 4096.

An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care. Cal. Civil Code, § 1971; Dak. Civil Code, § 1131; S. D. Civil Code, § 4943; N. D. Civil Code, § 4097.

The California Code, § 1970, was amended in 1903 by the insertion of the sentence: "Unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee."

1654. [653¾] Effect of these statutes.—In construing these provisions the courts have proceeded upon the theory that it was the intention of the legislatures to frame an enactment which should embody certain common-law principles assumed to have been previously

¹ *Hess v. Adamant Mfg. Co.* (1896) 66 Minn. 79, 68 N. W. 774.

² *Lundberg v. Shevlin-Carpenter Co.* (1897) 68 Minn. 135, 70 N. W. 1078.

adopted.¹ Accordingly, we find decisions illustrating the principle that there can be no recovery where the delinquent and injured servants were engaged in the same kind of work;² that coservice is not necessarily negatived by the fact that the delinquent and the injured servants were engaged in different kinds of work;³ that, if the de-

¹ In California it has been explicitly laid down that the statute has not changed the rule as to common employment which prevailed prior to its enactment. *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175. The case of *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184 (see § 1460, *ante*), was cited by plaintiff's counsel, but was not followed because of the language used in the statute. See also *Rodgers v. Central P. R. Co.* (1885) 67 Cal. 607, 8 Pac. 377; *Thompson v. California Constr. Co.* (1905) 148 Cal. 35, 82 Pac. 367.

The Civil Code of Dakota was declared by the territorial court to have simply enacted into a statute the common-law doctrine. *Elliot v. Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L. R. A. 363, 41 N. W. 758; *Herbert v. Northern P. R. Co.* (1882) 3 Dak. 38, 13 N. W. 349. That this is also the view taken by the Supreme Court of the United States is shown by the following language used in the judgment rendered on the appeal of the latter case: "We do not perceive that the provision of the 6th section of the Civil Code of Dakota, that in the territory 'there is no common law in any case where the law is declared by the Codes,' at all affects the question before us. There cannot be two rules of law on the same subject contradicting each other. Therefore, where the Code declares the law, there can be no occasion to look further; but where the Code is silent, the common law prevails. What constitutes the 'same general business' is not defined by the Code, but may be explained by adjudged cases. The declaration by the Code of a general rule which is conformable to existing law does not prevent the courts from looking to those cases for explanation any more than it prevents them from looking into the dictionary for the meaning of words" *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

The defense of coservice is an affirmative defense, and the burden is on the defendant to establish it. *Bjorman v. Ft. Bragg Redwood Co.* (1894) 104 Cal. 626, 38 Pac. 451 (instruction held erroneous, which told the jury that the burden was on the plaintiff to prove that the injury was caused by the negligence of the defendant, and not by any one else, or by a fellow servant of the plaintiff).

² *Long v. Coronado R. Co.* (1892) 96 Cal. 269, 31 Pac. 170 (conductor injured by negligence of engineer on the same train); *Brown v. Central P. R. Co.* (1887) 72 Cal. 523, 14 Pac. 138 (conductor injured by negligence of brakeman); *Vizelich v. Southern P. R. Co.* (1899) 126 Cal. 587, 59 Pac. 129 (brakeman injured by negligence of another brakeman); *Kevern v. Providence Gold & S. Min. Co.* (1886) 70 Cal. 392, 11 Pac. 740 (minor injured by negligence of a fellow workman); *Gribben v. Yellow Aster Min. & Mill Co.* (1904) 142 Cal. 255, 75 Pac. 839 (miner injured by negligence of other miners); *Schwind v. Floriston Pulp & Paper Co.* (1907) 5 Cal. App. 203, 89 Pac. 1066 (employee in electrical department of factory fellow servant of foreman of railroad yard run in connection therewith); *Weisser v. Southern P. R. Co.* (1906) 148 Cal. 429, 430, 83 Pac. 439, 7 Ann. Cas. 636 ("student brakeman" injured by negligence of other employees on train); *Leishman v. Union Iron Works* (1905) 148 Cal. 274, 3 L.R.A.(N.S.) 500, 113 Am. St. Rep. 243, 83 Pac. 30 (foreman of molding shop and foreman of carpenter shop in foundry fellow servants of molders); *McDonald v. California Timber Co.* (1908) 7 Cal. App. 375, 94 Pac. 376 (blacksmith who makes tools for lumber company fellow servant of engineer of donkey engine).

³ A conductor and track walker are both coservants of a laborer employed to remove snow, etc., from the track. *Fagundes v. Central P. R. Co.* (1889) 79 Cal. 97, 3 L.R.A. 824, 21 Pac. 437

linquent and injured servants were engaged in essentially distinct kinds of work, the case does not fall within the purview of the statute;⁴ that vice principalship is not predicable merely on the ground that the delinquent servant exercised control over the injured one,⁵

(track walker, by interfering with a switch, and conductor, by not being sufficiently on the alert, caused a collision between two trains).

The operator of an elevator is a coservant of a carpenter engaged in repairing the shaft. *Mann v. O'Sullivan* (1899) 126 Cal. 61, 77 Am. St. Rep. 149, 58 Pac. 375 (carpenter injured by the starting of the elevator without warning).

The engineer of a regular train and a road master on a construction train are coservants. *Holland v. Southern P. Co.* (1893) 100 Cal. 240, 34 Pac. 666 (engineer ran train too fast).

An engineer of a mining company's hoisting machinery is a coservant of a miner injured while being hoisted. *Trewatha v. Buchanan Gold Min. & Mill. Co.* (1892) 96 Cal. 494, 28 Pac. 571, 31 Pac. 561.

⁴In *Northern P. R. Co. v. Herbert* (1885) 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590, the court stated its opinion as follows: "We do not consider that the first of these sections changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow servant in the same general business, or identifies the business of providing safe machinery and keeping it in repair with the business of handling and moving it. The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it. They are, as stated in the case decided by the supreme court of Massachusetts, from which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each. The person engaged in the former represents the employer, and in that business is not a fellow servant with one engaged in the latter. The words 'same general business' in the section have reference to the general business of the department of service in which the employee is engaged, and do not embrace business of every kind which may have some relation to the affairs of the em-

ployer, or even be necessary for their successful management. If any other construction were adopted there would, under the section, be no such thing as separate departments of service in the business of railroad companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business."

The decision there was that a brakeman injured by reason of defective, worn-out, and broken brakes, which an employee of the railroad company was charged with the duty of keeping in repair, could maintain an action against the railroad company, without regard to the company's negligence in the selection of the employee charged with the duty of keeping the brakes in repair. (Bradley, Matthews, Gray, and Blatchford, JJ., diss.)

⁵*Brown v. Central P. R. Co.* (1887) 72 Cal. 523, 14 Pac. 138 (conductor); *Daves v. Southern P. Co.* (1893) 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708 (section foreman); *Elliot v. Chicago, M. & St. P. R. Co.* (1889) 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758 (section foreman); *Noyes v. Wood* (1889) 102 Cal. 389, 36 Pac. 766 (foreman of farm); *Donnelly v. San Francisco Bridge Co.* (1897) 117 Cal. 417, 49 Pac. 559 (superintendent of construction of a bridge); *Callan v. Bull* (1896) 113 Cal. 593, 45 Pac. 1017 (foreman of construction); *Stephens v. Doe* (1887) 73 Cal. 26, 14 Pac. 378 (foreman of mine); *Donovan v. Ferris* (1900) 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519 (foreman of work of blasting a tunnel, there being also a general superintendent); *Nixon v. Selby Smelting & Lead Co.* (1894) 102 Cal. 458, 36 Pac. 803 (foreman of silver-room in smelting works); *Fisk v. Central P. R. Co.* (1887) 72 Cal. 38, 1 Am. St. Rep. 22, 13 Pac. 144 (foreman of boiler shop); *Burns v. Sennett* (1893) 99 Cal. 363, 33 Pac. 916 (foreman of gang of stevedores); *McDonald v. Hazeltine* (1878) 53 Cal. 35 (foreman of gang of longshoremen); *Livingston v. Kodiak Packing Co.* (1894) 103 Cal. 258, 37 Pac.

even though the exercise of control may have been accompanied by the power of hiring and discharging.⁶

The supreme court of California seems to have recognized in some cases the doctrine that an employee who exercises a discretionary authority and discharges such functions as are ordinarily intrusted to a manager, as that term is commonly understood, is a vice principal.⁷ That the character of the act which caused the injury is a test of the relation which exists between a delinquent and an injured servant is also recognized in actions under the statute.⁸ But both the doctrine that a general manager is a vice principal and the doctrine that the

149 (mate of vessel); *Vestner v. Northern California Power Co.* (1910) 158 Cal. 284, 110 Pac. 918 (foreman of workman engaged in constructing a power line).

In *Northern P. R. Co. v. Hogan* (1894) 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102 (conductor held not to be a vice principal), the court considered itself bound to reject the doctrine of *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, and defer to the authority of the state court in *Ell v. Northern P. R. Co.* (1891) 1 N. D. 336, 12 L.R.A. 97, 26 Am. St. Rep. 621, 48 N. W. 222.

⁶ *Stevens v. San Francisco & N. P. R. Co.* (1893) 100 Cal. 554, 35 Pac. 165.

⁷ *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255, 10 Mor. Min. Rep. 22 (foreman of the entire work of a mine did not notify a miner that a blast was about to be fired); *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20 (superintendent of mine caused injury to miner by his failure to furnish safe appliances); *Brown v. Sennett* (1885) 68 Cal. 225, 58 Am. Rep. 8, 9 Pac. 74 (stevedore's foreman, to whom was delegated the entire management of the work of unloading a vessel, "with full discretion to control and supervise it," failed to signal for the stoppage of an overloaded bucket which was swinging dangerously, and finally discharged its load on a workman in the hold).

The last-cited case was criticised in *Congrave v. Southern P. R. Co.* (1891) 88 Cal. 360, 26 Pac. 175, as being hard to reconcile with other rulings, particularly with *Collier v. Steinhart* (1875) 51 Cal. 116, 10 Mor. Min. Rep.

1 (see note 9, *infra*). It was also suggested that *Beeson v. Green Mountain Gold Min. Co.* (1880) 57 Cal. 20, went no further than to decide that the duty of providing suitable appliances is non-delegable. The decision thus explained may doubtless stand on this footing, but the report seems to show that it was rather based on the theory that the delinquent represented the master by virtue of his official position, as superintendent. At all events the decision in *McLean v. Blue Point Gravel Min. Co.* (1876) 51 Cal. 255, 10 Mor. Min. Rep. 22, is a clear recognition of the doctrine that a superintendent in full control of an industrial concern is a vice principal as to all matters affecting the safety of his subordinates, whether those matters do or do not involve the discharge of a non-delegable duty. And such is also the effect of *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L.R.A. 524, 44 Pac. 471, where the defendant was held liable for the negligence of the engineer of a refrigerating machine who, while in sole charge while the general manager was absent, allowed inexperienced men to do work for which they were unfitted.

⁸ A carpenter employed to construct a scaffold for the bricklayers engaged on a building in course of construction was held to be a vice principal, "even though his work promoted the erection of the building." *McNamara v. McDonough* (1894) 102 Cal. 575, 36 Pac. 941.

A nonsuit is erroneous where the evidence tends to show that the injury was due to the giving way of loose planks on which a servant had to stand while he was working near a revolving

selection of fit servants is a non-delegable duty seem to be rejected in one decision.⁹

[On the other hand, the selection of competent fellow servants has been expressly held to be a non-delegable duty.¹⁰]

D. GEORGIA.

See chapter LXXVI., *post*.

1654a. Text of statute.—By the Civil Code of Georgia it is provided as follows:

The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency; he must use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto. Ga. Civ. Code, § 2611.

A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with the duties imposed by the preceding section, it must appear that the master knew or ought to have known of the incompetency of the other servant, or of the defects or danger in the machinery supplied, and it must also appear that the servant injured did not know and had not equal means of knowing such fact, and that, in the exercise of ordinary care, could not have known thereof. Ga. Civ. Code, 2612.

shaft. *Mullin v. California Horseshoe Co.* (1894) 105 Cal. 77, 38 Pac. 535.

As against positive allegations that the acts and omissions complained of were by the defendant it cannot be presumed, for the purposes of a demurrer, that they were those of a fellow servant of the injured person. *Brown v. Central P. R. Co.* (1885) 68 Cal. 171, 8 Pac. 828 (held to be error to sustain demurrer to a complaint alleging a breach of duty on the defendant's part to show a right signal for the guidance of the plaintiff, an engineer; two judges dissented).

A materialman and train despatcher who employs and discharges the men and directs the movements of the trains on a line under construction is a vice principal. *McKune v. California Southern R. Co.* (1885) 66 Cal. 302, 5 Pac. 482.

On the other hand, the temporary adjustment of the several parts of a

hoisting apparatus used in unloading a ship is not a personal duty of the master. *Burns v. Sennett* (1893) 99 Cal. 363, 33 Pac. 916. Nor is the detail of giving a laborer in a quarry warning that a blast is about to be fired. *Donovan v. Ferris* (1900) 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519.

⁹ *Collier v. Steinhart* (1875) 51 Cal. 116, 10 Mor. Min. Rep. 1, where a complaint was held demurrable, which alleged that the defendant did not use ordinary skill in selecting the negligent servant, but which also recited facts showing that such servant was employed by the defendant's superintendent, and contained no averment that such superintendent had been negligently selected. This ruling seems inconsistent with the others, cited above, in which the master was held liable.

¹⁰ *Cragg v. Los Angeles Trust Co.* (1908) 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061.

1654b. Effect of this statute.—These provisions are merely a codification of rulings of the court, made prior to the adoption of the code.¹

Under the Georgia statute (Civil Code, §§ 2611, 2612), although the master has failed to furnish safe machinery, yet a servant cannot recovery if he knew or had equal means of knowing such fact.²

E. NEW MEXICO.

1654c. Text of statute.—N. M. Laws 1893, chap. 28, § 1 (Comp. Laws 1897, § 3217), provides as follows:

§ 3217. It shall be unlawful for any such [railroad] corporation knowingly and wilfully to use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective, or shops or machinery and attachments thereof which are in any manner defective, which defects might have been previously ascertained by ordinary care and diligence by said corporation.

If the employee of any such corporation shall receive any injury by reason of such defect in any car or locomotive or machinery or attachments thereto belonging, or shops or machinery and attachments thereof, owned and operated, or being run and operated, by such corporation, through no fault of his own, such corporation shall be liable for such injury, and upon proof of the same in an action brought by such employee or his legal representatives, in any court of proper jurisdiction, against such railroad corporation for damages on account of such injury so received, shall be entitled to recover against such corporation any sum commensurate with the injuries sustained: Provided, That it shall be the duty of all the employees of railroad corporations to promptly report all defects coming to their knowledge in any such car or locomotive or shops or machinery and attachments thereof to the proper officer or agent of such corporation, and after such report the doctrine of contributory negligence shall not apply to such employee.

Territorial act of March 11, 1903, applies generally to all negligence actions, and the provisions thereof refer to matters of practice rather than to matters of substantive law. One provision requiring an affidavit as to the cause, nature, etc., of the injury, to be served within ninety days after such injuries were received, has been held to be a condition precedent to the bringing of an action in another

¹ *Baxley v. Satilla Mfg. Co.* (1902) 114 Ga. 720, 40 S. E. 730.

² *Western & A. R. Co. v. Moran* (1902) 116 Ga. 441, 42 S. E. 737; could not have known of the defect by *Whitfield v. Louisville & N. R. Co.* the exercise of ordinary care. *Wysong* (1910) 7 Ga. App. 268, 66 S. E. 973; *v. Seaboard Air Line R. Co.* (1906) *Short v. Cherokee Mfg. Co.* (1908) 3 74 S. C. 1, 54 S. E. 214. Ga. App. 377, 59 S. E. 1115.

The Georgia statute requires that it should affirmatively appear as a condition of recovery that the servant

state for injuries occurring in New Mexico.¹ So far as railroads are concerned, this statute was superseded by the Federal employers' liability act of 1906.² See chapter LXXVI., *post*.

¹ *Swisher v. Atchison, T. & S. F. R. McGinnis* (1909) 98 C. C. A. 403, 174 Co. (1901) 76 Kan. 97, 90 Pac. 812. Fed. 649; *Atchison, T. & S. F. R. Co.*

² *El Paso & N. E. R. Co. v. Gutierrez v. Mills* (1909) 53 Tex. Civ. App. 359, (1909) 215 U. S. 87, 54 L. ed. 106, 30 116 S. W. 852.
Sup. Ct. Rep. 21; *Southern P. Co. v.*

CHAPTER LXXIV.

ENGLISH EMPLOYERS' LIABILITY ACT OF 1880 AND THE AMERICAN CANADIAN, AND AUSTRALIAN STATUTES MODELED THEREON.

1655. Introductory.

A. TEXT OF THE STATUTES.

- 1656. England.
- 1657. Alabama.
- 1658. Massachusetts.
- 1659. Colorado.
- 1660. Indiana.
- 1661. New York.
- 1661a. Ohio.
- 1661b. Pennsylvania.
- 1661c. New Jersey.
- 1661d. Maine.
- 1661e. Oklahoma.
- 1661f. Vermont.
- 1662. Canadian provinces.
- 1663. Australian statutes.

B. EFFECT OF THE STATUTES AS A WHOLE.

- 1664. Generally.
- 1665. Modified operation of these acts in the case of servants of municipal corporations.
- 1666. Employers' liability acts; whether strictly or liberally construed.
- 1667. Concurrent rights of action under the statutes and at common law.
- 1668. Liability of infants under the statutes.

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1655. [653a] Introductory.—In this chapter it is proposed to review the decisions construing the English Employers' liability act of 1880, and the American, Canadian, and Australian statutes modeled thereafter. As to the constitutionality of the American statutes discussed in this chapter, see the concluding chapter of this treatise. The English act is set out in the next section, and the text of the various statutes in which the language of this act has been more or less closely copied is set out in the following sections.

A. TEXT OF THE STATUTES.

1656. [654] England.—The dissatisfaction which the doctrine of common employment, as applied in the earlier English decisions, has naturally provoked among those classes of the community who suffered most severely from its operation, was at last brought to a head by the famous case of *Wilson v. Merry*.¹ After several years of vigorous agitation, both in and out of Parliament, a select committee of the House of Commons, which made a careful investigation of the subject, declared in favor of a modification of the law. One of the recommendations was embodied in the following passage of the report, submitted in 1877: "Your committee are of opinion that in cases such as these,—that is, where the actual employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents,—the acts or defaults of the agents who thus discharge the duties and fulfil the functions of masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of the business, notwithstanding that such agents are technically in the employment of the principals." It was also suggested that the doctrine of common employment should be narrowed so as to be applicable only to those cases where each servant "is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require."² Proposals of a much more radical nature were put forward in the draft report submitted by Mr. Lowe.³

¹ (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, 19 Eng. Rul. Cas. 132. courts which have adopted this principle independently of statutes, see §§ 1425 *et seq.*, *ante*.

² For the decisions of the American

³ A good deal of useful information

A bill framed on the lines thus suggested was introduced into Parliament in 1879, but withdrawn at the close of the session. It was reintroduced in 1880, and after a reference to a select committee, and a good deal of discussion, which bore fruit in various amendments, was finally passed. The text of the act, which came into operation on January 1, 1881, is as follows:

Sec. 1. Where, after the commencement of this act, personal injury is caused to a workman:

Subs. 1. By reason of any defect in the condition of ways, works, machinery, or plant, connected with or used in the business of the employer; or

Subs. 2. By reason of the negligence of any person in the service of the employer, who has any superintendence intrusted to him whilst in the exercise of such superintendence; or

Subs. 3. By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed; or

Subs. 4. By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

Subs. 5. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railway,—the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Sec. 2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

Subs. 1. Under subsec. 1 of § 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;

Subs. 2. Under subsec. 4 of § 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's principal secretaries of state, or by the board of trade, or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed, for the purposes of this act, to be an improper or defective rule or by-law;

Subs. 3. In any case where the workman knew of the defect or negligence which

on this and other matters connected final form will be found in Mr. Fall's with the history of the events which Pamphlet on Employers' Liability. preceded the passage of the act in its

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caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Sec. 3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Sec. 4. An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided, always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.⁴

Sec. 5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under or through a workman in respect of any cause of action arising under this act, any penalty or part of a penalty which may have been paid in pursuance of any other act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or part of a penalty under any other act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other act of Parliament, in respect of the same cause of action.

Sec. 6, subs. 1. Every action for recovery of compensation under this act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed;

Subs. 2. Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation;

Subs. 3. For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time, in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "sheriff's court," and shall, with respect to Ireland, mean the "civil bill court."

In Scotland any action under this act may be removed to the court of sessions

⁴ Under the interpretation act (52 & 53 Vict.) chap. 63, § 3, a "month" means a calendar month.

at the instance of either party, in the manner provided by and subject to the conditions prescribed by § 9 of the sheriff courts (Scotland) act 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Sec. 7. Notice in respect of any injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices, of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Sec. 8. for the purposes of this act, unless the context otherwise requires,—

The expression "person who has superintendence intrusted to him" means a person whose sole or principal duty is that of superintence, and who is not ordinarily engaged in manual labor;

The expression "employer" includes a body of persons corporate or unincorporate;

The expression "workman" means a railway servant, and any person to whom the employers and workman act of 1875 applies.

Sec. 9. This act shall not come into operation until the 1st day of January, 1881, which date is in this act referred to as the commencement of this act.

Sec. 10. This act may be cited as the employers' liability act 1880, and shall continue in force till the 31st day of December, 1887, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine; and all actions commenced under this act before that period shall be continued as if the said act had not expired.

By successive renewals, this act has been kept in force up to the present time; but since 1897 it has subsisted side by side with the more drastic workmen's compensation act, and its amendments of 1900 and 1906. See chapter LXXVII., *post*. Its inadequacy as a piece of remedial legislation, designed mainly for the redress of the grievances of the poorest and most illiterate members of the community, has

long been notorious.⁵ But it has certainly mitigated some of the harshest and most objectionable features of the common law. That its repeal will not be long postponed may be reasonably conjectured from the tendencies of social and economic development in England at the present conjecture. Its abrogations, however, will not destroy the practical interest which it possesses for the lawyers of the American states which legislated on the same lines; for under a familiar principle of statutory construction, the decisions of the English judges with regard to its provisions are, in those states, of something more than a merely persuasive authority.⁶

1657. [655] Alabama.—Laws 1884–1885, p. 115, Civil Code 1886, § 2950 (Civil Code 1896, chap. 3, § 1749; Civil Code 1907, chap. 80, § 3910; the text as given is that of the original law, with material added by the Code of 1907 in brackets):

Liability of Master or Employer to Servant or Employee for Injuries.—When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee as if he were a stranger, and not engaged in such service or employment, in the cases following:

(1) When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the master or employer;

(2) When the injury is caused by reason of the negligence of any person in

⁵ See Pollock, Torts, pp. *90, 91, and the same author's Essays in Jurisprudence (1882) chap. 5. The Report of a Select Committee of the House of Commons on Amending Bills 1886 (192), may also be consulted.

The preface to Mr. Beven's work on Employers' Liability, 2d ed., contains some suggestive remarks on the over-refinement in which some judges have been too apt to indulge in construing the act.

⁶ In *Ryalls v. Mechanics' Mills* (1889) 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, it was remarked that, as the Massachusetts statute was a close copy of that of England, the court could not deal with it quite on the same footing as if the legislature had framed it in their own language, used for the first time, but "must assume that they were content with the expounded meaning of the words which they adopted."

In *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146, the court said: "Our statute, as far as it goes, is a substantial copy of the English act entitled the 'employers' liability act,'

some of the provisions of which had previously received a judicial construction. Its enactment by the legislature, in substantially the same language, is persuasive of a legislative adoption of that construction."

In another case the same court, speaking of the construction placed upon the English statute by English judges, said: "In view of the source whence our statute came, this judicial construction is, of course, entitled to very great weight and influence with this court—an influence even beyond that which in ordinary cases the ability and learning of those courts command." *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88.

That the Colorado act was "presumably adopted with the construction given to it by the courts of Massachusetts," see *Colorado Mill & Elevator Co. v. Mitchell* (1899) 26 Colo. 284, 58 Pac. 28. This is, of course, equivalent, for practical purposes, to acknowledging the authority of the English decisions to which the courts of Massachusetts defer.

the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence;

(3) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed;

(4) When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf;

(5) When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal [,] points, locomotive [,] engine, [electric motor,] switch, car, or train upon a railway, or of any part of the track of a railway.

The master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that [the last four words are omitted in the Code of 1907] the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition; [provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect, or who committed the negligent act causing the injury complained of.]

Sec. 2591 (1751, 3912). *Personal Representatives may Sue if Injury Results in Death.*—If such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distribution.

Sec. 2592 (1750, 3911). *Damages Exempt.*—Damages recovered by the servant or employee, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

Sec. 2593. *Liability of Personal Representative and Sureties.*—The personal representative and the sureties on his bond are liable to the parties in interest for the due and legal distribution of all damages recovered by such representative under § 2588, or § 2589, or § 2591, and are subject to all remedies which may be pursued against such representative and sureties for the due administration of personal assets. [This section is omitted in the Code of 1907.]

[3913. No contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for

personal injuries to or death of such employee; but upon the trial of such action against any employer, the defendant may set off therein any sum he (or it) has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of death, to his personal representative.]

1658. [656] Massachusetts.—Laws 1887, chap. 270, § 1.—Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:

Subs. 1. By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

Subs. 2. By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence; [or, in the absence of such superintendent, of any person acting as superintendent with the authority and consent of such employer]. The bracketed words were inserted by Mass. Stat. 1894, chap. 499, § 1.

Subs. 3. By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad, the employee or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work.

The following provision was added to this section by Mass. Stat. 1892, chap. 260: And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed \$5,000, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the persons for whose negligence he is made liable.

Another addition to this section was made by the Laws of 1893, chap. 259, to this effect: A car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person.

Sec. 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or, in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent,

as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Sec. 3. The amount of compensation receivable under this act in cases of personal injury shall not exceed the sum of \$4,000. In case of death, compensation in lieu thereof may be recovered in not less than \$500 and not more than \$5,000, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death.

In 1888 the following words were inserted here: The notice required by this section shall be in writing, signed by the person injured or by someone in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed; and in case of his death without having given the notice, and without having been, for ten days, at any time after his injury, of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment. Mass. Pub. Stat. chap. 155, § 1, March 22, 1888.

But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury; provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

By Mass. Stat. 1892, chap. 260, § 2, it was enacted that the following words should precede the first sentence of the above section: "Except in actions brought by personal representatives under § 1 of this act, to recover damages for both the injury and death of an employee;" and that, after the word "death" in the third line, there should be inserted the words: "which follows instantaneously, or without conscious suffering."

Sec. 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 5. An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case, where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

Sec. 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purposes of indemnifying an employee for personal injuries for which compensation may be recovered under this act, or to any relief

society formed under chapter 244 of the acts of the year 1882, as authorized by chapter 125 of the acts of the year 1886, may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employee to such fund or society bears to the whole contribution thereto.

The various amendments and additions which, as above indicated, had been from time to time inserted in this act, were incorporated in the consolidated statute cited as Rev. Laws 1902, chap. 106; and as the text of some of the sections not affected by these alterations was also modified to some extent by the same statute, it has been deemed advisable to set it out in full, and some slight amendments which have been added from time to time have been inserted in brackets, with the date of the amendment at the end of the paragraph.

Rev. Laws 1902, chap. 106.—Sec. 71. If personal injury is caused to an employee who, at the time of the injury, is in the exercise of due care, by reason of:

First. A defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

Second. The negligence of a person in the service of the employer who was intrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or,

Third. The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, [elevated train,] or train upon a railroad [or elevated railway]; the employee, or his legal representative, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation, [or an elevated car which is in use by or which is in possession of an elevated railway corporation,] shall be considered as a part of the ways, works, or machinery of the corporation which uses or has it in possession, within the meaning of clause 1 of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause 3 of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, [elevated train] or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, [elevated train] or train within the meaning of said clause. [As amended by 1908, 420.]

Sec. 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous, or is preceded by conscious

suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death, in addition to those for the injury; [and in the same action, under a separate count at common law, may recover damages for conscious suffering from the same injury. (As amended by 1906, 370.)]

Sec 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of § 71, an employee is instantly killed, or dies without conscious suffering, his widow, or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer. [If an action is brought under the provisions of this section by the widow of the employee, or by the next of kin, who may have such right of action, or if the action is brought under the provisions of § 71 by the legal representatives, such action shall not fail by reason of the fact that it should have been brought under the other section, but may be amended so as to provide against such failure at any time prior to final judgment.] (As amended by 1908, 451.)

Sec. 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of § 71 for a personal injury to an employee, in which no damages for his death are awarded under the provisions of § 72, shall not exceed \$4,000.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of § 72, shall not exceed \$5,000 for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of § 73, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of § 73 shall not be less than \$500 nor more than \$5,000.

Sec. 75. No action for the recovery of damages for injury or death under the provisions of §§ 71 to 74, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but, if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed; and if he dies without having given the notice and without having been, for ten days, at any time after his injury, of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of § 22 of chapter 51 shall apply to notices under the provisions of this section.

Sec. 76. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 77. An employee or his legal representatives shall not be entitled under the provisions of §§ 71 to 74, inclusive, to any right of action for damages against his employer, if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who was intrusted with general superintendence.

Sec. 78. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under the provisions of §§ 71 to 74, inclusive, or to any relief society formed under the provisions of §§ 17, 18, and 19 of chapter 125, may prove, in mitigation of the damages recoverable by an employee under the provisions of said sections such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 79. The provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm labors by fellow employees.

Laws 1909, chap. 514, § 143. An employee of a railroad corporation who is injured by any locomotive, car or train which is used contrary to the provisions of §§ 159, 161, 162, and 163, of Part II. of chapter 463 of the acts of the year 1906, shall not be deemed to have assumed the risk of such injury, although he continues in the employment of such corporation after the unlawful use of such locomotive, car, or train has been brought to his knowledge. An employee of a railroad corporation who is injured by any locomotive, car, or train by reason of the negligence of any other employee of the corporation shall not be deemed to have assumed the risk of such injury.

Laws 1909, chap. 363, § 1. If a defect in the ways, works, or machinery of a person, partnership, or corporation has been reported to the person whose duty it is to remedy said defect, or cause it to be remedied, or to report its existence, and such defect is not remedied within a reasonable time, and by reason of said defect an employee is injured, such employee shall not be held to have assumed the risk of such injury.

1659. [657] Colorado.—Laws 1893, chap. 77 (Mill's Anno. Stat. Supp. 1891–1896, § 1511a).—Sec. 1. Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time:

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had

not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, intrusted with exercising superintendence, whose sole or principal duty is that of superintendence.

(3) By reason of the negligence of any person in the service of the employer, who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad, the employee, or in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if the employee had not been an employee of, or in the service of, the employer or engaged in his or its works.

Sec. 2 (1511b). The amount of compensation recoverable under this act, in case of a personal injury resulting solely from the negligence of a coemployee, shall not exceed the sum of \$5,000. No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years, from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury: Provided, It is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Sec. 3 (1511c). Whenever an employer enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 4 (1511d). An employee, or those entitled by law to sue and recover under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer, who had intrusted to him some general superintendence.

Sec. 5 (1511e). If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a coemployee, the coemployee shall be equally liable under the provisions of this act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action the court may submit to and require the jury to find a special verdict upon the question as to whether the employer or his vice principal was or was not guilty of negligence proximately causing the injury complained of; or whether such injury resulted solely from the negligence of the

coemployee; and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the coemployee, the jury may assess damages both against the employer and the employee.

Approved April 8, 1893.

This act was expressly repealed by the statute set out in chapter LXXVI., *post*.

1660. [658] Indiana.—Acts 1893, chap. 130, p. 294; 3 Rev. Stat. 1894, §§ 7083–7087; Horner's Rev. Stat. 1897, §§ 5206, 5210; Burns's Rev. Stat. 1901, §§ 7083–7087; Rev. Stat. 7083. Liability for Personal Injuries.—1. That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation, who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

Sec. 7084. When Damages not Recoverable.—2. Neither an employee nor his legal representative shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employee to palpable danger; nor where the injury was caused by the incompetency of the coemployee, and such incompetency was known to the employee injured, or such injured employee, in the exercise of reasonable care, might have discovered such incompetency; unless the employee so injured gave or caused to be given information thereof to the

corporation or to some superior intrusted with the general superintendence of such coemployee, and such corporation failed or refused to discharge such incompetent employee within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the coemployee or superior, and discharge him if found incompetent.

Repealed by act 1894, chap. 64.

Sec. 7085. Measure of Damages.—3. The measure of damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: Provided, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

Sec. 7086. Contracts of Release Void.—5. All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation, releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect; nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

In effect March 4, 1893.

[This statute, in so far as it applies to corporations other than railroad corporations, has been pronounced unconstitutional.¹ But, as applied to railroads alone, it has been frequently upheld.² In respect to railroads, however, its application is limited to injuries caused by those risks which are peculiar to the operation of railroads.³ Consequently, under the decisions of the court, the statute is similar in this respect to those reviewed in chapter LXXVI., *post*. But, as the language is patterned closely after that of the English employers' liability act of 1880 (except as to the employers to whom it is applicable), and as there is quite a body of decisions rendered under the act before its application was limited in the manner noted above, it is deemed advisable to retain it in the present location.

¹ *Bedford Quarries Co. v. Bough* (1907) 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529, where it was held that the imposing upon private corporations of a liability for injuries to employees which will not exist in case of individuals or partnerships for injuries arising from the same cause and under the same condition violates the constitutional provision guaranteeing equal protection of the laws.

² A freight brakeman injured by the

negligence of the engineer while both are acting in the line of duty as employees of a corporation has a right of action against the company, under the Indiana employers' liability act of 1893. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1905) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582.

³ See *Richey v. Cleveland, C. C. & St. L. R. Co.* (1911) — Ind. —, — L.R.A. (N.S.) —, 96 N. E. 694.

For a discussion as to the constitutionality of this statute, see the concluding chapter of this treatise.

In the note below will be found a number of cases construing the statute in its limited application.⁴ For other cases involving the same question arising under other statutes receiving the same construction, see §§ 1778, 1780, 1782, 1784, *b*, 1790, 1795, *a*, 1801*a*, *post*.]

1661. [659] New York.—Laws 1902, chap. 600 (Consol. Laws 1909, labor law, art. 14):—Sec. 1 (§ 200). Where, after this act takes effect, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied, owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition;

2. By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer,—the employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife, or next of kin, shall have the same right of compensation and remedies against the employer as

⁴ A member of a repair and construction gang on a street railway is not, while engaged in unloading rails from a standing car, exposed to any of the peculiar hazards of using and operating a railroad, so as to come within the protection of the statute. *Indianapolis Traction & Terminal Co. v. Kinney* (1908) 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954.

A member of a bridge gang injured by the falling of piles is not within the protection of the statute. *Cleveland, C. C. & St. L. R. Co. v. Foland* (1910) 174 Ind. 411, 91 N. E. 594, rehearing denied (1910) 174 Ind. 417, 92 N. E. 165.

An injury received by a fall from a hand car is not within a statute making employers liable for injuries received by employees in the operation of a railroad, since the hazard is not so peculiar as to come within a proper classification of perils for which railroads may be rendered liable. *Richey v. Cleveland, C. C. & St. L. R. Co.* (1911) — Ind. —, — L.R.A.(N.S.) —, 96 N. E. 694.

A railroad section hand thrown from a hand car by the application of the brakes by the brakeman without warning, on the signal of the foreman, can-

not hold the railroad company liable for the resulting injuries. *Thacker v. Chicago, I. & L. R. Co.* (1902) 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605. The basis of this decision was that the brakeman was a mere fellow servant of the section hand, and although the act of applying the brakes was done in accordance with a signal received from a vice principal, nevertheless, the signal did not require the brakeman to imperil the safety of the other men on the car by applying the brakes without giving them any warning.

But a more liberal construction of the statute has been given by other courts. Thus, in *Louisville & N. R. Co. v. Melton* (1907) 127 Ky. 276, 105 S. W. 366, rehearing denied in (1908) 127 Ky. 291, 110 S. W. 233, recovery was allowed for injuries to a carpenter engaged in building a coal chute, by reason of the breaking of a chain used to lift the beams. This decision was sustained by the United States Supreme Court (1910) 218 U. S. 36, 54 L. ed. 921, — L.R.A.(N.S.) —, 30 Sup. Ct. Rep. 676, over the contention that the act as thus applied was unconstitutional.

if the employee had not been an employee of, nor in the service of, the employer, nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act.

Sec. 2. (§ 200). No action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by someone in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment; but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury, if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The notice required by this section shall be served on the employer, or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post, by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post, addressed to the office or principal place of business of such corporation.

Sec. 3 (§ 202). An employee, by entering upon or continuing in the service of the employer, shall be presumed to have assented to the necessary risks of the occupation or employment, and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, inherent in the nature of the business, which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action maintained for the recovery of damages for personal injuries to an employee received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of, the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a

verdict rendered contrary to the evidence. An employee, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person prior to such injuries to the employee.

Sec. 4. (§ 203). An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries, for which compensation may be recovered under this act, or to any relief society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employee under this act such proportion of the pecuniary benefit which has been received by such employee from such fund or society on account of such contribution of employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Sec. 5. (§ 204). Every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this act contained shall be construed as limiting any such right of action; nor shall the failure to give the notice provided for in § 2 of this act be a bar to the maintenance of a suit upon any such existing right of action.

Sec. 6. This act shall take effect July 1, 1902.

Laws of 1910, chap. 352, amended §§ 200, 201, 202, and added § 202a, as follows:

Sec. 200. Employer's Liability for Injuries.—When personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;

2. By reason of the negligence of any person in the service of the employer, intrusted with any superintendence, or by reason of the negligence of any person intrusted with authority to direct, control, or command any employee in the performance of the duty of such employee. The employee, or, in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife, or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee, suing under the provisions of this article. If an employer enters into a contract, written or

verbal, with an independent contractor, to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for the injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 201. Notice to be Served.—No action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within one hundred and twenty days, and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, and signed by the person injured, or by someone in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give notice within the time provided in this section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment; but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury, if it be shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby. If such notice does not apprise the employer of the time, place, or cause of injury, he may, within eight days after service thereof, serve upon the sender a written demand for a further notice, which demand must specify the particular in which the first notice is claimed to be defective, and a failure by the employer to make such demand as herein provided shall be a waiver of all defects that the notice may contain. After service of such demand, as herein provided, the sender of such notice may at any time within eight days thereafter serve an amended notice which shall supersede such first notice, and have the same effect as an original notice hereunder. The notice required by this section shall be served on the employer, or, if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice or demand may be served by post, by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same, or by sending it by post, addressed to the office or principal place of business of such corporation.

Sec. 202. Assumption of Risk; Contributory Negligence, When a Question of Fact.—An employee, by entering upon or continuing in the service of the employer, shall be presumed to have assented to the necessary risks of the occupation or employment, and no others. The necessary risks of the occupation or employment shall, in all cases arising after this article takes effect, be considered as including those risks, and those only, inherent in the nature of the

business, which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action brought to recover damages for personal injury or for death resulting therefrom, received after this act takes effect, owing to any cause, including open and visible defects, for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed, of the danger of personal injury therefrom, shall not be, as matter of fact or as matter of law, an assumption of the risk of injury therefrom, but an employee, or his legal representative, shall not be entitled under this article to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, or who had intrusted to him some superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer or superior person prior to such injuries to the employee; or unless such defect could have been discovered by such employer by reasonable and proper care, tests, or inspection.

202a. Trial; Burden of Proof.—On the trial of any action brought by any employee or his personal representative to recover damages for negligence arising out of and in the course of such employment, contributory negligence of the injured employee shall be a defense, to be so pleaded and proved by the defendant.

By Laws of 1906, chap. 657, the following section was added to the railroad law, and forms § 42a of the railroad law as embraced in the Consolidated Laws of 1910:

§ 42a. Liability to Employees.—In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of, any person, while in the employment of such corporation or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death suffered by him, from the act of omission or such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are intrusted by such corporation or receiver with the authority of superintendence, control, or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car train, or telegraph office, are vice principals of such corporation or receiver, and are not fellow servants of

such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools, or implements, or of any car, train, locomotive, or attachment thereto belonging, owned, or operated, or being run and operated, by such corporation or receiver, when such defect could have been discovered by such corporation or receiver by reasonable and proper care, tests, or inspection, such corporation or receiver shall be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action now existing; and no contract, receipt, rule, or regulation, between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

[It will be seen from the language of this section that its effect is but little more than to extend the application of the employers' liability act to certain designated railroad employees, and to make the statute in this respect conform to the English act and others modeled closely thereafter. It is to be noted, however, that there is no provision in this act for a notice of injury to be given to the employer, consequently the giving of such notice is not a condition precedent to a recovery in an action brought under this section, as it is under the employers' liability act. See § 1711, *post*.

This act has been pronounced constitutional.¹]

1661a. Ohio.—Act of April 2, 1890. Sec. 2. It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employee of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated, or being run and operated, by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained; and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representatives, against any railroad corporation for damages on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation.¹ Ohio General Code, 1910, §§ 6242,

¹ *Vroom v. New York C. & H. R. R. Co.* (1909) 129 App. Div. 858, 115 N. Y. Supp. 1063, affirmed in (1910) 197 N. Y. 588, 91 N. E. 1121.

¹ The operation of a flat car having no side or end boards or standard to

prevent heavy stones which are loaded on it from falling off is not within the prohibition of this section. *Toledo & O. C. R. Co. v. Beard* (1898) 20 Ohio C. C. 681, 11 Ohio C. D. 406.

6243.— Sec. 6242. An employer shall be responsible in damages for a personal injury to an employee who, at the time he was injured, was exercising due care and diligence, if such injury resulted from a defect in the condition of the machinery or appliances connected with or used in the business of the employer, which arose from or had not been discovered or remedied, owing to the negligence of the employer or any person in his service intrusted with the duty of inspecting or repairing such machinery or appliances, or of seeing that such machinery and appliances were in proper condition. (95 v. 114, § 1.)

Sec. 6243. In an action by an employee or his legal representative against his employer to recover damages for personal injury, if it appears that such injury was caused, in whole or in part, by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where such employee was employed, as required by any statute of this state or of the United States, the fact that such employee continued in his employment with knowledge of such omission shall not constitute a defense in such action. (97 v. 547, § 1.)

1661b. Pennsylvania.—Act June 10, 1907 (Public Laws, 523). Sec. 1. Liability of Employer. Negligence of Fellow Servant.—In all actions brought to recover from an employer for injury suffered by his employee, the negligence of a fellow servant of the employee shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely,—

Sec. 2. Declaring What Shall Not Be a Defense.—Any defect in the works, plant, or machinery of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as a superintendent, manager, foreman, or any other person in charge or control of the works, plant, or machinery; the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the negligence of any person to whose orders the employee was bound to conform and did conform, and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer or any other person who has authority to direct the doing of said act.

Sec. 3. Agent.—The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer in all suits for damages for death or injury suffered by the employees.

1661c. New Jersey.—Laws of 1909, p. 114 (N. J. Comp. Stat. 1910, Labor Law §§ 89–93). 89. Employer's Liability.—Sec. 1. Where, after this act takes effect, personal injury or death results to an employee who is himself in the exercise of reasonable care at the time:

—Defects in place, ways, works, machinery or plant.—1. By reason of any defect in the condition of the place, ways, works, machinery, or plant connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and intrusted by him with the duty of seeing that the place, ways, works, machinery, or plant were in proper condition; or —Negligence of Persons Exercising Superintendence.—2. By reason of negligence of any person in the service of the employer intrusted with and at the time of the injury exercising superintendence, whose sole or principal duty is

that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent, with the authority or consent of such employer; or —Negligence of Fellow Servants; Persons Entitled to Remedy; Laws Applicable. —3. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad; said employee, or, in case the injury results in death, the executor or administrator of such deceased employee, who has left surviving a husband, wife, or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of such deceased employee, suing under the provisions of this act.

90. Notice of Injury; Time for Giving; Form and Contents; Service.—Sec. 2. No action against an employer for recovery of compensation for injury or death of an employee under this act shall be maintained unless notice of the time, place, and cause of injury is given to the employer within one hundred and twenty (120) days, and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured, or by someone in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten (10) days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty (60) days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury, if it be shown that there was no intention to mislead, and that the party entitled to notice was not, in fact, misled thereby. The notice required by this section shall be served on the employer; or, if there is more than one employer, upon one of such employers; and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by registered letter, addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post.

When the employer is a corporation, notice shall be served by delivering the same, or by sending it by post by registered letter, addressed to the office or principal place of business of such occupation.

91. Assumption of Risks of Employment; Question of Fact; Effect of Knowledge by Employee of Defects.—Sec. 3. An employee by entering upon or continuing in the service of an employer shall be presumed to have assumed all risks necessarily incident to his occupation or employment. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, which are inherent in the nature of the business, and which remain after the employer has exercised due care in providing for the safety of his employees, and has com-

plied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action maintained for the recovery of damages for personal injuries to an employee, received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed, of the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employee, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer or superior person, or could have been discovered by reasonable and proper care or inspection by such employer or superior person prior to such injury to the employee.

92. Contributions by Employers to Insurance Fund, etc.—Sec. 4. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries, for which compensation may be recovered under this act, or to any relief society or benefit fund, may prove in mitigation of damages recoverable by an employee under this act such proportion of the pecuniary benefit which has been received by such employee from such fund or society on account of such contribution of employer as the contribution of such employer to such fund or society bears to the whole contribution thereto.

93. Existing Rights Continued.—Sec. 5. Every existing right of action for negligence, or to recover damages for injuries resulting in death, is continued, and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two (2) of this act be a bar to the maintenance of a suit upon any such existing right of action.

1661d. Maine.—Laws of 1909, chap. 258. Sec. 1. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of:

First, a defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his services who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or,—

Second, that the negligence of a person in the service of the employer, who was intrusted with and was exercising superintendence, and whose sole or principal

duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer;—

Third, the negligence of a person in the service of the employer, who was in charge or control of a signal, switch, locomotive engine, or train upon a railroad;—

The employee or his legal representatives shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation, shall be considered as a part of the ways, works, or machinery of the corporation which uses or has it in possession, within the meaning of clause 1 of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause 3 of this section; and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, or train, shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, or train within the meaning of said clause.

Sec. 2. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous, or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

Sec. 3. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of § 1, an employee is instantly killed, or dies without conscious suffering, his widow, or if he leaves no widow, his next of kin who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Sec. 4. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of § 1 for a personal injury to an employee, in which no damages for his death are awarded under the provisions of § 2, shall not exceed \$4,000.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of § 2, shall not exceed \$5,000 for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of § 3, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of § 3, shall not be less than \$500 nor more than \$5,000.

Sec. 5. No action for the recovery of damages for injury or death under the provisions of §§ 1 to 4, inclusive shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within one year after the accident which causes the injury

or death. Such notice shall be in writing, signed by the person injured, or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed; and if he dies without having given the notice, and without having been, for ten days at any time after his injury, of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby.

If a notice given under this section is claimed by the employer to be insufficient for any reason, he shall so notify in writing the person giving it, within ten days, stating the insufficiency claimed to exist; and thereupon the person whose duty is to give the notice may, within thirty days, give a new notice with the same effect as if originally given.

Sec. 6. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 7. An employee or his legal representatives shall not be entitled under the provisions of §§ 1 to 4, inclusive, to any right of action for damages against his employer, if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who was intrusted with general superintendence.

Sec. 8. The provisions of the seven preceding sections shall not apply to the injuries caused to domestic servants or farm laborers by fellow employees, or to those engaged in cutting, hauling, or driving logs.

Sec. 9. Nothing in this act shall be construed to abridge any common-law rights or remedies which the employee may have against his employer, but a judgment recovered under the provisions of this act, or a settlement of any action commenced or claim made for death or injury, under the provisions of this act, shall be a bar to any claim made or action begun to recover for the same injury or the same death, under the provisions of the common law or under the provisions of any other statute.

1661e. Oklahoma.—Laws of 1907-8, p. 520 (Comp. Stat. 1909, § 4051). An employer shall be responsible in damages for personal injury caused to an employee who is himself in the exercise of due care and diligence at the time, by reason of any defect in the condition of the machinery or appliances connected with or used in the business of the employer, which arose or had not been discovered or remedied owing to the negligence of the employer or of any person

intrusted by him with the duty of inspection, repair, or of seeing that the machinery or appliances were in proper condition.

1661f. Vermont.—Laws of 1910, Act No. 97, sec. 1. If personal injury is caused to an employee who, at the time of the injury, is in the exercise of due care, by reason of:

First, a defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or,—

Second, the negligence of a person in the service of the employer who was intrusted with and was exercising any superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent or foreman with the authority, consent, or knowledge of such employer; or,—

Third, the negligence of a person in the service of the employer, who was in charge or control of a signal, switch, locomotive engine, or train upon a railroad:

The employee or his legal representatives, shall, subject to the provisions of the nine following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works, or machinery of the corporation which uses or has it in possession, within the meaning of clause 1 of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause 3 of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, or train, shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, or train within the meaning of said clause.

Sec. 2. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous, or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

Sec. 3. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of § 1, an employee is instantly killed, or dies without conscious suffering, his widow, or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Sec. 4. If an action is brought under the provisions of the preceding section by the widow of the employee, or by the next of kin who may have such right of action, or if the action is brought under the provisions of § 2 by the legal representatives, such actions shall not fail by reason of the fact that it should have been brought under the other section, but may be so amended as to provide against such failure, at any time prior to final judgment.

Sec. 5. If, under the provisions of either § 2 or § 3, damages are awarded for death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of § 1 for a personal injury to an employee, in which no damages for his death are awarded under the provisions of § 2, shall not exceed \$4,000.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of § 2, shall not exceed \$5,000 for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of § 3, to bring an action for his death, if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of § 3 shall not be less than \$500 nor more than \$5,000.

Sec. 6. No action for the recovery of damages for injury or death under the provisions of §§ 1 to 5, inclusive, shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured, or by a person in his behalf; but if, from physical or mental incapacity, it is impossible for the person injured to give the notice within the time provided in this section, he may give it within thirty days after such incapacity has been removed, and, if he dies without having given the notice and without having been for thirty days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, or cause of the injury, if it be shown that there was no intention to mislead, and that the employer was not in fact misled thereby.

If a notice given under this section is claimed by the employer to be insufficient for any reason, he shall so notify in writing the person giving it within thirty days, stating the insufficiency claimed to exist, and thereupon the person whose duty is to give the notice may, within thirty days, give a new notice with the same effect as if originally given.

Sec. 7. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or, if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

Sec. 9. An employee or his legal representatives shall not be entitled under the provisions of §§ 1 to 5, inclusive, to any right of action for damages against his employer, if such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who was intrusted with any superintendence.

Sec. 9. Nothing in this act shall be construed to abridge any common-law rights or remedies which the employee may have against his employer, but a judgment recovered under the provisions of this act, or a settlement of any action commenced or claim made for death or injury under the provisions of this act, shall be a bar to any claim made or action begun to recover for the same injury or the same death, under the provisions of the common law or under the provisions of any other statute.

Sec. 10. Any superior judge may, upon petition setting forth in ordinary language that the servant or employee of a certain firm, person, corporation, or association has been injured in the course of his employment, through some defect in the ways, works, or machinery owned or used by the employer, and that it is necessary, in order to protect the interests of the injured person, that an examination should be made of the ways, works, or machinery through a defect in which the injury occurred, and after such notice to the employer as any such judge may direct or approve, and a hearing, grant or order directing the employer or person in control of such ways, works, or machinery to permit the person named in said order to make such examination under such conditions as shall be set forth in the order.

Sec. 11. The provisions of this act shall not apply to injuries caused to domestic servants or farm laborers by fellow employees, or to those engaged in cutting, hauling, or driving logs.

Sec. 1. This act shall take effect from its passage.

Approved January 28, 1911.

1662. [660] Canadian provinces.—The English act has naturally been followed very closely in all the colonies which have adopted a similar statute.

In Newfoundland the original act is followed word for word.

In Ontario the legislatures, while preserving the provisions of that act in the essential features, have made some important additions. As the statutes of these colonies are virtually identical, it will be sufficient to give the text of that of Ontario, so far as it is of general interest.

The statute at present in force is 55 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160). In this is incorporated, with some unimportant verbal variations, the provisions of the earlier act, 49 Vict. chap. 28 (Ont. Rev. Stat. 1887, chap. 141). Several new sections are also added.

Any of the alterations which it seems advisable to note are mentioned.

Sec. 1. This act may be known and cited as "the workingmen's compensation for injuries act." 55 Vict. chap. 30, § 1.

Sec. 2. Where the following words occur in this act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

Subs. 1. "Superintendence" shall be construed as meaning such general super-

intendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labor.

Subs. 2. "Employer" shall include a body of persons corporate or unincorporate, and also the legal personal representatives of a deceased employer, and the person liable to pay compensation under § 4 of this act. 55 Vict. chap. 30, § 2, subs. 1, 2.

[Subsecs. 1 and 2 are altered from the earlier act, but not so as to affect the extent of the master's liability.]

Subs. 3. "Workman" does not include a domestic or menial servant, or servant in husbandry, gardening, or fruit growing, where the personal injury caused to any such servant has been occasioned by or has arisen from or in the usual course of his work or employment as a domestic or menial servant, or as a servant in husbandry, gardening, or fruit growing; but, save as aforesaid, means any railway servant and any person who, being a laborer, servant, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract is made before or after the passing of this act, is expressed or implied, oral or in writing, and is a contract of service or a contract personally to execute any work or labor. 56 Vict. chap. 26, § 1.

Subs. 4. "Packing" shall mean a packing of wood or metal, or some other equally substantial and solid material, of not less than 2 inches in thickness, and which, where filled in, shall extend within $1\frac{1}{2}$ inches of the crown of the rails in use on any railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

Subs. 5. "Railway servant" shall mean and include a railway servant, tramway servant, and street railway servant. 55 Vict. chap. 30, § 2, subs. 4, 5.

Sec. 3. Where personal injury is caused to a workman:

Subs. 1. By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in, the business of the employer; or

Subs. 2. By reason of the negligence of any person in the service of the employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence; or

[See § 2, subs. 1.]

Subs. 3. By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

Subs. 4. By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer or by any person delegated with the authority of the employer in that behalf; or

Subs. 5. By reason of the negligence of any person in the service of the employer, who has the charge or control of any points, signal, locomotive engine,

machine, or train upon a railway, tramway, or street railway,—the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. 55 Vict. chap. 30, § 3.

Sec. 4, subs. 1. Where the execution of any work is being carried into effect under any contract, and

(a) The person for whom the work, or any part thereof, is done, owns or supplies any ways, works, machinery, plant, buildings or premises used for the purpose of executing the work; and

[This provision is not inserted in the Manitoba act.]

(b) By reason of any defect in the condition or arrangement of such ways, works, machinery, plant, buildings, or premises, personal injury is caused to any workman employed by the contractor or by any subcontractor; and

(c) The defect or the failure to discover or remedy the defect arose from the negligence of the person for whom the work or any part thereof is done, or of some person being in his service and intrusted by him with the duty of seeing that such condition or arrangement is proper,—the person for whom the work, or that part of the work, is done, shall be liable to pay compensation for the injury as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this act: Provided, always, That any such contractor or subcontractor shall be liable to pay compensation for the injury as if this section had not been enacted, so, however, that double compensation shall not be recoverable for the same injury.

[Nothing corresponding to this provision is found in the English act. It should be compared with § 4 of the Massachusetts act.]

Subs. 2. Nothing in this section contained shall affect any rights or liabilities of the person for whom the work is done and the contractor and subcontractor (if any), as between themselves. 55 Vict. chap. 30, § 4.

Sec. 5. Where, within this province, personal injury is caused to a workman employed on or about any railway:

Subs. 1. By reason of the lower beams or members of the superstructure of any highway or other overhead bridge, or any other erection or structure over said railway, not being of a sufficient height from the surface of the rails to admit of an open and clear headway of at least 7 feet between the top of the highest freight cars, then running on such railway, and the bottom of such lower beams or members; or,

Subs. 2. By reason of the space between the rails in any railway frog, extending from the point of such frog backward to where the heads of such rails are not less than 5 inches apart, not being filled in with packing; or,

Subs. 3. By reason of the space between any wing rail and any railway frog, and between any guard rail and any other rail fixed and used alongside thereof as aforesaid, and between all wing rails where no other rail intervenes (save only where the space between the heads of any such wing rail and railway frog as aforesaid, or between the heads of any such guard rail and any other rail fixed and used alongside thereof as aforesaid, or between the heads of any such wing rails where no other rail intervenes as aforesaid, is either less than $1\frac{1}{4}$ of an inch or more than 5 inches in width) not being at all times during every

month of April, May, June, July, August, September, October, and November, filled in with packing,—such injury shall be deemed and taken to have been caused by reason of a defect within the meaning of clause numbered 1 of § 3 of this act; but nothing in this section contained shall be taken or construed, as in any respect, or for any purpose, restricting the meaning of the said clause. 55 Vict. chap. 30, § 5; 60 Vict. chap. 15, Schedule A (57).

[The above provisions are not found in Rev. Stat. 1887, and are peculiar to this Canadian statute, and the two others which are copied from it.]

Sec. 6. A workman, or his legal representatives, or any person entitled in case of his death, shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases; that is to say:

Subs. 1. Under clause 1 of § 3, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person intrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, building, or premises are proper;

Subs. 2. Under clause 4 of § 3, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned: Provided, That where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, either by the lieutenant governor in council, or under and pursuant to any provision in that behalf of any act of the legislature of Ontario, or of the Parliament of Canada, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law;

Subs. 3. In any case where the workman knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give, or cause to be given within a reasonable time, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence: Provided, however, That such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury. 55 Vict. chap. 30, § 6; 60 Vict. chap. 14, § 85.

Sec. 7. The amount of compensation recoverable under this act shall not exceed either such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment within this province, or the sum of \$1,500, whichever is larger; and such compensation shall not be subject to any deduction or abatement, by reason or on account or in respect of any matter or thing whatsoever, save such as is specially provided for in § 12 of this act. 55 Vict. chap. 30, § 7.

Sec. 8. When in any action under this act compensation is awarded in the case of the death of a workman, for an injury sustained by him in the course of his employment, the amount recovered, after deducting the costs not recovered from the defendant, may, if the court or judge before whom the action is tried so directs, be divided between the wife or husband, parent and child of the deceased in such shares as the court or judge, with or without assessors, as the case may be, or, if the action is tried by a jury, as the jury may determine. 55 Vict. chap. 30, § 8.

Sec. 9. Subject to the provisions of sections 13 and 14, an action for the recov-

ery, under this act, of compensation for an injury, shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death: Provided, always, That in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice. 55 Vict. chap. 30, § 9.¹

Sec. 10. No contract or agreement made or entered into by a workman shall be a bar or constitute any defense to an action for the recovery under this act of compensation for any injury.

Subs. 1. Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor

Subs. 2. Unless such other consideration was, in the opinion of the court or judge before whom such action is tried, ample and adequate; nor

Subs. 3. Unless, in the opinion of the court or judge, such contract or agreement, in view of such other consideration, was not, on the part of the workman, improvident, but was just and reasonable; and the burden of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that the contract was just and reasonable and was not improvident, as aforesaid, shall, in all cases, rest upon the defendant: Provided, always, That, notwithstanding anything in this section contained, no contract or agreement whatsoever, made or entered into by a workman, shall be a bar or constitute any defense to an action for the recovery under this act of compensation for any injury happening or caused by reason of any of the matters mentioned in § 5 of this act. 55 Vict. chap. 30, § 10.

Sec. 11. Notwithstanding anything contained in this act, an action under §§ 3, 4, or 5 shall lie against the legal personal representatives of a deceased employer. 55 Vict. chap. 30, § 11.

Sec. 12. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this act, any penalty or damages, or part of a penalty or damages, which may, in pursuance of any other act, either of the Parliament of Canada or of the legislature of Ontario, have been paid to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or damages, or part of a penalty or damages under any such act, either of the said Parliament or of the said legislature, in respect of the same cause of action, such workman, representatives, or persons shall not, so far as the said legislature has power so to enact, be entitled thereafter to receive in respect of the same cause of action, any such penalty or damages, or part of a penalty or damages, under any such last mentioned act. 55 Vict. chap. 30, § 12.

¹ Under the interpretation act (Ont. subs. 15, a "month" means a calendar Rev. Stat. 1887 and 1897) chap. 1, § 8, month.

Sec. 13, subs. 1. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers;

Subs. 2. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served;

Subs. 3. The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered;

Subs. 4. Where the employer is a body of persons corporate or unincorporate the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to, the office, or, if there be more than one office, any one of the offices of such body;

Subs. 5. The want or insufficiency of the notice required by this section, or by § 9 of this act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury, if the court or judge before whom such action is tried, or, in case of appeal, if the court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defense.

Subs. 6. A notice under this section shall be deemed sufficient if in the form or to the effect following:—

To A. B., of (*here insert employer's address*) or To the _____ Company
(*or as the case may be*).

Take notice, that on the _____ day of _____, C. D., of (*insert address of injured person*) a workman in your employment, sustained personal injury (*add, of which he died, if such be the case*), and that such injury was caused by (*state shortly the cause of injury, e. g., the fall of a beam*).

(Date.)

Yours, etc.,
X. Y.

55 Vict. chap. 30, § 13.

Sec. 14. If the defendant in any action against an employer for compensation for an injury sustained by a workman in the course of his employment intends to rely for a defense on the want of notice or the insufficiency of notice, or on the ground that he was not the employer of the workman injured, he shall, not less than seven days before the hearing of the action, or such other time as may be fixed by the rules regulating the practice of the court in which the action is brought, give notice to the plaintiff of his intention to rely on that defense; and the court may, in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an adjournment of the case for the purpose of enabling such notice to be given; and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with §§ 9 and 13 of this act. 55 Vict. chap. 30, § 14.

Sec. 15. In an action brought under this act, the particulars of demand or

statement of claim shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed; and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff and where the injury of which the plaintiff complains shall have arisen by reason of the negligence, act, or omission of any person in the service of the defendant, the particulars shall give the name and description of such person. 55 Vict. chap. 30, § 15.

Sec. 16. (End of act deals merely with the appointment of assessors to ascertain the proper amount of compensation, and with other details of local practice.)

The following statutes are framed on the same lines as the Ontario act:

British Columbia: Employers' liability act; Rev. Stat. 1897, chap. 69.

Manitoba: Workmen's compensation act; Rev. Stat. 1902, chap. 178.

New Brunswick: Consol. Stat. 1903, chap. 146 (Laws 1903, chap. 11).

1663. [660a] Australian statutes.—The Australian statutes are those specified in the subjoined list. They are not copied verbatim from the original English act, but the changes are of much less importance than those made by the legislature of Ontario, and it will be unnecessary to reproduce any of them in this volume.

New South Wales: Employers' liability act 1886 (50 Vict. No. 8). This, with its amendment as enacted in 1893 (56 Vict. No. 6), was superseded by the present act of 1897 (61 Vict. No. 28).

Victoria: Employers' and employees' act 1890, No. 1087, pt. III. [amended in 1891, No. 1219].

Queensland: Employers' liability act 1886.

South Australia: Employers' liability act 1884, No. 325.

New Zealand: 46 Vict. No. 20.

B. EFFECT OF THE STATUTES AS A WHOLE.

1664. [661] Generally.—Speaking of the English act, Lord Justice Fry remarked: "The statute is one which has created considerable difficulty in many cases, and I must observe that it appears to me to be a piece of legislation which does not carry into effect any one simple idea, but is, on the contrary, a compromise, so to speak, between two contending schemes of legislation or lines of thought on the subject of the liability of a master to an employee. Every word of it represents the result of a conflict or struggle of thought, and

therefore the statute must be considered with great care, having reference to the particular words used in each portion of it.”¹

According to Lord Watson, “the main, although not the sole, object of the act of 1880 was to place masters who do not, upon the same footing of responsibility with those who do, personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence, as if it were their own. In effecting that object the Legislature has found it expedient in many instances to enact what were acknowledged principles of the common law.”²

The effect of the provision that the injured “employee shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in its work,” is simply that, in the cases specified, the defense of common employment with the person through whose negligence the injury was caused is taken away.³

[The view generally taken is that the statute gives the servant a new cause of action and increases accordingly the lia-

¹ *Whatley v. Holloway* (1890) 62 L. T. N. S. 639, 54 J. P. 645.

² *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. See also, to same effect, the extract from the opinion of Field, J., in *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 4 J. P. 711, 47 L. T. N. S. 10, 30 Week. Rep. 797, note 3, *infra*.

³ *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

“The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a coemployee of the same or superior grade, in the enumerated classes of cases.” *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145.

“The only effect of the statute is to take away a plea which might exclude an action based upon the common law, in the event of the wrong complained of having been done by a fellow workman.” *Morrison v. Baird* (1882) 10 Sc. Sess. Cas. 4th series, 271.

“The employers’ liability act,” observed Field, J., “was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control

in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that for the negligence of a fellow workman not coming within any of the classes of persons specified in the act the employer is not liable. But before the passing of the act, *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, 19 Eng. Rul. Cas. 132, had decided that where the injury was caused through the negligence of a superior person in the employment, the workmen could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes.” *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 4 J. P. 711.

Since these acts confer upon a servant the same rights of action as a stranger, wherever the injury was caused by the negligence of any of the employees for whose delinquencies the employer is required to answer, a master is liable for the wanton, wilful, or intentional mis-

bility of the master.^{3a} But the Massachusetts courts apparently take a different view.⁴ Under the statute the servant assumes the ordinary risks of the service,^{4a} and it is necessary that he

conduct of such an employee. *Southern R. Co. v. Moore* (1901) 128 Ala. 434, 29 So. 659; *Louisville & N. R. Co. v. York* (1901) 128 Ala. 305, 30 So. 676.

^{3a} In *Curran v. Manhattan R. Co.* (1907) 118 App. Div. 347, 103 N. Y. Supp. 351, the court said: "The employers' liability act is not an abridgment of the rights of an employee against his employer as they existed at the time of its passage. Such rights as he had at common law still exist, and the act has added other rights of action which he may take advantage of if he conforms to the provisions of the statute."

The statute gives the employee a new cause of action. *Lass v. Volk Housewrecking Co.* (1911) 72 Misc. 62, 129 N. Y. Supp. 150; *Uss v. Crane Co.* (1910) 138 App. Div. 256, 123 N. Y. Supp. 94.

In *Pittsburgh, C. C. & St. L. R. Co. v. Lichteiser* (1906) 168 Ind. 438, 78 N. E. 1033, in speaking of the statute, the court said: "It enlarged the class of vice principals as it had existed before said act took effect, and under the provisions thereof railroad corporations are liable for the negligence of such employees; that is, any person in the service of such company who has charge of any signal, telegraph office, switchyard, round house, locomotive engine, or train upon a railway, the same as for the negligence of vice principals."

The act of April 13th, 1909, changes the common-law rule which relieves the master from responsibility for injuries to a servant caused by the negligence of a fellow servant, and imposes liability upon the master for injuries so occasioned, in the class of cases embraced in the statute. *Quigley v. Lehigh Valley R. Co.* (1911) 80 N. J. L. 486, 79 Atl. 458.

This statute does not take away a right of action existing by virtue of § 18 of the labor law (Laws of 1897, chap. 415) (*Gmaehle v. Rosenberg* (1903) 40 Misc. 267, 81 N. Y. Supp. 930); nor a right existing under the common law (*Rosin v. Ligderwood Mfg. Co.* (1903) 89 App. Div. 245, 86 N. Y. Supp. 49; *Mahoney v. Cayuga Lake*

Cement Co. (1908) 126 App. Div. 164, 110 N. Y. Supp. 549).

⁴ The effect of R. L. C. 106, § 76, is to preserve, and not enlarge, the common-law liability of the defendant. *Sullivan v. New Bedford Gas & Edison Light Co.* (1906) 190 Mass. 288, 76 N. E. 1048.

According to circumstances, the right of an employee to maintain an action under this statute may be greater or may be less than at common law. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

See also the language used in *Ashley v. Hart* (1888) 147 Mass. 573, 1 L.R.A. 355, 18 N. E. 416.

This statute, so far as affecting the liability of the master for his negligence, is the same as at common law. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* (1906) 194 Mass. 412, 120 Am. St. Rep. 562, 80 N. E. 460.

^{4a} *McDonald v. Dillon* (1908) 198 Mass. 398, 84 N. E. 434; *Tanner v. New York, N. H. & H. R. Co.* (1902) 180 Mass. 572, 62 N. E. 993; *Lewis v. Gehlin* (1910) 136 App. Div. 855, 122 N. Y. Supp. 89; *Bellambi Coal Co. v. Murray* (1909) 9 Austr. Comm. L. R. 568, reversing *Murray v. Bellambi Coal Co.* 9 New South Wales St. R. 309 (tackle used in warping vessel around jetty gave way; nothing to indicate that tackle was defective).

An employee cannot recover where he was injured while engaged in repairing the defect. *Walton v. Tennessee Coal, Iron & R. Co.* (1910) 166 Ala. 538, 52 So. 328.

A servant who was intrusted by the defendant with the duty of seeing that a cotton gin was in proper condition cannot recover because of defects therein. *Maddox v. Chilton Warehouse & Mfg. Co.* (1911) 171 Ala. 216, 55 So. 93.

"The duties of the master to his servants who are engaged in preparing or collecting material to construct or repair the ways, works, or machinery of the plant, and putting it in suitable condition for use for the carrying on of the master's business, are not the same as the duties he owes to his servants

show that the master was guilty of negligence under some section of the statute.^{4b}]

Proof that the injury was due to the carelessness of any servant not belonging to the classes specially designated is a bar to the action.⁵ The statute does not render the master liable for the negligence of a mere fellow servant.^{5a} And although the negligent servant may belong to one of those classes, it is clear that, under the general principles of the law of agency, the employer cannot be held respon-

who are using such ways, works, machinery, etc., after the construction or repairs are completed and the business of the master is in operation; and that servants who are engaged in this construction or repair work of the plant of the master assume the risks which are obviously incident to the work of construction or repair." *Tobler v. Pioneer Min. & Mfg. Co.* (1910) 166 Ala. 482, 52 So. 86.

^{4b} *Walton v. Tennessee Coal, Iron & R. Co.* (1910) 166 Ala. 538, 52 So. 328.

⁵ *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169 (brakeman injured by negligence of employees engaged in making up a train, held not entitled to recover).

"The burden of proof in such a case as this is upon the plaintiffs to show that the negligence was that of a fellow workman for whose negligence the employers are made liable by the statute." *Gibbs v. Great Western R. Co.* (1884) L. R. 12 Q. B. Div. (C. A.) 208, 32 Week Rep. 329, per Brett, M. R.

"To entitle plaintiff to recover by virtue of the statute, he must both aver and prove a case coming within one of the enumerated classes of cases." *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145.

There can be no recovery for the negligence of an employee where there is no evidence that superintendence was his sole or principal duty. *Henahan v. Lyons* (1909) 201 Mass. 269, 87 N. E. 602.

^{5a} *Carr v. Shields* (1903) 125 Fed. 827; *Richey v. Cleveland, C. C. & St. L. R. Co.* (1911) — Ind. —, — L.R.A. (N.S.) —, 96 N. E. 694; *Sandusky Portland Cement Co. v. Rice* (1907) — Ind. App. —, 81 N. E. 213; *Hohl v. Hewitt Motor Co.* (1907) 121 App. Div. 866, 106 N. Y. Supp. 881; *Stafford v. Canavan Bros. Co.* (1909) 135 App. Div.

889, 120 N. Y. Supp. 314; *Coleman v. Keenan* (1909) 223 Pa. 29, 72 Atl. 267.

The statute does not make the master liable for the negligence of an employee who is a mere fellow servant, and nothing more, of the injured employee. *Walton v. Tennessee Coal, Iron & R. Co.* (1910) 166 Ala. 538, 52 So. 328; *Boggs v. Alabama Consol. Coal & I. Co.* (1910) 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878.

The master is not liable for the negligence of an employee using a sledge to tamp a cement floor, whereby another employee is injured while holding the block upon which the sledge is used. *Wilkinson Co-op. Glass Co. v. Dickinson* (1905) 35 Ind. App. 230, 73 N. E. 957.

The captain of a tug towing a float is the fellow servant of the captain of the float. *Carlin v. New York, N. H. & H. R. Co.* (1910) 137 App. Div. 71, 122 N. Y. Supp. 57.

The driver of a team, acting under the orders of the owner's superintendent, is a mere fellow servant of a laborer engaged in loading the wagon, although, at the time of the injury, the laborer may have been obeying the directions of the driver in respect to hitching the horses to a wagon. *Anderson v. Smith* (1911) 209 Mass. 52, 95 N. E. 392.

Two third-rail patrolmen working together are fellow servants, under § 42a of the railroad law, although, while one is inspecting the rail, the other watches for approaching trains and gives warning thereof. *Hintze v. New York C. & H. R. Co.* (1910) 140 App. Div. 852, 125 N. Y. Supp. 644.

A trackman cannot recover for the negligence of a brakeman, although he had been left in charge of the cars by the conductor. *Denver & R. G. R. Co. v. Vitello* (1905) 34 Colo. 50, 81 Pac. 766.

sible for his negligence unless the act in question was one which was within the scope of his authority.⁶

[In the note below will be found a number of cases construing certain provisions which are peculiar to the particular statute.^{6a}]

⁶ Injuries to servants resulting from the negligence of fellow servants, not within the line or scope of the employment, or within the provisions of the employers' liability act, do not render the master liable for such act. *Tobler v. Pioneer Min. & Mfg. Co.* (1910) 166 Ala. 482, 52 So. 86.

A railroad company is not liable for injuries to an employee engaged in cleaning an engine of which the engineer is at the time in sole charge, by the blowing out of the packing of a valve, due to the act of a hostler who gets upon the engine and opens the throttle for the purpose of moving it. *Louisville & N. R. Co. v. Richardson* (1893) 100 Ala. 232, 14 So. 208 (deemed to be the act of a mere trespasser).

The foreman of a contractor is acting within the scope of his duties when he orders the workmen to attend some ten minutes before the regular hours of work to clear the ground of certain obstructions, which the employees of the principal employer are in the habit of leaving over night, and are such that the contract work cannot go forward unless they are removed. *Suceney v. McGilvray* (1886) 14 Sc. Sess. Cas. 4th series, 105.

Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation cannot avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment. *Sheffield v. Harris* (1893) 101 Ala. 564, 14 So. 357.

See also § 1677, note 12, *post*, § 1688, note 2, *post*, § 1690, note 1, subd. b, *ad finem*, *post*, § 1694, note 2, *post*.

Compare also § 1466, *ante*, for the rule applied in common-law actions.

^{6a} The employers' liability act (§ 7083, Burns, 1901) imposes no liability unless the offending party is a corporation. *Ft. Wayne Gas Co. v. Nieman* (1904) 33 Ind. App. 178, 71 N. E. 59;

Acme Bedford Stone Co. v. McPhetridge (1905) 35 Ind. App. 79, 73 N. E. 838.

The Pennsylvania act applies to all employers. *Toward v. Meadow Lands Coal Co.* (1911) 229 Pa. 553, 79 Atl. 129 (holding that mine owners are within the act).

But it does not apply to a mine foreman appointed pursuant to statute, since to apply it to such employees would render it unconstitutional. *D'Jorko v. Berwind-White Coal Min. Co.* (1911) 231 Pa. 164, 80 Atl. 77.

The Pennsylvania act is not retro-spective. *McHugh v. Jones & L. Steel Co.* (1908) 219 Pa. 644, 69 Atl. 90.

A foreman on a farm is a "farm laborer," and consequently not within the protection of the statute. *Rowley v. Ellis* (1908) 197 Mass. 391, 83 N. E. 1103.

The Manitoba act does not apply to the Crown. *Ryder v. Rex* (1906) 9 Can. Exch. 330.

Due care, as these words are employed in R. L. chap. 106, § 71 (now Stat. 1909, chap. 514, § 127), means that degree of care which the ordinarily prudent man would use for his own safety in the light of all the circumstances at the time of the act under inquiry. *Curren v. Magee Furnace Co.* (1911) 208 Mass. 229, 94 N. E. 399.

The statute imposes upon the master the duty to maintain the machinery in a safe condition as well as to provide safe machinery in the first instance. *Houston Biscuit Co. v. Dial* (1903) 135 Ala. 168, 33 So. 268.

The provision as to the bringing of the suit within one year is a condition precedent to the right to recover under the statute. *McRae v. New York, N. H. & H. R. Co.* (1908) 199 Mass. 418, 85 N. E. 425, 15 Ann. Cas. 489. In the course of the opinion the court said: "In this part of the statute the legislature seems to be dealing with conditions upon which the right of action given in previous parts of the statute should be availed of. It imposes two conditions: one as to notice and one as to the time in which the action should be brought. The language as

1665. [662] Modified operation of these acts in the case of servants of municipal corporations.—Although the series of acts now under review inure to the benefit of employees of municipal corporations, they do not operate so as to override the familiar principle that “no private action, unless authorized by express statute, can be maintained against a city for a neglect of a public duty imposed on it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.”¹

1666. [663] Employers' liability acts; whether strictly or liberally construed.—(See also § 1641a, *ante*, 1853, *post*.) In one of the earlier cases dealing with the English act of 1880, it was considered by Brett, M. R., that, this statute “having been passed for the benefit of workmen,” it was the duty of the court “not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and, therefore, as largely as reason enables one, to construe it in their favor and for the furtherance of the object of the act.”¹ The same view was ex-

posed to the necessity for the existence of the one is the same as that with reference to the necessity for the existence of the other. One has already been declared to be a condition precedent. The right of action is created by the statute and is maintainable solely by its authority. In view of these considerations, we think that the same rule must be applied to the second condition as to the first, and that this limitation of time must be regarded not merely as a statute of limitation but as one of the conditions of a right of action. It forms one of two conditions, each of which is essential to the right of action. The right must be accepted and pursued under the conditions affixed to it.”

The 58th section of “An Act Concerning Railroads” (Revision of 1903), which requires actions, by an executor or administrator, for injuries causing the death of the testator or intestate, to be commenced and sued within one year next after the death, is not repealed by the amendment of 1907 to “An Act to Provide for the Recovery of Damages in Cases Where the Death of a Person Is Caused by Wrongful Act, Neglect, or Default,” which permits actions arising thereunder to be commenced within twenty-four calendar months after the death of the decedent.

Eldridge v. Philadelphia & R. R. Co. (1911) 80 N. J. L. 478, 79 Atl. 423.

“To hold, in the absence of a special contract on sufficient consideration, that plaintiff's intestate, at the time of entering defendant's service, or by afterwards remaining in that service, assumed the risk of defendant's default in the observance of the statute, or of negligence in superintendence under the employers' liability act, would emasculate those statutes by defeating their clear purpose.” *Pratt Consol. Coal Co. v. Davidson* (1911) 173 Ala. 667, 55 So. 886.

¹*Pettingell v. Chelsea* (1894) 161 Mass. 368, 24 L.R.A. 426, 37 N. E. 380, where the court, on the authority of *Hill v. Boston* (1877) 122 Mass. 344, 23 Am. Rep. 332, held that a city is not liable to a lineman on its fire-signal system, for negligence in respect to the condition of a pole which breaks and injures him.

The statute applies to municipalities when engaged in other than governmental functions. *Josupeet v. Niagara Falls* (1910) 70 Misc. 638, 127 N. Y. Supp. 527, affirmed in (1911) 147 App. Div. 919, 131 N. Y. Supp. 1122.

¹*Gibbs v. Great Western R. Co.* (1884) L. R. 12 Q. B. Div. 208, 32 Week. Rep. 329.

pressed a few years later by the same eminent judge, who had in the meantime become Lord Esher, though there was, as he observes in the following passage, a difference of judicial opinion on the subject.²

In the United States for the most part a theory of construction has been applied which appears to be virtually the same as that which has been adopted by the English judges.³ [But the New York courts

2 "There have always been, I think, two schools of thought in relation to cases of this kind,—that is to say, cases of injury happening to workmen while in the employment of their masters. The view of one school has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be narrowed, and that they should be construed as strictly as possible. The view of the other school is that masters and workmen are not really on an equal footing; that if there is danger in the employment it does not exist with regard to the master, but only in the case of the workman; and the workman is not on an equal footing because he must run the risk or give up his employment. These two schools of thought may easily be traced in the cases on the subject of masters and workmen. When the subject was investigated before a committee of the House of Commons, before the act was passed, conflicting views were presented to the committee, one being that the then existing law of master and servant, with regard to the liabilities of the master, was a just and right law, the other being that the law on the subject had been laid down by the judges on wrong principles and was unfair to the workmen, and that it ought to be altered; and it was upon these conflicting views that this legislation took place. The title of the employers' liability act 1880, itself indicates that it was passed in favor of the workmen. Its object clearly was to alter the law in favor of the workmen and to extend the liabilities of masters. Since the passing of the statute it appears to me that the same conflict of views which existed previously has still been in operation. Some judges have construed the act as narrowly as possible, with a view to preventing what they conceived to be injustice to masters. Other judges have considered that the act, having been passed to extend the liabilities of masters in favor of

workmen, ought to be construed liberally in favor of the workmen. I myself have always belonged to the latter school. I think that those who belonged to the former school have approached the enactment with too much timidity, and on the other hand, have been too bold in interfering with the verdicts of juries. I must say I thought it was well settled by the House of Lords that the verdicts of juries ought not to be interfered with, except upon the strongest grounds." *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371.

See also the language used by Wright, J., in *Brannigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328.

3 Thus, the supreme court of Alabama has declared that, as the statute of that state is in derogation of the common law, the inference is that its terms clearly import the changes intended, and that their operation will not be enlarged by construction further than may be necessary to effectuate the nearest ends. But it goes on to say: "Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions, commensurate with the proposed purposes. The doctrine that prevailed prior to its passage had been carried to an extent which met with disfavor; and the tendency of the legislation has been, in many of the states, to abrogate as to particular corporations, or to modify as to all masters or employers, the rules which had governed their nonliability." *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146.

Similarly, one of the Federal courts of appeals, in discussing the Ohio act of April 2, 1890 (see chapter LXXV., *post*), has remarked that, although it is in derogation of the common law, it is "a remedial statute," and that, as it is of that nature, a servant "is en-

have taken the contrary view of the statute in that state.⁴ On the other hand, the court of appeals has held that § 42a of the railroad act is to be liberally construed.⁵]

1667. [664] Concurrent rights of action under the statutes and at common law.—(Compare § 1664, *ante*.) A servant is not precluded by the provisions of any of these statutes from recovering damages in a common-law action, if the circumstances are such as would have enabled him to maintain an action before it was passed.¹ [And the

titled to invoke a construction that will give effect to the intention of the law-maker." *Hornsby v. Eddy* (1893) 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461.

"It is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires. . . . This court has repeatedly announced the general principle. The statute, however, is remedial, and ought to be construed so as to advance the remedy." *Boggs v. Alabama Consol. Coal & I. Co.* (1910) 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878.

The Indiana employers' liability act is remedial in character and is to be liberally construed. *Cleveland, C. C. & St. L. R. Co. v. Austin* (1906) 127 Ill. App. 281.

In *Reeder v. Lehigh Valley Coal Co.* (1911) 231 Pa. 563, 80 Atl. 1121, it was said that there should be no such thing as a doubtful statutory duty.

⁴"The liability created by the employers' liability act has been held by this court to be in derogation of common law, and the act is subject, therefore, to strict construction." *Williams v. Citizens' S. B. Co.* (1907) 122 App. Div. 188, 106 N. Y. Supp. 975. To the same effect, *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. Supp. 148; *Bovi v. Hess* (1908) 123 App. Div. 389, 107 N. Y. Supp. 1001; *Finnigan v. New York Contracting Co.* (1907) 122 App. Div. 712, 107 N. Y. Supp. 855.

But in *Proctor & G. Co. v. Williams* (1910) 106 C. C. A. 45, 183 Fed. 695, the court said the statute was remedial in character, and it would seem that it ought to be liberally construed so as to secure the benefits intended to the working men.

⁵*Utess v. Erie R. Co.* (1912) 204 N. Y. 324, 97 N. E. 722.

¹In *Ryalls v. Mechanics Mills* (1889)

150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766, Holmes, J., after saying that the court would not undertake to decide, until it was necessary, whether § 1, cl. 1, of the Massachusetts act had not an operation in excluding the defense of implied assumption of risk, when the defect, although manifest, was still properly attributable to the negligence of the master or of a person intrusted by him, nor whether the act would apply to cases in which, under the earlier decisions in that state, negligence in making small repairs, needed from day to day, might still be attributed to a fellow servant, proceeded thus: "If the act does apply to such cases, there is the stronger reason for saying that its only purpose is to extend the common-law liability to the previously excluded cases. And if the object is to make a rule which will reach extremes not touched by the common law, the fact that this is done by a new and broader rule, the terms of which necessarily are wide enough to include the narrower common-law principle, does not show an intention to prejudice rights which the statute was not needed to create. Whether or not an action could be maintained under the statute in a case where there is a common-law remedy, as assumed in a passage which we have quoted concerning the English act, we need not decide. If the facts warrant a recovery at common law, it is not likely that any plaintiff will wish to rely upon the statute, although, when it is uncertain how the facts will turn out, it may be necessary and proper to join a count on the statute with one on the common-law liability."

See also, to the same general effect. *Clark v. Merchants & M. Transp. Co.* (1890) 151 Mass. 352, 24 N. E. 49; *Colorado Mill. & Elevator Co. v. Mitchell* (1899) 26 Colo. 284, 58 Pac. 28.

fact that the plaintiff might have maintained the action at common law does not deprive him of the benefits of the statute.² But if the action is brought for common-law negligence, the plaintiff is not entitled to the benefits of the statute.³

The remedy afforded by the New York employers' liability act (chap. 600, p. 1748, Laws 1902) to an employee injured in the course of his employment is in addition to, and not exclusive of, or in abrogation of, a right of action at common law. *Kleps v. Bristol Mfg. Co.* (1907) 189 N. Y. 516, 12 L.R.A. (N.S.) 1038, 81 N. E. 765.

"It was no part of the purpose of the act to codify the whole law as to the liability of employers, or to destroy any common-law right of servants." *Boggs v. Alabama Consol. Coal & I. Co.* (1910) 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878.

Where a complaint is broad enough to embrace a common-law as well as a statutory liability, the court can regard a notice as surplusage, and submit the case at common law. *O'Neil v. Manufacturers' Automatic Sprinkler Co.* (1911) 143 App. Div. 56, 127 N. Y. Supp. 692.

The employers' liability act, in so far as regards defects in the ways, works, or machinery connected with the employer's business, works no change in the law of the state, and is declaratory of existing common-law principles; so that an action brought under subd. 1, § 1, of the act, could as well be brought under existing provisions of the common law. *Scott v. Nauss Bros. Co.* (1910) 141 App. Div. 255, 126 N. Y. Supp. 17.

A plaintiff who is required to elect between a common-law and a statutory count, and, as a consequence of electing to stand on the latter, is nonsuited, cannot have the nonsuit set aside on the ground that he was prejudiced by being required to make such election, where the evidence shows that in a common-law action the defense of common employment and assumption of risks would both have been open to the master. *May v. Whittier Mach. Co.* (1891) 154 Mass. 29, 27 N. E. 768.

A policy by which an assurance company agrees to indemnify an employer for "all sums which such employer shall become liable for, under or by virtue of the employers' liability act of 1880," does not render it liable for damages

recovered in a common-law action, even though the circumstances were such that the employer might have been held liable under the act also. *Morrison v. Scottish Employers' Co.* (1888) 16 Sc. Sess. Cas. 4th series, 212.

See note to *Kleps v. Bristol Mfg. Co.* 12 L.R.A. (N.S.) 1038.

² *Proctor v. Rockville Centre Mill & Constr. Co.* (1910) 141 App. Div. 900, 126 N. Y. Supp. 743. The court said: "The language of the statute in question covers the cause of action pleaded in this action and proved at the trial. That such a cause of action did exist at common law is not exclusive of plaintiff's right to maintain it under the statute. While the statute in question created liabilities that did not exist at common law, it also, by § 3 (labor law, § 202), gave to a plaintiff who maintained an action under its terms certain advantages or privileges not granted to those who did not avail themselves of its terms. By giving the notice required by § 2 of the act (labor law, § 201), he intended to so inform the defendant that he proposed to avail himself of all the privileges granted by the act. To adopt the construction asserted by the appellant, the language of subd. 1 of § 1 of the statute (labor law, § 200, subd. 1), relating to the negligence of an employer, would have to be eliminated from the statute. I can see no reasonable basis on which such process of elimination could be made to rest."

³ *Welch v. Waterbury* (1910) 136 App. Div. 315, 120 N. Y. Supp. 1059; *Curran v. Manhattan R. Co.* (1907) 118 App. Div. 347, 103 N. Y. Supp. 351.

If the notice states nothing more than a common-law liability, the questions presented must be determined by the common law rules. *Beauregard v. New York Tunnel Co.* (1910) 136 App. Div. 834, 121 N. Y. Supp. 865.

In *Impellizzieri v. Cranford* (1910) 141 App. Div. 755, 126 N. Y. Supp. 644, it was held that where an action has been tried and a verdict rendered for plaintiff upon the theory of a common-law liability only, if the evidence

As the employers' liability act (chap. 600, p. 1748, Laws of 1902) creates no new liability for the failure of an employer to make proper rules and regulations, an action based on such failure must be at common law.^{4]}

This rule of construction is of considerable importance in view of the requirements as to notice, etc., which must be complied with by a servant who wishes to avail himself of the right of action conferred by the statute on which he relies.⁵

1668. [665] Liability of infants under the statutes.—So far as the present writer knows, there is no reported case which bears directly or indirectly upon the important question, whether an infant can be made responsible as an "employer" under these acts. Mr. Ruegg (employers' liability act, p. 118) has expressed the opinion that the new responsibilities imposed by the English statute do not extend to an infant. The reason advanced by this learned author is that a suit to recover damages from him for the negligence of one of the agents specified in the act could not be maintained without recognizing the validity of the contract which defines the relations between him and that agent. His conclusion, therefore, is that the case falls within the scope of the general principle that an infant, although he is liable for his torts, cannot be sued for a wrong, where the cause of action is in substance *ex contractu*, or so directly connected with the contract that the action would be an indirect way of enforcing the contract.¹

There would, however, seem to be good grounds for arguing that an agreement for the hire of another person to assist in carrying on a business belongs to the beneficial class, and is therefore binding upon the infant employer as long as the services continue to be performed.² If this be the correct doctrine he must, it would seem, be responsible for the nonperformance of any of the obligations which are either implied as incidents of the contract, irrespective of statute, or which are imposed by the legislature upon all those who enter into the contract.

does not warrant such a finding, the judgment cannot be sustained under the provisions of the employers' liability act, for the reason that the jury has not passed upon the issues on which such liability may be predicated.

⁴ *Ward v. Manhattan R. Co.* (1904) 95 App. Div. 437, 88 N. Y. Supp. 758; *Davenport v. Oceanic Amusement Co.* (1909) 132 App. Div. 368, 116 N. Y. Supp. 609; *Matrusciello v. Milliken*

Bros. (1910) 141 App. Div. 769, 126 N. Y. Supp. 739.

⁵ "No evidence will be required to support one remedy over the other except the formal proof of the service of the 120-day notice." *Monigan v. Erie R. Co.* (1904) 99 App. Div. 603, 91 N. Y. Supp. 657.

¹ See Pollock, Torts, p. *74.

² See Pollock, Contr. p. *66.

C. LIABILITY FOR DEFECTS IN THE WAYS, ETC.

English act of 1880, § 1, subs. 1, § 2, subs. 1.

Alabama act: Code, § 2590, subs. 1.

Massachusetts act of 1887, § 1, subs. 1.

Colorado act of 1893, § 1, subs. 1.

Indiana act: Rev. Stat. 1894, § 7083, subs. 1.

New York act of 1902, § 1, subs. 1.

New Jersey act of 1909, § 1, subs. 1.

Pennsylvania act of 1907, § 2.

Ohio act: Gen. Code 1910, § 6242.

Ontario act: Rev. Stat. 1897, § 3, subs. 1, § 6, subs. 1.

1669. [666] Effect of the statutory provisions as to defects; generally.—The effect of these provisions, as a whole, is to give, under the circumstances specified, a statutory sanction to a doctrine which, so far as the common law is concerned, has been greatly restricted in England and the English Colonies by the well-known case of *Wilson v. Merry*,¹ but which has been fully developed and is applied in all the American states—the doctrine, namely, that the master is absolutely responsible for the proper discharge of certain duties, whether he undertakes to perform them in person, or employs an agent to perform them in his stead. See chapter LXIV., *ante*. In other words, the injured servant is given a right to recover damages in the cases enumerated, although the abnormal conditions which caused his injury may have been created or suffered to continue through the negligence of a fellow servant.² Hence, in order to establish the allegations of a complaint framed on the theory that the master is liable under this section, it is not necessary to show that he was himself negligent.³

So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the immediate actor, whether he be the master himself or an employee, the evidential prerequisites to establishing a right to indemnity are essentially the same under the statutes as at common law. See §§ 1673–1676, *post*.

¹ (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, 19 Eng. Rul. Cas. 132. As to the precise effect of this decision, see §§ 1457, 1459, 1498, 1499, *ante*.

² See the remarks of the court in *Ashley v. Hart* (1888) 147 Mass. 573, 1 L.R.A. 355, 18 N. E. 416.

³ *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550. There the action was for personal injuries occasioned to the plaintiff by the falling upon him of a bank of earth, which he was engaged in undermining by direction of the defendant's superintendent. Held, that the defendant was not entitled to a ruling

1670. [667] Master not liable unless the defect alleged was the proximate cause of the injury.—Under the general principles of the law of negligence (see § 1571, *ante*), as well as by the express terms of the statutes, the injured servant cannot maintain an action unless he shows that the defect alleged was the proximate cause of his injury.¹ Thus, he cannot recover if his injuries are due to an occurrence which was a mere accident,² nor if the negligence of a fellow servant in the use of the defective appliance was the actual, efficient cause of the injury,³ nor if the defect in question would not have caused any injury, if he had not himself been guilty of negligence in dealing with the defective appliance.⁴

But proof that a defect for the existence of which the master was responsible was the sole proximate cause of the injury is not a condition precedent to recovery. It is only requisite to show that it was one of the efficient causes.⁵

that "the plaintiff cannot recover under the second count of his declaration, as there was no evidence that there was any negligence on the part of the defendant."

¹ *Southern R. Co. v. Guyton* (1898) 122 Ala. 231, 25 So. 34; *McDonald v. Nova Scotia Steel & Coal Co.* (1910) 44 N. S. 173; *Armstrong v. Canada Atlantic R. Co.* (1902) 4 Ont. L. Rep. 560; *Wack v. Tobin* (1907) 122 App. Div. 704, 107 N. Y. Supp. 659.

² *McManus v. Hay* (1882) 9 Sc. Sess. Cas. 4th series, 425.

A freight brakeman cannot recover for personal injuries alleged to have been caused by defects in a brake which he was trying to let loose, causing the brake to stick or be retarded in its revolutions, and throwing him from the top of a box car, in the absence of proof that the brake was defective, or that his falling was not due to his slipping or to some other cause wholly unconnected with any defect of the brake. *Louisville & N. R. Co. v. Binion* (1893) 98 Ala. 570, 14 So. 619.

In *Hamilton v. Groesbeck* (1891) 18 Ont. App. 437, affirming (1889) 19 Ont. Rep. 76, the court of appeal held the action not maintainable for the reason that the proximate cause of the injury was not the unguarded condition of the saw by which the plaintiff was hurt, but the fact that he tripped over a pile of staves.

³ The fact that a defect existed and that the plaintiff had to be assigned to

the work of remedying it is not the proximate cause of an injury received by him in consequence of a fellow servant negligently setting machinery in motion while plaintiff is engaged in the work. *Mackay v. Watson* (1897) 24 Sc. Sess. Cas. 4th series, 383.

⁴ A defect in the machinery is not the cause of an injury received by a workman in consequence of his using it in an unsafe manner, when he knew how to use it with safety to himself. *Martin v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. 216, where the plaintiff knew that a car brake was bent and did not see that it was in its proper position before signaling to the engineer to move the car. See also *Mulligan v. M'Alpine* (1888) 15 Sc. Sess. Cas. 4th series, 789, as stated in § 1676, note 1, *post*.

An employee who goes into a dangerous place at the request of another employee to whose orders he was not bound to conform, and is injured while performing work outside the scope of his employment, cannot recover. *MacPherson v. MacLachlan* (1904) 36 N. S. 435.

⁵ A plaintiff is entitled to retain a verdict in his favor where the jury find that the injury was caused by a defect in the plant, and also by the negligence of a fellow servant. *Bean v. Harper* (1892) 18 Vict. L. Rep. (L.) 388. For common law cases to the same effect, see §§ 1582, 1583, *ante*.

1671. [668] What instrumentalities are covered by the terms "ways," etc.—The words used to designate the instrumentalities for the defects of which the master is made liable are not precisely the same in the statutes now under discussion. In all of them except Ohio the terms "works and machinery" are found, and with the exception of that of Pennsylvania these words are preceded by the word "ways." The expression "plant," which occurs in the English act as well as in those of the various British colonies and of Alabama and Indiana, and which was inserted in the New York act by the amendment of 1910 (see § 1661, *ante*), is omitted in the statutes of Massachusetts and Colorado. In the Ohio statute the words used to designate the instrumentalities are limited to "machinery and appliances." The list of instrumentalities enumerated in the English act is enlarged in the Ontario act by the addition of the words "buildings and premises," and in the Indiana act by the addition of the word "tools," and in the New Jersey act by the word "place." That these variations of phraseology imply corresponding differences in the total extent of the master's liability cannot be affirmed in view of the decisions as they stand, though possibly some case may hereafter arise in which they may be found material.

a. *Two or more descriptive terms used in combination.*—In the cases where the court in affirming or denying the defendant's liability has coupled together two or more of the instrumentalities specified in the statute under review, it is impossible to say with certainty to which designation it was intended to refer the instrumentality which caused the injury.¹

¹ A defect in the "ways, works, machinery, or plant," enumerated in the Alabama statute, has been held to exist where the supply pipe of a water tank extended over a railroad track so as to knock a brakeman off the top of a freight car. *East Tennessee, V. & G. R. Co. v. Thompson* (1891) 94 Ala. 636, 10 So. 280.

In an Alabama case it has been held that a rope used for lowering timber in the construction of a trestle along a railroad track, by means of which heavy timbers are put into their places, is in no sense a part of the ways, works, machinery, or plant of a railroad company. *Southern R. Co. v. Moore* (1901) 128 Ala. 434, 29 So. 659. The court seems to have assumed that the authority of the two Alabama cases cited in subs. d, *infra*, declaring such an ap-

pliance not to be "machinery," was conclusive against the right of the servant to maintain the action. But there is no apparent reason why the rope in question should not be regarded as a part of the "plant."

And a signal rope from the bottom of a mine to the engine room was held to be a part of the ways, works, machinery, and plant, in *New Connellsville Coal & Coke Co. v. Kilgore* (1909) 162 Ala. 642, 50 So. 205.

So was a skidway on which a bucket was raised from the bottom of a mine in the same case.

The shorter formula "ways, works and machinery," which occurs in the Massachusetts statute, has been construed in a number of cases. It includes a truck used by a railroad company as a part of the appliances of the repair

b. "Ways."—In its ordinary sense this term may be regarded as embracing any part of the master's premises over which the servants

shop, consisting of axles, wheels, and a frame, all fastened together and fitted to the tracks. *Gunn v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

And a chain used with a derrick in lifting stone from a quarry. *Morena v. Winston* (1907) 194 Mass. 378, 80 N. E. 473.

And the floor in a mill. *Howard v. Fall River Iron Works Co.* (1909) 203 Mass. 273, 89 N. E. 615.

But not a pile of cotton bales in a freight house. *Cahill v. Boston & M. R. Co.* (1906) 190 Mass. 421, 76 N. E. 911.

Nor an iron casting which a servant is about to attach to an elevator door. *Nye v. Dutton* (1905) 187 Mass. 549, 73 N. E. 654.

Nor marks or tags on elevator cable to indicate position of the elevator. *Del Signore v. Thompson-Starrett Co.* (1908) 198 Mass. 337, 84 N. E. 466.

Nor the harness of a horse attached to a wagon which an employee is driving. *Murphy v. O'Neil* (1910) 204 Mass. 42, 26 L.R.A.(N.S.) 146, 90 N. E. 406.

Nor an iron skid used in unloading freight from cars onto the station platform. *Nappa v. Erie R. Co.* (1908) 195 N. Y. 176, 21 L.R.A.(N.S.) 96, 88 N. E. 30.

Nor planks used for a temporary walk. *Morris v. Walworth Mfg. Co.* (1902) 181 Mass. 326, 63 N. E. 910.

Nor a staging for use in painting a car, which was easily movable and not fastened together. *Nichols v. Boston & M. R. Co.* (1910) 206 Mass. 463, 92 N. E. 711.

Nor stones temporarily placed in a pile. *Bonin v. Bullard* (1907) 196 Mass. 524, 82 N. E. 702.

The hatchway of a ship is not part of the ways, works, or machinery of a stevedore engaged in loading the ship. *Hyde v. Booth* (1905) 188 Mass. 290, 74 N. E. 337.

So, the cars belonging to a railroad company which were loaded with coal, and were run into defendant's sheds to be unloaded by the defendant's employees, are not part of the defendant's ways, works, or machinery. *Dunn v. Boston & N. Street R. Co.* (1905) 189

Mass. 62, 109 Am. St. Rep. 601, 75 N. E. 75. But see *Bowers v. Connecticut River R. Co. infra*.

The steps of a building over which the owner retained control are not part of the "ways, works, and machinery" of a tenant occupying the upper floors of the building. *Hawkes v. Broadwall: Shoe Co.* (1910) 207 Mass. 117, — L.R.A.(N.S.) —, 92 N. E. 1017.

The position of the barrels of sugar, one upon the other, rim to rim, by which the weight of the upper crushed in the head of the lower barrel, and then fell upon the plaintiff, did not constitute a defect in the ways, works, or machinery of the defendant, as the condition was of a temporary character, arising from a transitory cause. *Mungovan v. O'Keeffe* (1911) 208 Mass. 304, 94 N. E. 277.

No liability is incurred under the statute for injuries caused by the defective condition of a strap on an express wagon, used for the purpose of securing the load. *Condon v. Gahm* (1911) 208 Mass. 339, 94 N. E. 284.

A temporary derrick at a stone yard, erected to move stones from cars to where stonecutters, who had nothing to do with setting it up, could use them, is a part of the "ways, works, and machinery" connected with the yard. *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854 (considered to be a part of the fitting of the stone yard rather than an appliance to be put together and set up and moved from place to place by the workmen who were using it. See § 1679, *post*).

A temporary staging erected by the side of a woodpile, to enable the workmen to place wood thereon and pile it higher, and which is taken down and put up from time to time in different places, and intended to be used from four days to a week at a time in each place, is a part of the owner's ways, works, and machinery while in use at a particular place. *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675 (held to be competent for the jury to find this).

Loaded freight cars received from other lines form a part of the "works and machinery" of the receiving com-

pass, on foot or otherwise, from one point to another.² To constitute

pany. *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 508.

A car belonging to another company, but used as a passageway for defendant's employees in unloading freight, is a part of its works and machinery. *Foster v. New York, N. H. & H. R. Co.* (1904) 187 Mass. 21, 72 N. E. 331.

A temporary scaffold is a part of the ways, works, plant, tools, and machinery under the Indiana statute. *Cleveland, C. C. & St. L. R. Co. v. Austin* (1906) 127 Ill. App. 281.

A cleat nailed to a roof and used as a means of support by a carpenter engaged in shingling the roof is a part of the "works" or "plant." *Markle v. Donaldson* (1905) 8 Ont. L. Rep. 682.

A cable and its hoisting machinery used to handle heavy beams in constructing a bridge is part of the works and machinery. *McGlynn v. Pennsylvania Steel Co.* (1911) 144 App. Div. 343, 129 N. Y. Supp. 45; *Juve v. Pennsylvania Steel Co.* (1911) 144 App. Div. 903, 129 N. Y. Supp. 53.

The rock in which workmen are boring holes for blasting purposes can in no sense be said to be part of the master's works or machinery. *McGowan v. New York Contracting Co.* (1911) 143 App. Div. 1, 127 N. Y. Supp. 532.

An engine which had been built preparatory to its being shipped away is not a part of the ways, works, machinery, plant, building, or premises of the proprietor of the iron works. *Milner v. King* (1904) 34 Can. S. C. 710.

² "The course which a workman would in ordinary circumstances take in order to go from one part of a shop where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a 'way.'" *Willets v. Watt* [1892] (C. A.) 2 Q. B. 92, 61 L. J. Q. B. N. S. 540, per Lord Esher. Compare the statement that the word applies to such places as a workman or servant is called upon to pass over in the performance of his duty. *Caldwell v. Mills* (1893) 24 Ont. Rep. 462, holding that a plank put down to serve as a fulcrum for a lever, if it is placed in such a position that servants have to pass over it in the course of their duties, is a "way." For specific instances of "defects" in what were conceded to be "ways." see § 1674, *a. post.*

In *Southern R. Co. v. Bentley* (1911) 1 Ala. App. 359, 56 So. 249 (holding that a tree which overhung the tracks of a railway was a part of the "way"), the court said: "Obviously, the way of a railroad is not merely its rails, but also such adjacent and superjacent space as may be requisite for the unimpeded operation of its rolling stock. And if an obstruction be permanent in its nature, as opposed to that which is transient merely, if it be inherent in the way, as distinguished from that which is foreign and incidental only, it is clearly a part of the way."

A bridge maintained over defendant's railroad with its consent is a part of its ways. *Central of Georgia R. Co. v. Alexander* (1906) 144 Ala. 257, 40 So. 424.

"Ways" includes a plank walk from a factory to an outhouse provided for the accommodation of the employees. *Urquhart v. Smith & A. Co.* (1906) 192 Mass. 257, 18 N. E. 410.

A hatch cover which, when in place, constituted part of the gangway over which employees were required to move cargo in loading the vessel, constituted a "way." *La Compagnie Générale Transatlantique v. Maguire* (1909) 93 C. C. A. 385, 168 Fed. 34.

A staging built around a vessel in the process of construction, for the use of the carpenters and caulkers, is a way. *Richard T. Green Co. v. Young* (1910) 103 C. C. A. 73, 179 Fed. 493.

This word does not cover a pile of boards. *Campbell v. Dearborn* (1900) 175 Mass. 183, 55 N. E. 1042.

Nor a skid used for unloading cars. *Nappa v. Erie R. Co.* (1909) 195 N. Y. 176, 21 L.R.A.(N.S.) 96, 88 N. E. 30; *Heiser v. Cincinnati Abattoir* (1910) 141 App. Div. 400, 126 N. Y. Supp. 265.

Nor a wall in the course of construction. *Ripp v. Fuchs* (1908) 129 App. Div. 321, 113 N. Y. Supp. 361.

Nor the open joists of a floor of a house in course of construction, across which a laborer had to pass in carrying out an order by his foreman. *McGowan v. Smith* (1906-7) Sc. Sess. Cas. 548.

Nor the rock in which workmen are boring holes for blasting purposes. *McGowan v. New York Contracting Co.* (1911) 143 App. Div. 1, 127 N. Y. Supp. 532.

a "way" within the purview of the act, it is not necessary that it should be marked out by metes and bounds or by habitual user.³

In a more technical sense the term signifies a path or track, which is specially constructed for the purpose of drawing or propelling with greater facility certain kinds of appliances which are used, and certain kinds of substances or manufactured articles which are handled, by the servants in the course of their work.⁴

The "ways" with which the cases deal are usually horizontal or sloping. But presumably the term also covers such instrumentalities as the vertical shaft of a mine or of an elevator.⁵

c. "*Works.*"—In one well-known case this word seems to be regarded as connotative of the same idea as "system."⁶ [The word has also been construed in the cases cited below.^{6a}] For other cases indicative of its significance, see § 1672, b, c, *post*.

³ In *Willetts v. Watt* [1892] (C. A.) 2 Q. B. 92, Fry, L. J., said (p. 99): "In determining what is a 'way,' we should, I think, look to the fact that workmen have to go through places where sometimes there is an open space, while at other times what was an open space is covered with stores or other things used in the business. We should consider, further, the case of an open yard, where the whole or only a small part might be used at any time, according as there were a great many or only a few workmen going through it. I think that these and other considerations show that we should answer in the negative the question whether metes and bounds are necessary to a 'way' under the statute. There are many ways which persons have a right to use that are not defined by any physical boundary, and to hold that such a boundary is necessary would be to withdraw from the protection given by the statute a large number of places used by workmen in which the mischief at which the statute was aimed might arise. For the purpose of this case, I should say that wherever there is a large space connected with or used in the business of the employer, over which the workmen pass in the course of their employment, when that space is for the time being vacant, and is so used, it is a 'way' within the meaning of the statute."

⁴ The most familiar instance of such a way is a railway track. See *Kansas City M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88; *Louisville & N.*

R. Co. v. Bouldin (1895) 110 Ala. 185, 20 So. 325; *McQuade v. Dixon* (1887) 14 Sc. Sess. Cas. 4th series, 1039.

A roadway of iron plates, along which loads are conveyed in a car, was held to be a way in *McGiffin v. Palmers Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70. Doubtless the term would also be held to include the ways in a shipbuilding yard or the skids used for the transfer of heavy articles, such as logs, barrels, etc., or the posts between which the hammer of a pile-driver moves up and down.

⁵ In *Pegram v. Dixon* (1886) 55 L. J. Q. B. N. S. 447, 51 J. P. 198, it was apparently assumed that a lift-well in a building under construction becomes a "way" when workmen place ladders in it for the purpose of obtaining access to the upper floors.

⁶ *Smith v. Baker* [1891] A. C. 325. There Lord Watson, in commenting on the finding of the jury that the manner in which the apparatus in question was used betokened negligence, first referred to the method adopted as being a "defective system" (p. 353), and in a later passage of his opinion (p. 354) remarked that the evidence brought the case within the operation of the rule that a dangerous arrangement of machinery and tackle constitutes a "defect" in the condition of the works.

^{6a} Mule holes for confining mules in a mine are part of the mine owner's

d. "Machinery."—The term "machine" has been defined as "every mechanical device or combination of mechanical powers and devices to perform some function, and produce a certain effect or result."⁷ [Such a definition obviously excludes such an appliance as a hammer, disconnected from other mechanical appliances, and operated only by muscular strength.^{7a}] Nor does this word include a steel bar used to align the track on a railway bridge.⁸ [Nor a wall in the course of construction.^{8a} Nor the harness of a horse attached to a wagon, which an employee was driving.^{8b}]

For specific examples of appliances viewed as "machinery," the point actually involved being whether there was a "defect," see § 1674, *b, post*.

e. "Plant."—(See also under § 1672, *post*.) This term includes "whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."⁹ For examples of defective instrumentalities assumed to come within this definition, see § 1674, *d, post*.

works. *Toward v. Meadow Lands Coal Co.* (1911) 229 Pa. 553, 79 Atl. 129.

Cars loaded with coal consigned to a mill company, and left on a side-track, from which they were taken by the mill company over its own spur tracks, and unloaded at its pocket, form part of the company's works. *D'Almeida v. Boston & M. R. Co.* (1911) 209 Mass. 81, 95 N. E. 398.

A clay bank is "works." *Bacelli v. New England Brick Co.* (1910) 138 App. Div. 656, 122 N. Y. Supp. 856.

⁷ *Corning v. Burden* (1853) 15 How. 267, 14 L. ed. 690 (patent case).

"Machinery" includes only such machines or mechanical devices as are in use, and such appurtenances thereof as are incidental to the use of the machine. *Murphy v. O'Neil* (1910) 204 Mass. 42, 26 L.R.A. (N.S.) 146, 90 N. E. 406.

^{7a} *Georgia P. R. Co. v. Brooks* (1887) 84 Ala. 138, 4 So. 289 (scale flying from an iron rail when struck by a hammer wielded by a fellow servant injured plaintiff). It would seem that, if the rail was in such a condition as to render such an accident probable, the defendant should have been held liable as for a defect in the "plant" or in the "works."

⁸ *Clements v. Alabama G. S. R. Co.* (1900) 127 Ala. 166, 28 So. 643. The reason assigned was that the bar was "disconnected from any other mechanical appliances, and operated by muscular strength directly applied." Apparently the action might have been maintained both in this case and the other Alabama decision cited in note 7a, *supra*, if the pleader had alleged the existence of defects in the "plant."

^{8a} *Ripp v. Fuohs* (1908) 129 App. Div. 321, 113 N. Y. Supp. 361.

^{8b} *Murphy v. O'Neil* (1910) 204 Mass. 42, 26 L.R.A. (N.S.) 146, 90 N. E. 406.

⁹ *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 17 Eng. Rul. Cas. 217, per Lord Esher, who thus disposed of the contention that a horse was not a part of the "plant:" "It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses, horses and carts, wagons, or drays, seem to me to form the most material part of the plant. They are the materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all. The principal part

[*f. "Tools."*—The word "tools," included in the Indiana statute, obviously embraces many appliances which would not be embraced in the terms "works" and "machinery," used in the other statutes, but the word has received but little attention from the courts.¹⁰]

1672. [669] Significance of the qualifying phrase, "connected with or used in the business of" the employer.—*a. Instrumentalities temporarily used by the defendant's servants in the transaction of his business.*—The mere fact that the defendant did not own the defective instrumentality which caused the injury will not protect him if, as a matter of fact, it was being used in his business at the time of the accident.¹ Whether there was such use within the meaning of the statutes is determined with reference to various considerations.

In some cases the essential question is whether or not he himself or his agent had, at the time when the injury was received, adopted the instrumentality as a part of the plant by means of which the plaintiff was expected to perform his duties. If such adoption is shown, he is considered to have assumed, as regards this temporary addition to his plant, a liability which, it would seem, is of precisely the same character and extent as that to which he is subject as regards his own property.² Manifestly, no adoption within the mean-

of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees; and for this purpose he must use horses and carts or wagons. They are all necessary for carrying on of the business. It cannot for a moment be contended that the carts and wagons are not 'plant.' Can it be said that the horses, without which the carts and wagons would be useless, are not?"

To same effect, see *Haston v. Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621; *Fraser v. Hood* (1897) 15 Sc. Sess. Cas. 4th series, 178.

A substance used to dress a belt to prevent it from slipping is a part of the plant. *Riddle v. Bessemer Soil Pipe Co.* (1911) 170 Ala. 559, 54 So. 525.

A ladder used in the business is a part of the plant. *Huyck v. McNerney* (1909) 163 Ala. 244, 50 So. 926; *Grasselli Chemical Co. v. Davis* (1910) 166 Ala. 471, 52 So. 35.

Pieces of timber commonly used by furnace companies to scotch or chock hot pots and hold them in position on inclined tracks on slag piles while they cool are part of the plant of such furnace company. *Sloss-Sheffield Steel &*

I. Co. v. Mobley (1904) 139 Ala. 425, 36 So. 181.

¹⁰A section hand injured by a defective chisel furnished by his foreman can recover. *Baltimore & O. S. W. R. Co. v. Walker* (1908) 41 Ind. App. 588, 84 N. E. 730.

¹*Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L.R.A. 283, 35 N. E. 547; *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552; *Trask v. Old Colony R. Co.* (1892) 156 Mass. 298, 31 N. E. 6.

²Lack of ventilation of the hold of a vessel belonging to a navigation company, in which coal is shipped by contractors to supply coal to a railway at another port where such contractors have to unload the coal, in consequence of which one of their employees is injured by an explosion of gas accumulating in the hold, is a defect in the plant of such contractors. *Carter v. Clarke* (1898) 78 L. T. N. S. 76.

It has been laid down, without qualification, that a defect in a cart hired temporarily to carry a load is not a defect in the plant. *Allmarch v. Walker*

ing of this doctrine can be inferred, where the plaintiff or his fellow workmen took and made use of the defective instrumentality without any authority, either express or implied, from the employer himself or his agent. Under such circumstances no liability can be predicated from the fact that there was a defect, and that a proper inspection would have disclosed it.³

The rationale of other decisions is that the words of the provision now under discussion imply that "the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right."⁴ A corollary of this doctrine is that, unless there is some-

(1885) 78 L. T. Journ. (Q. B. Div.) 391. But this ruling seems to be inconsistent with the one last cited, and to be unjustifiable on general principles. The report is so meager that it is impossible to say precisely what the standpoint of the court may have been.

³ A verdict for the plaintiff has been set aside where the injury was caused by the giving way of a ladder which the workmen themselves had taken and used simply because they found it lying on the premises where they were sent to work, and which had not been borrowed, so as to become a part of the plant, by any person having authority to make it a part of such plant. *Jones v. Burford* (1884) 1 Times L. R. (Q. B. Div.) 137.

A complaint of which the gravamen is that the plant was defective is not sustained by evidence showing that the plaintiff, a painter in the employ of a firm of contractors doing work on a government building, asked his foreman for a ladder; that, being referred by the foreman to the government official in charge of the work, he was told he might have a ladder belonging to the government; and that the ladder which he thus obtained leave to use was so defective that it broke under him. *Perry v. Brass* (1889) 5 Times L. R. (Q. B. Div.) 253. The court relied mainly on the fact that the ladder did not belong to the defendants, but Denman, J., also laid stress on the fact that their foreman knew nothing about it. The correctness of this decision under the particular facts in evidence seems somewhat dubious, as it may fairly be argued that the permission of a foreman to use whatever appliance a designated person may supply should have

the effect of making the appliance actually selected a part of the plant.

⁴ *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L.R.A. 283, 35 N. E. 547, holding that a railroad track owned, maintained, and repaired by a manufacturing company, and used by a railroad company only under a license or invitation to deliver freight under a contract, is not a part of the railroad company's "ways." In delivering the opinion of the majority of the court, Holmes, J., said: "We think that neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employees once in a while may be called for a few minutes."

A railroad company that only goes upon the track of another under a license to take cars therefrom, and which has no control over it, is not liable for an injury to an employee caused by its defective character. *Trask v. Old Colony R. Co.* (1892) 156 Mass. 298, 31 N. E. 6.

An employee of a gas company hired to remove gas pipe from a trench dug by authority of the city has no right to expect his employer to shore the sides of the trench or make it safer than it was, for he must be taken to know that his employer had no control over it. *Hughes v. Malden & M. Gas-light Co.* (1897) 168 Mass. 395, 47 N. E. 125.

The location of the tracks of a street car company being determined by the municipal authorities, it cannot be charged with failure to provide a safe place for its conductor, for the reason that there is a tree close to the side of

thing to put him on inquiry, a master is not under any active duty of inspection with regard to an instrumentality not under his control.⁵

The cases involving the liability of a railway company for de-

the car, unless it is shown that the company had a right to remove the tree. *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

The want of a fence at the top of a declivity at one side of a public street used by the employer as an approach to his place of business is not a defect for which he can be held liable. *Stride v. Diamond Glass Co.* (1895) 26 Ont. Rep. 270 (Following *Engel v. New York, P. & B. R. Co.* [1893] 160 Mass. 260, 22 L.R.A. 283, 35 N. E. 547). Discussing the question whether the defective condition of a public street which was used by the employer in connection with his business was a defect in a "way used in the business," within the meaning of the Ontario employers' liability act, § 3, subs. 1, Boyd, C., said: "Light is thrown upon the scope of these words by § 6, subs. 1, which provides that the workman shall not be able to recover unless the defect arose from, or had not been remedied owing to the negligence of, the employer. That means some defect on his premises, or on a place over which he had control, that could be made right by the employer. Such is not the case in regard to a public street upon which the employer had no right to construct a fence or barrier as is here suggested. One part of the street is higher than the other, but it is the business of the corporation of the city to deal with the alleged defect in the interests of the public, or be exposed to action by injured persons."

A coal master is not liable to a servant for injuries caused by defects in wagons sent by a railway company to be loaded with coal for carriage, and left at the pit in charge of his servants. Such wagons are not a part of the coal master's plant, and even if they are, he is not, under such circumstances, under the duty of inspecting them before allowing the servants to use them. *Robinson v. Watson* (1892) 20 Sc. Sess. Cas. 4th series, 144.

An auctioneer selling goods on the premises of a stranger is not responsible to his servants for the sufficiency of the appliances for bringing forward and re-

moving the goods which are to be sold. *Nelson v. Scott* (1892) 19 Sc. Sess. Cas. 4th series, 425.

⁵ The failure of a gas company to ask how long a trench dug by the city has been dug, and to tell its employee the length of time, before sending such employee into same to remove gas pipe therefrom, does not render it liable for an injury to the employee caused by the caving-in of the trench. *Hughes v. Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125. "He," said the court, "had a right to expect that, if the defendant knew of any danger which the plaintiff did not know and ought not to be assumed to know, it would inform him. But no such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible to the eye, or to have been able or bound to infer from what was visible anything which the plaintiff with his experience was not equally able to infer. What more could it have done? There is no reason to suppose that inspection would have disclosed anything beyond the visible facts, and therefore it is not necessary to consider whether the duty of inspection existing with regard to cars received from connecting lines to be forwarded on a railroad would be held to exist in such a case as this."

In the absence of any allegation of particular circumstances which would impose the duty of inspecting the fittings of a ship in which a stevedore or other person has contracted to do work, defendant's servant cannot maintain an action against him for an injury caused by defects in these fittings. *Simpson v. Paton* (1896) 23 Sc. Sess. Cas. 4th series, 590.

In *McLachlan v. S. S. Peverel Co.* (1896) 23 Sc. Sess. Cas. 4th series, 753, a complaint based on existence of duty to inspect was held to be demurrable. Lord Young dissented on the ground that the stevedore was not wholly exempt from the duty of supervision, and declined to assent to the proposition that there would be no liability if things are wrong, and by proper supervision,

fects in a car received from another road have been made to turn upon the question whether they were loaded or empty. Loaded cars, it is said, form a part of the works and machinery of the receiving company, inasmuch as it is not bound to use them in its train if, on inspection, they are found to be unsafe.⁶ But an isolated empty car on its way to be returned to its owner is a part of the ways, works, or machinery connected with or used in the business of a railroad company which received it loaded.⁷ It is, however, not apparent why the right of rejection which undoubtedly exists in this instance as well as in the former should not create a similar obligation. The distinction taken and its rationale are, it is submitted, unsatisfactory. In Massachusetts it is no longer of importance since § 1 of the act was amended, as shown in § 1658, *ante*.

In one case the principle is applied that a "defect" within the meaning of these statutes exists, where the physical conditions resulting from a use to which the servant's employer permits a stranger to put his premises are of such a nature that negligence would have been a warrantable inference if they had been created by the act of the employer himself or his agent.⁸

As the decisions holding a master not to be liable for an injury due to a defect in an instrumentality belonging to another person may be regarded as being in their essence merely declarations that the wrong party was being sued, there would, at first sight, seem to be no serious practical objection to such an application of the general principle that responsibility is a juridical incident of the power of control, and does not exist apart from such power. But the extremely nebulous condition of the law defining the nature and extent

without requiring anything out of the way on his part, he would have discovered that they were in that condition. See also *Robinson v. Watson* (1892) 20 Sc. Sess. Cas. 4th series, 144, as stated in note 4, *supra*.

⁶ *Bowers v. Connecticut River R. Co.* (1894) 162 Mass. 312, 38 N. E. 503, settling this point, which was left undecided in the next case cited.

⁷ In *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128, the court said: "By the terms 'ways, works, or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer, for doing or carrying on the work which

is to be done. The use of other words may not make the meaning clearer, but it would seem that there must be a defect in something which can in some sense be said to be provided by the employer."

⁸ *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737, where a railway company which permitted a guy to be stretched by a third person across its tracks, at a point where the volume of business required great diligence and care as to the condition of the track, was held liable for an injury to an employee, caused by failure to see that the guy was placed at a particular height to avoid such injury. (The statute construed was that of Massachusetts).

of a stranger's liability to the servants of one with whom he has business relations, involving the use of, or contact with, his property,⁹ renders it wholly unwarrantable to assume that, in all the cases in which the defendant will be absolved for the reason that he had no control over the defective instrumentality, the plaintiff will be able to maintain an action against the actual owner of that instrumentality. It is manifest, therefore, that the employment of this test to determine the applicability of these statutes will sometimes result in leaving the injured servant entirely remediless. Under these circumstances, the doctrine that the possession or nonpossession of the power of control is the main differentiating factor in cases in which the existence or absence of authority to use the defective instrumentality is not involved, as one of the determinant elements, deserves to be somewhat closely scrutinized.

It is submitted that the clause in question may, upon a perfectly reasonable construction, be made to comprehend instrumentalities over which the employer has no control. The opposite contention would doubtless be irresistible if the failure to "remedy" defects were mentioned as the sole ground of liability. But the declaration of an alternative liability for the negligent failure to "discover" defects seems to be hardly susceptible of any other interpretation than that it was intended to extend the employer's responsibility beyond the cases in which the right to apply a remedy may be predicated. Such a declaration may fairly be regarded as a recognition of the principle that the application of a remedy is neither the only duty which the law implies, nor the only method by which the master can free himself from the imputation of negligence. On the one hand, where it is in his power to apply a remedy to the defect thus actually or constructively known to him, it may conceivably be, and in fact frequently is, his duty to warn his servants as to the existence of the defect, or to discontinue the use of the defective instrumentality until it has been restored to a safe condition. On the other hand, where it is not in his power to apply a remedy, the duties of warning or discontinuance become imperative, and by performing them he fully discharges his obligations to his servants. It is clear, therefore, that there are certain obligations to which he may be subject in respect to instrumentalities which are out of his control, and that the negligence which consists in the failure to dis-

⁹ See the article contributed by the the Canada Law Journal (vol. xxxvi., present writer to the Law Quarterly pp. 178 *et seq.*), and his note published Review (vol. XVI., pp. 168 *et seq.*), and in 46 L.R.A. pp. 33 *et seq.*

cover a defect cannot be dissociated from the negligence which consists in the breach of those obligations, for the reason that they arise as soon as the defect is known, and that it is presumed to be known wherever it would have been known if due care had been exercised. It is submitted, therefore, that the balance of probability is in favor of the inference that the legislature intended to create a responsibility for injuries due to instrumentalities not controlled by the master, provided they are "connected with his business," and that, upon the true construction of the statute, the absence of the power of control merely affects the extent of that responsibility.¹⁰

¹⁰ Some of the unsatisfactory consequences of the doctrine that the statute does not apply to cases where there is no power of control are pointed out in the dissenting opinion of Knowlton, J., in *Engel v. New York, P. & B. R. Co.* (1893) 160 Mass. 260, 22 L.R.A. 283, 35 N. E. 547: "The employee finds a track of this kind, used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freighting business. Ordinarily he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with and used in the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track, he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference under the statute how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they are connected with his business and used in it, it is his duty to have them safe, so that his employees may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employee, to see that the owner properly does what he agrees to do. It is a general rule of the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight arising

from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty to maintain the track in repair under their contract may be upon the owner of the road; but as between the first mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. . . . The duty of a railroad corporation to furnish for its employees safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case, its duty is the same when the tracks, cars, and engines are hired, or used under a license from others as when they are owned by the employer. . . . The doctrine contended for by the defendant, as I understand it, comes to this,—if a manufacturer, instead of owning the ways, works, and machinery necessary to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use and to keep it constantly in good condition, and if one of his employees is instantly killed by a defect negligently suffered to be in the ways, works, or machinery which he is using under this arrangement, he will not be liable under the statute, because the ways, works, and machinery are not his. The owner will not be liable under the statute for he is a stranger to the manufacturing business carried on there, and the person killed is not his employee. Neither the employer nor the owner of the establishment will be liable at the common law,

The Ontario case in which the master was held not to be liable under the statute for the want of a fence on a public street which was used as an approach to the master's place of business¹¹ seems to have been improperly referred to the analogy of the other cases cited in this section. The true ground upon which a servant is precluded from maintaining an action against his master under the circumstances there in evidence is that which was alluded to in the opinion, *viz.*, so far as regards his right of recovery for injuries which are due simply to the manner in which streets are laid out, graded, and protected, he is in the same position as any other member of the public. His remedy, if any, must be sought from the municipal body which is responsible for the creation and continuance of those conditions.

b. Structures, etc., in course of erection or demolition.—According to the most recent of the English authorities, these statutes should be so construed as to enable a servant of a contractor to recover for injuries due to the abnormally dangerous conditions of the building itself which is in course of erection or demolition by that contractor himself. The broad principle relied upon was that premises which are in the possession of a person for the purposes of his business are to be regarded as the “works” of such person so long as he is carrying on his business there.¹² The contention that the case of *Howe v. Finch* (see following subsection) was a controlling precedent against the plaintiff was easily disposed of on the ground that the employer who was sued there was the owner, not the builder of the premises. But, singularly enough, no reference was made to the cases cited in the subjoined note, which are not distinguishable on this ground, and are directly opposed to the

for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employee will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the legislature.”

¹¹ See note 4, *supra*.

¹² *Brannigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328 (house was being pulled down). The doctrine of this case is in harmony with two other English decisions, though this particular point was not directly raised.

In *Moore v. Gimson* (1889) 58 L. J. Q. B. N. S. 169, an insecure wall left standing on premises where there had

been a fire seems to be regarded as a part of the works of a party who took a contract for the reinstatement of the building destroyed. The case was decided against the plaintiff on the ground that there was no knowledge, actual or constructive, of the conditions. Compare *Booker v. Higgs* (1887) 3 Times L. R. 618, where a wall fell on the servant of a person who, as incident to certain work on the premises, was making a hole through it.

It has been held in Ontario that a railway used by contractors engaged in constructing an extension of the line is a part of their plant while the work is going on. *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

conclusion arrived at. The conflict of authority thus disclosed can now be adjusted in England only by a decision of the court of appeal.¹³

In Massachusetts the servant's right to maintain an action under such circumstances has been uniformly denied.¹⁴

c. Instrumentalities not yet brought into use, or disused.—The

¹³ In one case it was held that no action lay for an injury caused by the negligence of a coservant in throwing rubbish down a lift-well of a building under construction, through which, by means of ladders, the workmen were obliged to get access to the upper floors, this result not being affected by the fact that the master had not taken precautions to prevent such accident by warning the workmen to cease throwing things down, when it became necessary to use the well as a passage for the workmen. *Pegram v. Dixon* (1886) 55 L. J. Q. B. N. S. 447, 51 J. P. 198, Reversing 2 Times L. R. 603.

In another, a contractor was held not to be liable for maintaining an unusually large well-hole in the staircase of a building under construction, through which a brick fell on the plaintiff from an upper story. *Conway v. Clemence* (1885) 2 Times L. R. (Q. B. Div.) 80.

In another, a contractor for the brick-work on an unfinished house was held not liable for injuries caused by the collapse of a staircase erected shortly before by another contractor as the permanent staircase of the house, as he was entitled to rely on the sufficiency of the structure without examination. *McInulty v. Primrose* (1897) 24 Sc. Sess. Cas. 4th series, 442.

¹⁴ It is held that contractors by setting a servant to work on the premises of a third person where there are movable steps leading into a cellar, going down which the servant was injured, cannot be said to adopt the steps as a way used in their business. *Regan v. Donovan* (1893) 159 Mass. 1, 33 N. E. 702 (injury was caused by the steps falling).

A servant of a contractor engaged in grading the land of a third person cannot recover on the theory that the liability of a bank of earth to fall, when undermined, unless it is properly shored up, is a "defect" within the statute, the descriptive words being applicable to "ways, etc., of a permanent character,

such as are connected with or used in an employer's business." *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

A building in process of construction is not "ways, works, or machinery connected with or used in the business" of a subcontractor helping to build it, so as to render a hole cut in the floor by another subcontractor a defect in "ways, works, and machinery." *Beique v. Hosmer* (1897) 169 Mass. 541, 48 N. E. 338.

A plumber is not liable to an employee injured by the fall of ladders and stagings leading from one floor to another of a building in process of construction, where he neither constructed, managed, nor controlled such ladders and stagings. *Riley v. Tucker* (1901) 179 Mass. 190, 60 N. E. 484.

In *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550, the court remarked that there is a conflict between *Braunigan v. Robinson* [1892] 1 Q. B. 344, 61 L. J. Q. B. N. S. 202, 66 L. T. N. S. 647, 56 J. P. 328, and *Hove v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276. But this is not necessarily so. It is quite possible, without any inconsistency, to take the view that a wall is a part of the works of the person who has it under his control for the purpose of erecting it, and at the same time not a portion of the works of the person who intends to use it in his business when it is completed. It would be going too far to say that an instrumentality can never be a part of the works of two separate employers at the same time, but the mere statement of the situation presented by cases of this type shows that the user by the owner of the structure and the user by the contractor for its erection are successive, and mutually exclusive. It is, therefore, possible, to say the least, that the legal quantity of the structure may be different according as regard be had to the servants of the owner or to the servants of the contractor.

words of the statute are declared to be applicable only to ways, etc., which are "existing and completed," and not to those which are partly finished, and not yet used for the purposes of the employer's business.¹⁵ On the analogy of the case which established this doctrine it was subsequently held by the King's bench division that no action lies for an injury caused by a defect in a machine which had at the time of the accident been discarded, as unfit for use, and was then being removed from the premises.¹⁶ This decision, however, was reversed by the court of appeal on the ground that there was evidence from which it was warrantable for a judge sitting as a jury to draw the inference that the machine was connected with the defendant's business when the accident occurred.¹⁷ It is manifest that this ruling throws considerable doubt upon the correctness of many of the cases cited in the last two subsections.

1673. [670] What constitutes a defect.— Wherever an instrumentality is "not in a proper condition for the purpose for which it was applied," there is a "defect" in its condition within the meaning of the act.¹ If the whole arrangement of a machine is defective for the purpose for which it is applied, there is a defect so as to bring it within the act, although each part may be sufficient.² It follows,

¹⁵ *Howe v. Finch* (1886) L. R. 17 Q. B. Div. 187, 34 Week. Rep. 593, 51 J. P. 276 (where a wall in course of erection fell on a plumber in the defendant's employ).

A wall in the course of construction is not a part of the "works." *Ripp v. Fuchs* (1908) 129 App. Div. 321, 113 N. Y. Supp. 361.

¹⁶ *Thompson v. City Glass Bottle Co.* [1901] 2 K. B. 483, 17 Times L. R. 594 (a portion of the machine fell on the plaintiff).

¹⁷ *Thompson v. City Glass Bottle Co.* [1892] 1 K. B. 233, [1901] W. N. 228.

¹ Lord Coleridge in *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474 (approved in *Cripps v. Judge* [1884; C. A.] L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100).

Lindley, L. J., in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 17 Eng. Rul. Cas. 217, said: "I take 'defect' to include anything which renders the plant, etc., unfit for the use for which it is intended, when used in a reasonable way and with reasonable care."

The word "defect" implies an inher-

ent defect, a deficiency in something essential to the proper use of the apparatus for the purpose for which it is to be used. *Hamilton v. Groesbeck* (1890) 19 Ont. Rep. 76.

Compare also the passage from the majority opinion in *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, as quoted in § 1675, note 1, *post*.

"A defect in the condition of the way, or works, or machinery, or plant . . . means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." Per Stephen, J., in *McGiffin v. Palmer's Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5.

² *Cripps v. Judge* (1884; C. A.) L. R.

therefore, that whenever there is such unsuitableness for the work intended to be done and actually done, the liability contemplated by the statute arises, although the appliance is perfect of its kind and in good repair and suitable for other kinds of work. In such a case the employer is in fault because he has furnished appliances for a use for which they are unsuitable and in effect in so ordering and carrying on his work that, without fault on the part of an ordinary workman, the natural consequences will be that the appliance will be used for purposes for which it is unsuitable.³

A defect importing negligence on the master's part may properly be found to exist where the appliance in question was so constructed or arranged that it was likely to cause undue hazard to a person exercising that degree of care which might be expected, whether regard be had to the special circumstances under which the appliance was to be put into operation,⁴ or to the age, skill, and experience of the particular employee who was to operate it.⁵

13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100, per Brett, M. R.

The words "defect in the arrangement" (used only in the acts of Ontario, Manitoba, and British Columbia) mean the element of danger arising from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose for which it is to be used. *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, per Osler, J. A. (p. 121).

In one case it was intimated, but not definitely determined, that appliances may be defective in respect to adaptability, as well as for inherent flaws. *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586.

³ *Geloneck v. Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

Whether an appliance was properly constructed in reference to the use for which it was intended is usually a question for the jury. *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675.

⁴ A sliding door intended to be closed in case of fire is defective unless it can be manipulated with reasonable safety by persons who would naturally be acting as hurriedly as would be the case under such circumstances. *Johnson v. Mitchell* (1885; Sc. Sess. Cas.) 22 Scot. L. R. 698.

⁵ This seems to be the actual scope

which should be ascribed to the decision in *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. (C. A.) 197, 38 Week. Rep. 412, in order to prevent its clashing with *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. (C. A.) 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, § 1675, note 1, *post*, to which, according to the statement of the court, there was no intention of running counter. A child was held entitled to maintain an action for an injury caused by uncovered machinery. The broad ground was taken that the statute applies where a machine is "defective with regard to the safety of the workmen," even though it is effective for the purpose for which it is used. The master of the rolls, who, since the decision in *Walsh v. Whiteley*, had been created Lord Esher said: "The argument in the present case is that there is no defect in machinery if the machine in question is in itself a proper one for the work it is to perform. It must be carried to this length, that if the machine contains a secret defect which causes danger to the workman, but which does not affect the purposes for which it is to be used, then this is not a defect within the meaning of the act. Now, this leather-pressing machine cannot be worked without workmen; without labor it is useless as a machine. Surely this fact of itself is something that has to do with the condition of the machine. If its con-

The fact that the instrumentality which caused the injury was less safe than one which was used by a large proportion, or by the majority, of other employers in the same business, is probably regarded by all courts as an element which entitles the servant to go to the jury on the question whether it was defective.⁶ (As to the effect of evidence that the employer had satisfied the standard fixed by common usage, see § 1675, *post*.)

In Ontario it is held that the effect of the provisions in the factories acts, by which the failure to take certain specified precautions is made a penal offense, is that, although an injury due to non-compliance with one of these provisions does not constitute a cause of action under the statute itself, such noncompliance is evidence which it is competent to consider as tending to show negligence on the defendant's part, in an action brought under the workmen's compensation act.⁷ Considering the extreme improbability that any

dition be such that the workman cannot do his part with safety, is that, or is it not, a defect in the condition of a machine the working of which is a necessary performance? It seems to me that unless we hold the defect complained of here to be one within the subsection in question, the act might as well have never been passed."

⁶As, where a common round stick without any holes in it was furnished to be used as a lever for tipping a large ladel of molten metal, the evidence being that it was not safe, and that another kind of device was customary in large foundries like that of the defendant. *Flaherty v. Norwood Engineering Co.* (1898) 172 Mass. 134, 51 N. E. 463.

Whether a piece of iron piping is a proper material to use as a buffer to protect the head of a bolt which is being driven is a question for the jury, where the evidence is that for several years copper hammers have been made for such work, and that piping is the least desirable of the metals used, because it is so brittle that chips are apt to fly off from it and injure the person holding it. *Littlefield v. Edward P. Allis Co.* (1900) 177 Mass. 151, 58 N. E. 692.

A railroad company operating passenger and freight trains on a dummy line having regular stations and section foremen and traversing a large section of country is under the same duties as are obligatory on other lines in respect to its employees as to providing locks for

its switches, and adopting and using other appliances and safeguards which are in use and deemed necessary by well-regulated railroads of the ordinary character. *Birmingham R. & Electric Co. v. Baylor* (1893) 101 Ala. 488, 13 So. 793, following *Birmingham R. & Electric Co. v. Allen* (1892) 99 Ala. 359, 20 L.R.A. 457, 13 So. 8.

In an action for injuries caused by the falling of a derrick, evidence that, if it had been fitted with a wire rope or iron rod to hold the guy plate and goose neck down, it would not have fallen, and that such an appliance was in common use, is admissible. *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854.

⁷*O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, affirmed in 21 Ont. App. Rep. 596, 24 Can. S. C. 598; *Thompson v. Wright* (1892) 22 Ont. Rep. 127; *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425; *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117; *Godwin v. Newcombe* (1901) 1 Ont. L. Rep. (C. A.) 525. In all these cases the propriety of declining to interfere with the verdicts of juries based on the theory that the maintenance of unguarded machinery is negligence was recognized.

In *Hamilton v. Groesbeck* (1889) 19 Ont. Rep. 76, the lower court seems to have been of opinion that an unguarded saw was not a defect. If it was intended to lay this down as a matter of law, the doctrine is clearly contrary to that

jury will absolve an employer who has been guilty of a breach of the statute, it is manifest that, for practical purposes, the consequence of such a rule is to place servants in a position not materially different from that which they would hold if the theory had been adopted that damages may be recovered by anyone injured by the violation of a penal act. The doctrine thus adopted is, moreover, inconsistent with that which has been applied in a decision by the English court of appeal.^{7a}

The statute is equally applicable, whether the defect was in the original construction of the machine, or arose from its not being kept up to the obligatory standard of safety.⁸ The fact that an appliance comes up to the legal standard of safety when it is in its normal condition will not excuse the master if that condition has been so changed as to render it unsafe, and the change is due to the act of an agent who is intrusted with the duty of seeing that it is in proper condition.⁹

In a leading English case Lord Watson remarked that he saw "no reason to doubt that an arrangement of machinery and tackle which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of

of the decisions just cited. The court of appeal ([1891] 18 Ont. App. 437) declined to consider whether the want of a guard was or was not a defect.

^{7a} *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, where it was held that when a statute provides that a person shall perform a specified duty, and a person for whose benefit the statute imposed the duty was injured because of the failure to perform the duty, an action will lie in favor of the injured person, unless there is something to the contrary in the statute.

⁸ See the passage quoted from the majority opinion in *Walsh v. Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, § 1675, note 1, *post*.

In *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, Stephen, J., in commenting on the theory of the county judge that a defect arising from the original construction of a machine was not a defect in the condition of the machinery, said: "The argument for the

defendants comes to this, that, if the employer has a machine, one part of which is weaker than it ought to be, there is a defect in its condition; but if the whole machine is too weak for the purpose for which it is applied there is no such defect. Could it be said that if a windlass, fit only for raising a bucket, is used to draw up a number of men, that there is no defect in the condition of the machinery? The condition of the machine must be a condition with relation to the purpose for which it is applied."

"Defect in condition" means a defect in original construction or subsequent condition, rendering the appliance in question unfit for the purpose to which it was applied, when used with reasonable care and caution, and does not cover the negligent use of a properly constructed appliance. *Metcalfe v. Great Boulder Proprietary Gold Mines* (1906) 3 Austr. Comm. L. R. 543.

⁹ *Tate v. Latham* [1897] 1 Q. B. (C. A.) 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, 45 Week. Rep. 400.

the business, constitutes a defect in the condition of the works within the meaning of the subsection." ¹⁰

A servant who is a mere licensee or trespasser in respect to the locality where he received the injury complained of cannot, it is manifest, recover damages, even though the conditions which caused the injury may have constituted a defect as to other employees. ¹¹ Compare § 1558, *ante*. A double reason for his inability to sue will, of course, exist where the servant's presence at the spot where he was injured was not merely unauthorized, but negligent as well. ¹²

1674. [671] Specific examples of defects.—*a. Defects in the condition of the ways.*—This phrase embraces only those inherent imperfections which render the ways themselves less fit for the use for which they are intended. ¹ See § 1673, *ante*. That the master is not

¹⁰ *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

¹¹ As, where a servant who left a dockyard by a path which was not the regular exit, and which the servants were merely permitted to use, fell into a pit. *Pritchard v. Lang* (1889) 5 Times L. R. (Q. B. Div.) 639, following *Bolch v. Smith* (1862) 7 Hurlst. & N. 736, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 10 Week. Rep. 387, as to the general principle.

¹² An unguarded elevator opening is not a "defect in the condition of the way," as regards a workman required to pass, through a passage 12 feet wide, well lighted, and with which he is well acquainted, where it is upon the opposite side of the passage from that upon which such workman should pass, and he turns out of his way to look at repairs in progress upon the elevator. *Headford v. McClary Mfg. Co.* (1894) 21 Ont. App. Rep. 164, affirmed (1895) 24 Can. S. C. 291.

¹ Plaintiff's servants injured by the following defects have been held entitled to go to the jury:

A loose plank extending over a hole at a place which the servant has to pass, and so laid as to tip up when he steps on it. *Bromley v. Cavendish Spinning Co.* (1886) 2 Times L. R. (C. A.) 881.

The unsafe adjustment of a plank in a temporary staging across which materials are to be carried. *Giles v. Thames Ironworks & Shipbuilding Co.* (1885) 1 Times L. R. (Q. B. Div.) 469.

A plank 8 inches wide and 30 feet from the ground, furnished as a means

for a servant to reach and repair a defective steam pipe. *United States Rolling-Stock Co. v. Weir* (1892) 96 Ala. 396, 11 So. 436 (complaint averring insufficiency, not demurrable).

A plank of insufficient strength to sustain the weight of the men who have to walk along it. *Caldwell v. Mills* (1893) 24 Ont. Rep. 462.

A defective track on a railway. *Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

A defective railway switch. *Birmingham R. & Electric R. Co. v. Allen* (1892) 99 Ala. 359, 20 L.R.A. 457, 13 So. 8.

An unpacked frog or space between frog and wing rail. *Cooper v. Hamilton Steel & I. Co.* (1904) 8 Ont. L. Rep. 353.

An open ditch across the track along which the plaintiff had to pull a car. *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

An unprotected aperture in a staircase which the workman has to use in the course of his employment. *Wood v. Dorrall* (1886) 2 Times L. R. (Q. B. Div.) 550.

The narrowing of the space between the wall of a passageway in a mine, and cars passing therein, so as to cause the cars to pass dangerously near to the wall. *McNamara v. Logan* (1893) 100 Ala. 187, 14 So. 175.

An overhead bridge on a railway, so low as to endanger trainmen on the roofs of cars. *Louisville & N. R. Co. v. Banks* (1894) 104 Ala. 508, 16 So. 547.

The roof of an adit in a mine so de-

liable for casual obstructions arising from the use of his ways, see § 1675, *post*.

b. Defects in the condition of the works.—Very few decisions specifically referable to this rather vague term are found in the reports, except the cases discussed in § 1672, *b, ante*, in which the liability of masters for the condition of the premises of another person upon which they have contracted to do something is in question.² See also the remark of Lord Watson, quoted in the last section. For some cases in which the term occurs in conjunction with others descriptive of various kinds of instrumentalities, see § 1671, *a, ante*.

c. Defects in the condition of the machinery.—The cases cited below indicate sufficiently the kind of abnormal conditions which may properly be found by a jury to fall within this description.³

fectively timbered as to allow a large stone to fall on a miner. *McMullen v. Newhouse Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 759.

A rock on the roof in a tunnel, which is so loose that it may fall at any moment. *Tutwiler Coal, Coke & I. Co. v. Ensley* (1901) 129 Ala. 336, 30 So. 600.

A complaint which alleges that a plank upon which an employee was required to stand was too narrow, and was 18 feet above the ground, and was slippery, sufficiently alleges a defect in the ways. *Pell City Mfg. Co. v. Cosper* (1911) 172 Ala. 532, 55 So. 214.

The master's liability is a question for the jury where the evidence is conflicting as to whether a gudgeon pin used to fasten the arms of a derrick to a mast was large enough for safety. *Richmond & D. R. Co. v. Weems* (1892) 97 Ala. 270, 12 So. 186.

The jury may find that a feed wire carrying a heavy current, which is uninsulated at a place where a servant may come in contact with it, is a defect in the ways. *Simpson v. Interborough Rapid Transit Co.* (1910) 141 App. Div. 148, 125 N. Y. Supp. 997.

² In *Thomas v. Quartermaine* (1886) L. R. 17 Q. B. Div. 417 (1887; C. A.) L. R. 38 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, a boiling vat and a cooling vat were placed in the same room in the defendant's brewery. A passage only 3 feet wide in one part ran between them, the rim of the cooling vat rising 16 inches above the passage. Underneath the barley vat was a board which the plaintiff had occasion

to use. To draw it out he had to give it a jerk, and it came away so suddenly that he fell back into the cooling vat. In the divisional court, Wills, J., said that he could see no evidence of any defect. But in the court of appeal it was considered that the finding of the trial judge sitting as a jury, that there was a defect in the condition of the works, must be allowed to stand, as there was some evidence to support his conclusion. (See pp. 687 and 703 of the report.)

A roof which proved too weak to support the snow which was allowed to accumulate on it seems to be treated in a Massachusetts case as a defect in the "works;" but the point actually decided was merely that an allegation of defective conditions was sustained by proof that the weight of snow was one of the causes of the fall. *Dolan v. Alley* (1891) 153 Mass. 380, 26 N. E. 989.

The failure to furnish suitable appliances to fasten the stones of a coping was held to be proof of defective condition, in *Gibson v. Sullivan* (1895) 164 Mass. 557, 42 N. E. 110 (stones fell on plaintiff).

³ Defects in a locomotive, which produce sudden, unnecessary movements of the cars. *Highland Ave. & Belt R. Co. v. Miller* (1898) 120 Ala. 535, 24 So. 955.

Defective pressure causing a hydraulic crane to work erratically. *Bacon v. Dawes* (1887) 3 Times L. R. (Q. B. Div.) 557.

A band which is constantly slipping off a shaft, thus creating a necessity for a frequent readjustment. *Baxter v.*

d. Defects in the condition of the plant.—As the term “plant” carries the very extensive meaning explained in § 1671, *e, ante*, the cases involving it cover a great variety of appliances. Some of them might presumably be referred to the instrumentalities discussed in the preceding sections.⁴

Wyman (1888) 4 Times L. R. (Q. B. Div.) 255.

A belt which is liable to slip off of a pulley. *Ellis v. Pierce* (1898) 172 Mass. 220, 51 N. E. 974.

Defective appliances for controlling the speed of a push car which collided with the plaintiff, knocking him down a high trestle. *Central R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969.

A part of a machine in a paper mill, so constructed that the rags, etc., which are fed to it, are apt to catch, the result being a frequently recurring necessity to remove them. *Paley v. Garnett* (1885) L. R. 16 Q. B. Div. 52, 34 Week. Rep. 295, 50 J. P. 469.

The absence of a guard to a circular saw provided by the owner of a saw-mill, but improperly removed by the sawyer for his own purposes. *Tate v. Latham* (1897) 1 Q. B. (C. A.) 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, 45 Week. Rep. 400.

The want of a fence to protect employees from moving machinery. *Wallace v. Cutler Paper Mills Co.* (1892) 19 Sc. Sess. Cas. 4th series, 915 (denying that this result was affected by the fact that the danger was a palpable one).

A loom in which the shuttles are neither so fixed as not to be constantly flying out, nor protected by proper guards. *Smith v. Harrison* (1889) 5 Times L. R. (Q. B. Div.) 406.

Unguarded machinery which is operated by children. *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. (C. A.) 197, 38 Week. Rep. 412.

Absence of bar which prevented the shifting of belting. *Houston Biscuit Co. v. Dial* (1903) 135 Ala. 168, 33 So. 268.

The mere starting of a machine without human agency when it should have remained at rest is of itself evidence of some defective condition. *Ryan v. Fall River Iron Works Co.* (1908) 200 Mass. 188, 86 N. E. 310.

The absence of an appliance to prevent the self-starting of machinery im-

ports negligence. *Houston Biscuit Co. v. Dial* (1903) 135 Ala. 168, 33 So. 268.

The failure to anneal chains in constant use in lifting heavy weights, so as to prevent the links from crystallizing, may be found to be negligence. *Ford v. Eastern Bridge & Structural Co.* (1906) 193 Mass. 89, 78 N. E. 771.

Unfenced machinery in a jurisdiction where a penalty is imposed by a factories act for not having machinery guarded may properly be found to import negligence. See § 1673, note 2, *ante*. In the most recent case in which this doctrine was applied it was held that the absence of a guard is a defect, if the machinery is thereby rendered dangerous to the workmen using it, even if the machinery is in itself well constructed and suitable for the purpose for which it was designed. *Godwin v. Newcombe* (1901) 1 Ont. L. Rep. (C. A.) 525.

Evidence that an injury received by a weaver in a cotton mill while he was assisting an inexperienced hand, in consequence of the shuttle flying out of the loom, was caused by a bolt breaking when the shuttle came in contact with it, is fit to go to the jury upon the question of negligence. *Canadian Coloured Cotton Mills v. Talbot* (1897) 27 Can. S. C. 198.

At the trial of an action against a railroad corporation for the death of an employee, caused by the falling upon him of a locomotive which had been placed on a truck in the repair shop, it is competent for the jury to find that, although the iron was sound where the wheel of the truck broke, yet, by reason of its long use and the increase in the weight of engines, the truck had become unsuitable for the use to which it was put, and that, if the wheel had been of proper strength, it would have withstood the strain caused by meeting the obstruction on the rail. *Gunn v. New York, N. H. & H. R. Co.* (1898) 171 Mass. 417, 50 N. E. 1031.

⁴The following defects have been held to come under the head of “defects in plant:”

1675. [672] Conditions not amounting to defects.—The mere fact that a machine is dangerous to manipulate, unless the servant takes certain precautions which any intelligent man would see to be appropriate under the circumstances, will not warrant a finding that the machine is defective within the meaning of the act. There can be no recovery unless the defect is one which implies negligence on the part of the master, or the agents for whose defaults he is answerable.¹

The want of ventilation for the hold of a coal ship, the result being that gas accumulated and exploded when the hatches were removed and the men engaged to unload the coal entered the hold with their lanterns. *Carter v. Clarke* (1896) 14 Times L. R. (Q. B. Div.) 172, 78 L. T. N. S. 76.

A horse intended for a particular kind of work, and so vicious as to be unfit for that work. *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, 17 Eng. Rul. Cas. 217.

A vicious horse. *Fraser v. Hood* (1887) 15 Sc. Sess. Cas. 4th series, 178.

A horse that is constantly falling. *Boston v. Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621.

The lack of some means either to prevent loose bodies from falling upon men working below, or to protect those men from any of the bodies which may fall. *Heske v. Samuelson* (1883) L. R. 12 Q. B. Div. 30, 53 L. J. Q. B. N. S. 45, 49 L. T. N. S. 474 (piece of coal fell from a lift, the sides of which were not fenced, on to an unroofed platform).

A ladder which, by the direction of the defendant, is used to support a scaffold, and, not being strong enough for the purpose, breaks under the weight of a servant. *Cripps v. Judge* (1884) L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100.

A bolt so weakened by constant strains that it breaks. *Irwin v. Denystown* (1885) 22 Sc. L. R. (Ct. of Sess.) 379.

A sliding door to be used in case of fire, without any provision for protecting the hands of an employee from being crushed when it is pulled to. *Johnson v. Mitchell* (1885) 22 Sc. L. R. (Sc. Sess. Cas.) 698.

An inflammable brattice cloth allowed to stand in a place where sparks fre-

quently fall on it. *Thomas v. Great Western Colliery Co.* (1894) 10 Times L. R. (C. A.) 244.

Car buffers of different heights, overlapping in coupling so as to afford no protection to the person making the coupling. *Bond v. Toronto R. Co.* (1895) 22 Ont. App. Rep. 78, affirmed (without opinion), in (1895) 24 Can. S. C. 715 (construing the phrase "defect in the arrangement of the plant," which occurs in the Ontario act).

The location of a post so close to a track as to leave but 7½ inches of space between it and cars passing on the track. *Day v. Dominion Iron & Steel Co.* (1903) 36 N. S. 113, reversed on other grounds in (1904) 34 Can. S. C. 387.

A switch not provided with a lock, nor securely guarded in any other way. *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

Insufficient number of scrapers supplied for cleaning out a brick-pressing machine. *Race v. Harrison* (1893) 10 Times L. R. (C. A.) 92, per Kay, L. J.

The failure to supply a boy with proper materials for the cleaning of machinery. *Thompson v. Wright* (1892) 22 Ont. Rep. 127.

The inadequate manning of cars which are "kicked" on to a side track, the result being that their speed cannot be controlled and they come into collision with other cars. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

¹In *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. (C. A.) 371, the trial judge left it to the jury to say whether there was a defect in the condition of the machine where there was evidence that the accident would not have happened if the disc of the wheel of a carding machine had been solid, and instructed them that, to be defective, a machine must be such as a reasonable, careful, experienced man, reasonably

Accordingly, under the statute as at common law (see § 931, *ante*), an employer is not bound to provide the very best machinery

careful of the safety of his workmen, would not use. The jury found that there was a defect, but the court of appeal held that the evidence did not warrant this conclusion. The following passage shows the position taken by the majority of the court (Lindley and Lopes, L. JJ.): "To determine the meaning of the words 'defect in the condition of the machinery,' we must look, not only at § 1, subs. 1, but also at § 2, subs. 1. Reading these sections and subsections together, we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied, or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark; but it is essential that there should be evidence of negligence of the employer or some person in his service intrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine, rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel which might have been solid had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. It is also suggested that the wheel was too close to the table and that, had the wheel and table been further apart the accident would not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years, and had sus-

tained no injury. It is to our mind clear that he would have suffered no injury on the present occasion if he had used proper care and caution. In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. We do not believe that such was the intention of the legislature; nor do we think it was intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous. But, in our opinion, the defect in the condition of the machinery must be such as to show negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used, used by the plaintiff for thirteen years without any complaint or mischief arising, perfect and unimpaired, and never thought by the plaintiff himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinary sharp knife, unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens."

The following passage from the dissenting opinion of Lord Esher, shows the theory adopted by that eminent judge: "Remembering that this is a statute passed to extend the liability of the employer in favor of workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine that consideration to the question of the purpose for which it is used. The defect contemplated by the act is not, in my opinion, a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it; and that defect may be either in the original construction of the machine or in the use to which the machine is put. Upon the findings of the jury and the true construction of the enactment, I am of the

that can possibly be invented. It is enough if he provides that which is reasonably sufficient for the purpose.²

opinion that the case is brought within the statute."

The general language of the decision is somewhat qualified by *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. (C. A.) 197, 38 Week. Rep. 412. (See § 1673, note 6, *ante*). There Lord Esher referring to the earlier case, made the following remarks: "I think it was assumed by the whole court that, if the machine were dangerous to a workman without any fault of his own, it came within the act. The only doubt that existed in the minds of two of the members of the court was whether the defect had arisen from the negligence of the employer."

The general rule has been enunciated, that machinery is not defective which is fit and proper for the purpose for which it is designed, and there is a reasonable mode, known to the injured servant, in which he could have operated it. *Nooman v. Dublin Distillery Co.* (1893) 32 L. R. Ir. 399.

Recovery has been denied in a case where it was apparent that the only danger to which the plaintiff was subjected arose from the fact that the machine in question was not stopped by him before he attempted to do the work on which he was engaged when the accident occurred. *Sutton v. Stead* (1887) 3 Times L. R. (Q. B. D.) 499.

² *Robins v. Cubitt* (1881) 46 L. T. N. S. 535, per Lopes, J.

The mere fact that the machine is dangerous and is not guarded does not render it defective. *Greenwood v. Greenwood* (1907) 97 L. T. N. S. 771, 24 Times L. R. 24.

Want of reasonable care is not established by evidence which merely shows that a particular safety catch of a different pattern from that on the defendant's elevator had been used ten years before by others. *Black v. Ontario Wheel Co.* (1890) 19 Ont. Rep. 578.

The rule, "An employer is not bound to provide against every possible danger, or to supply in all cases the safest and most approved appliances," was applied in *Mitchell v. Patullo* (1885) 23 Scot. L. R. 207. There the folding doors of a shed on a farm flapped in a horse's face, so that he backed a wagon, and crushed the plaintiff. Held, that the

farmer was not in fault for having failed to provide sliding doors.

A defect in apparatus for hoisting ice is not shown by the fact that a gin wheel was hung so low that the employee's hand was drawn into it and injured by failure to stop the rope soon enough, where it does not appear that it could have been hung any higher in the building, and proper arrangements were made for stopping the rope if the engineer had observed it. *Carbury v. Downing* (1891) 154 Mass. 248, 28 N. E. 162. There the plaintiff did not suggest that the means employed to stop the engine were not sufficient, or that any other should have been provided, but contended that the means for indicating to the engineer the time for stopping the engine, *viz.*, a mark upon the rope, were not sufficient. It was held that the jury could not properly have found that this was an insecure mode of indicating to the engineer when the ice arrived at the top of the run, and that the engine ought to have been inside the building, where the engineer could see the ice and the upper gin wheel, and decide in that way when the engine should be stopped.

In *Hill v. Iver Johnson Sporting Goods Co.* (1905) 188 Mass. 75, 74 N. E. 303, it was held that the mere fact that the catch holding up the gate to an elevator failed to work is not evidence of a defect in the ways, works, or machinery of the employer.

A servant cannot recover, as for a "defect," where he is injured by the fall of a bar which was used for fastening flap-doors in a floor, and which, instead of being secured by a chain or otherwise, so as to prevent its falling, was left loose. *Pooley v. Hicks* (1889) 5 Times L. R. 353.

A drawbar on the car of another railway company, which is of a different height from those on the defendant's own cars, is not a defect. *Ellsbury v. New York, N. H. & H. R. Co.* (1899) 172 Mass. 130, 70 Am. St. Rep. 248, 51 N. E. 415.

It is not, as matter of law, the duty of persons operating coal mines to cut a manway, different and separate from the slope through which coal is brought to the surface, for the ingress

Culpability is negated by proof that the instrumentalities furnished were the same in character and quality as those commonly used under similar circumstances by persons carrying on the same business as the defendant.³ Compare § 940, *ante*. But in order to be conclusive in the master's favor, as a matter of law, the usage appealed to must be, in a reasonable sense, a general one. Evidence

and egress of their employees. *Whitley v. Zenida Coal Co.* (1899) 122 Ala. 118, 26 So. 124.

A covered bridge on a railway, which is high enough to give sufficient space for a brakeman to walk in safety along the center line of roof of a car, is not defective. *Schaff v. Louisville & N. R. Co.* (1893) 100 Ala. 377, 14 So. 105.

A conductor on a street railway assumes the risks arising from the possibility of an occasional jolt of the car, and cannot recover if he is thrown off by such a movement, while he is on the bumper, engaged in replacing the trolley on the wire. *McCaughey v. Springfield Street R. Co.* (1897) 169 Mass. 301, 47 N. E. 1006.

Structures placed so close to a railway track that trainmen are in danger of coming into collision with them do not constitute a defect. *Dacey v. New York, N. H. & H. R. Co.* (1897) 168 Mass. 479, 47 N. E. 418.

³ An open hook without a catch, to which a bucket is attached for raising and lowering loads, cannot be held to be a defect, where the plaintiff's evidence is that such a hook was always used in work of a similar kind, and no proof is given of the occurrence of any previous accident. *Claxton v. Mowlen* (1888) 4 Times L. R. (C. A.) 756.

The failure of an ironmaster to fence in about 10 feet of the lower end of a shaft through which ore was raised to a furnace gangway will not render him liable for injuries to a workman struck by a piece of the ore which fell through the opening, if it is shown that it was usual in the trade to leave so much of these shafts unfenced. *Murray v. Merry* (1890) 17 Sc. Sess. Cas. 4th series, 815.

No negligence can be inferred where a scaffold alleged to be defective was the ordinary kind of scaffold used by masons, and as strong as they are usually made. *Thompson v. Dick* (1892) 19 Sc. Sess. Cas. 4th series, 804.

A trap door without a railing, such as is commonly maintained in factories

is not a "defect." *Moore v. Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

A projecting set screw in a shaft, being a common device for the purpose for which it is used, is not of itself a defect. *Donahue v. Washburn & M. Mfg. Co.* (1897) 169 Mass. 574, 48 N. E. 842; *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066 (1901) 59 N. E. 454; *Ford v. Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 52 N. E. 1065. In the last case recovery was denied though the screw had been placed on the shaft after the servant entered the employment.

Nor is a key-way with sharp edges in a shaft a defect. *Connolly v. Hamilton Woolen Co.* (1895) 163 Mass. 156, 39 N. E. 787.

An engineer employed in fitting up the boilers in a steamer in course of construction cannot recover for injuries caused by falling into an open manhole, while threading his way between decks in a dim light, on the theory that the master was bound to protect the manhole. *Forsyth v. Ramage* (1890) 18 Sc. Sess. Cas. 4th series, 21. In a later case the court explained that this decision was based upon the ground that the risk in question was an ordinary one incidental to the work undertaken, and disclaimed the intention of laying down any such general rule as that a workman on a ship in course of construction cannot recover for injuries due to the dangers of the place of work. *Jamieson v. Russell* (1892) 19 Sc. Sess. Cas. 4th series, 898, where the representative of an employee killed by falling into an open tank was allowed to recover for the reason that the tank was usually covered and lighted, and that neither of these precautions had been observed on the occasion when the accident occurred.

A workman injured through the slipping of some planks out of the loop in a hempen rope by means of which they are being lowered to the bottom of a trench cannot recover on the ground

which merely goes to show that he conformed to the practice of a few well-regulated concerns of the same description as his own will not justify a court in pronouncing him to be free from culpability.⁴ Compare § 950, *ante*. On the other hand, if usage is the controlling factor in the case, a jury will not be permitted to find him guilty of negligence where it is apparent that there is no uniform usage in regard to the subject-matter.⁵

As regards the effect thus ascribed to the general usage of employers, it is not amiss to remind the reader that, in common-law actions, many courts apply the doctrine that evidence of conformity to such usage is a circumstance which merely tends to show that the defendant exercised reasonable care, and not one which is conclusive in his favor. See § 947, *ante*.⁶

The statute is not construed so as to make him an insurer of his servants' safety to such an extent that he is bound to have his machinery so constructed and arranged as to provide for the contin-

that a wire rope should have been used, where it appears that hempen ropes were ordinarily used for such a purpose. *Pack v. Haycard* (1889) 5 Times L. R. (Q. B. Div.) 233.

In the case of a machine of a simple character the plaintiff is not entitled to go to trial merely upon averment that the machine was dangerous and that it was usual to fence such machines. *Cameron v. Walker* (1898) 25 Sc. Sess. Cas. 4th series, 409, following *Milligan v. Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18.

As to unfenced machinery, see also § 1674, *c*, *ante*, and the majority opinion in *Walsh v. Whiteley* (1888; C. A.) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, as quoted in note 1.

⁴ *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586 (charge held erroneous, which proposed as a standard test the custom of eight railway companies to use ratchet jack-screws for holding up the body of a derailed car); *Richmond & D. R. Co. v. Weems* (1892) 97 Ala. 270, 12 So. 186 (charge held erroneous which assumed the usage of five railway companies to be a decisive test).

⁵ Failure to provide a temporary scaffold or platform around a "bleeder" used for the escape of gas above an iron furnace, on which the master mechanic could stand to repair the bleeder, does

not constitute a defect in the ways, etc., where such scaffold was sometimes used in furnaces, but repairs were also made by means of a ladder. *Birmingham Furnace & Mfg. Co. v. Gross* (1892) 97 Ala. 220, 12 So. 36.

⁶ This doctrine is thus set forth in a somewhat extreme form by Lord Esher in his dissenting opinion in a case already cited: "If there was a defect in the machine so as to make it dangerous to workmen using it, it would be no answer to say that, though the master used a machine that was dangerous to his workmen, no one up to that time had invented a better one, and that it was the best machine theretofore manufactured. The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would show it to be dangerous to the workman using it. I am prepared to say that, if a careful consideration would show a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workmen, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman if he is thereby injured." *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371.

gency that one of the men whose duty it is to attend to it may, by negligently absenting himself from his post, cause it to operate in such a manner as to injure another servant.⁷

An accident attributable to what is merely a condition of the materials on which the employees were working, and necessarily incident to the business in which they were engaged, does not constitute a cause of action.⁸

An appliance is not defective simply because an accident results from its being subjected to an unexpectedly severe strain.⁹

[A wire stretched over a railroad track not sufficiently high above a freight car to clear an employee standing on it is not a defect in the "ways," under the Alabama statute.¹⁰]

1676. [673] Defective system; employer liable for.—Under the various employers' liability acts, as is also the case at common law (see chapter XLVIII., *ante*), the master is "no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery, than for injuries caused by a defect in the machinery itself." In other words, "a master is responsible, in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used."¹

In many instances, it will be observed, the adoption of a defective

⁷ *Robins v. Cubitt* (1881) 46 L. T. N. S. 535.

⁸ *Welch v. Grace* (1897) 167 Mass. 590, 46 N. E. 387, where the court rejected the contention that the death of an employee, due to subsequent explosion of a misspent blast which, owing to the character of the rock in which it had been placed, failed to explode in the first instance, should be deemed to be caused by a defect in the "ways, works, or machinery" of the employer.

The slippery condition of a ladder at the bottom of a shaft in a coal mine is not a "defect." *O'Neill v. Wilson* (1858) 20 Sc. Sess. Cas. 2d series, 427.

An open hatchway in a vessel while loading is not a defect in the ways, works, and machinery. *Bamford v. G. H. Hammond Co.* (1906) 191 Mass. 479, 78 N. E. 115.

Where a sawyer tending a shingle saw of a pattern in common use, and in good condition, was injured while using his hand to pull out a shingle from underneath the saw, it was held that no defect was predicable, and if

there was any defect, the workman was *volens*. *Guthrie v. W. F. Hunting Lumber Co.* (1910) 15 B. C. 471.

⁹ As, where a scaffold swings so violently, after a gutter which is being wrenched from the side of a building comes off with unexpected ease, that the servant engaged in the work is thrown down. *McLean v. Cole* (1899) 175 Mass. 5, 55 N. E. 458.

¹⁰ *Hubbard v. Central R. Co.* (1908) 131 Ga. 658, 19 L.R.A.(N.S.) 738, 63 S. E. 19.

¹ Lord Watson in *Smith v. Baker* (1891) A. C. 325 (p. 353), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, where a verdict was allowed to stand which found negligence in the system, where the plaintiff was injured by the fall of a stone from a crane which worked over his head intermittently, while he was engaged in drilling, and was thus prevented from being on his guard to avoid danger when, in the course of the work, the stones lifted by the crane were swung round over his head.

system virtually resolves itself into negligence in the exercise of superintendence. Under such circumstances a default of this kind

The absence in hoisting machinery of a sufficient safeguard against such a probable occurrence as a slip in the management of the machinery is a defect in the system. *Stanton v. Scrutton* (1893) 9 Times L. R. (Q. B. D.) 236, 62 L. J. Q. B. N. S. 405, 5 Reports, 244.

A master cannot be held liable as for a defective system, where the evidence is that the plaintiff, a boy, was injured by the sudden starting of a brick press while he was cleaning out the under part with his hands during a temporary stoppage of the machinery, but it is also shown that he had been warned not to use his hands for this purpose. *Race v. Harrison* (1893) 9 Times L. R. 567, 10 Times L. R. 92.

One who has contracted to take down a building which has been gutted by fire cannot be held to have adopted an improper method of doing the work, where he arranges to remove one of the walls piecemeal by means of a scaffold constructed alongside the wall of the adjacent house. Hence, a workman injured by the fall of the former wall against the latter cannot recover on the theory that the omission to shore the wall to be demolished was negligence, inasmuch as the process of shoring would have been fully as dangerous as that of erecting a scaffold. *McManus v. Greenwood* (1885) 52 L. T. Journ. (Q. B. D.) 160. The court of appeal reversed the judgment of the divisional court (1886) 2 Times L. R. 603. But the question whether the method of demolition adopted was defective was not discussed, the reversal being put upon the ground that defendant, although he knew that there was imminent danger of the collapse of the wall, and that the workmen were ignorant of the conditions, did not give them any warning.

A servant injured by an explosion of gunpowder is not entitled to go to the jury on the question whether the system of work was defective, where the complaint merely alleges that the powder was stored in a magazine five minutes' distance from the work, in small barrels; that, when it was desired to fire a charge, a barrel was carried from the store and opened at the place of work; and that while the plaintiff was firing a charge a gust of wind carried a piece

of fuse to a barrel from which powder had been taken, thus causing the powder to explode and injure him. Such allegations indicate rather the occurrence of an accident through the carelessness of the servant himself in not covering the barrel while the charge was being fired. *Mulligan v. M'Alpine* (1888) 15 Sc. Sess. Cas. 4th series, 789.

An employer may be found liable on the ground of a negligent arrangement of his plant, where he places a steam crank in such a position that live cinders from the boiler furnace may fall at a place where workmen are putting in blasts of gunpowder, and fails to provide some means for intercepting those cinders. *Grant v. Drysdale* (1883) 10 Sc. Sess. Cas. 4th series, 1159.

This principle was, strangely enough, quite lost sight of in a case which recently came before the Ontario court of appeal. *Sim v. Dominion Fish Co.* [1901] 2 Ont. L. Rep. 69. There it was correctly decided that the plaintiff was entitled to recover at common law upon a special finding that the master had made no provision for the inspection of appliances like that which caused the injury. But in the course of his opinion Chief Justice Armour took occasion to observe that, if the right of recovery had depended upon the employers' liability act, it would have been necessary to send the case back to another jury to determine whether some employee superior to the plaintiff was aware that the appliances were defective. It is manifest that this theory as to the effect of the verdict is erroneous. The declaration of the jury that the defendant had made no proper provision for the inspection of the appliances in question was clearly tantamount to a declaration that his system was defective in this regard. The finding, therefore, was expressive of a fact which implied personal negligence on the part of the master himself, and it was wholly unnecessary to ascertain whether the particular defect which caused the injury was known to a superior employee.

A mining company is liable to a workman who, while replacing on a track some cars that had been derailed, is struck by a car which ran down a grade and threw him against a set of

may be referred either to the category which is covered by this provision of the act, or to that which is discussed in the next subtitle.

1677. [674] "Not discovered or remedied, owing to the negligence," etc.—a. Generally.—The qualifying declaration in this statute, by which liability is excluded unless negligence can be predicated of the failure to discover and remedy the defect which caused the injury, merely embodies, so far as the employer himself is concerned, the common-law doctrine that negligence cannot be imputed to a person who is not shown to have had actual or constructive knowledge of the abnormally dangerous conditions from which the injury resulted. See chapter XLIII., *ante*.¹ The imposition of liability for the defaults of the class of agents designated by this clause may be regarded as being, for practical purposes, a legislative adoption of that doctrine of non-delegable duties which has been evolved, independently of statutes, in most of the American states. See chapter LXIV., *ante*.

b. "Not discovered."—Whether the gravamen of the servant's complaint be the default of the master himself or of his agents in failing to discover a defect, the existence or absence of culpability is tested by considerations of precisely the same kind as those which are applied in common-law actions. The servant cannot succeed in his action where neither the employer himself nor his representative within the meaning of this subsection had knowledge, actual or constructive, of the existence of the defect which caused the injury,²

exposed cogwheels some 10 feet to one side of the place where he was working. *Snow v. Crows' Nest Pass Coal Co.* (1907) 13 B. C. 145.

¹The converse proposition which is implied in this doctrine—*viz.*, that a master is culpably negligent if he permits the continuance of abnormally dangerous conditions which, by the exercise of due care, he might have ascertained—suggests a reason for doubting the correctness of the decision of the Ontario court of appeal, which is criticised on another ground in the preceding section. *Sim v. Dominion Fish Co.* [1901] 2 Ont. L. Rep. 69. It seems not unreasonable to say that, for the purposes of sustaining the judgment, a court of review would have been warranted in construing the finding of the jury, that the defendant had made no provision for a proper inspection, as being equivalent to a declaration by the jury that the defect in question would have been discovered

if such an inspection had been made. This would be tantamount to saying that the master ought to have known of the defect, and was therefore as culpable as if he had actually known of it and failed to remedy it. If this view be correct, the finding virtually attributed personal negligence to the master, and there was clearly no necessity to obtain the opinion of the jury upon the question whether the defect was known to a superior employee.

²*Groves v. Fuller* (1888) 4 Times L. R. (Q. B. D.) 474 (plaintiff nonsuited); *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38; *Morgan v. Hutchins* (1890) 59 L. J. Q. B. N. S. 197, 38 Week. Rep. 412; *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100, per Fry, L. J., followed in *Rudd v. Bell* (1887) 13 Ont.

nor where there was no reason to apprehend the particular casualty which occurred.³

On the other hand, the servant is entitled to recover if the master himself, or an employee who was discharging the functions indicated by the cases which are cited in subdivision d of this section, might by the exercise of proper care have discovered the defect in question.⁴

The mere fact that no accident has happened for several years does not prove that the master ought not to have known there was

Rep. 47; *Black v. Ontario Wheel Co.* (1890) 19 Ont. Rep. 578; *Louisville & N. R. Co. v. Campbell* (1893) 97 Ala. 147, 12 So. 574; *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128; *Wilson v. Louisville & N. R. Co.* (1887) 85 Ala. 269, 4 So. 701.

The mere fact that a stick which broke while being used as a lever was old and had been long in use will not justify a finding that the employer ought to have known the stick to be defective. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581.

Under the original Massachusetts act the common-law rule established by *Mackin v. Boston & A. R. Co.* (1883) 135 Mass. 201, 46 Am. Rep. 456, that a railway company was not liable for the negligence of its car inspectors, was declared not to have been changed in regard to foreign cars received merely for forwarding. *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169. Compare also *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128. But this decision is no longer a correct statement of the law since the passage of the amendatory act of 1893, chap. 359, declaring that the mere fact of a car being in possession of a railroad company makes it a part of its "ways, works, or machinery." See § 1658, *ante*.

³ *Booker v. Higgs* (1887) 3 Times L. R. (Q. B. D.) 618. Recovery denied for lack of positive evidence on this point in a case where a laborer was injured by the fall of a bank of earth which he has been ordered by the foreman to excavate by entering a hole in a wall against which the earth lay.

⁴ *Walsh v. Whiteley* (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38.

Evidence that the defect might have been discovered if the instrumentality

had been examined by a skilled person will justify a verdict for the servant. *Thomas v. Great Western Colliery Co.* (1894) 10 Times L. R. (C. A.) 244. *Fraser v. Fraser* (1882) 9 Sc. Sess. Cas. 4th series, 896 (rope broke).

A judgment for the plaintiff will not be disturbed where he was injured by the breaking of a bolt not shown to have any latent defect, and the evidence was that, although it had been subjected to usage which tended to diminish its strength, its strength had not been tested, as it should have been, with reasonable frequency. *Iruin v. Dennystown* (1885) 22 Sc. L. R. (Sc. Sess. Cas.) 379.

The fact that the machinery which caused the accident was changed after it occurred is admissible as evidence that the master knew the machinery to be defective. *Dodd v. Dunton* (1890) 16 Vict. L. Rep. (L.) 531.

Evidence that defects in a truck had existed for several weeks prior to the accident is relevant on the question of negligence. *Kansas City, M. & B. R. Co. v. Webb* (1892) 97 Ala. 157, 11 So. 888. (See, generally, § 1032, *ante*.)

A finding that a foreman should have seen that a plank which gave way was cross-grained and knotty, and consequently unsafe to walk upon in the position in which it was placed, will not be disturbed. *Caldwell v. Mills* (1893) 24 Ont. Rep. 462.

Where employees were injured by the falling of a derrick, evidence that it was set up so as to allow a vertical play of the goose neck and guy plate of 4 inches, and that the usual play of such parts in similar derricks was but $\frac{1}{4}$ of an inch, is competent to show that, by the exercise of ordinary care, the employers could have ascertained that it needed better adjustment for safety. *McMahon v. McHale* (1899) 174 Mass. 320, 54 N. E. 854.

danger. "Long immunity from accident does not prove absence of carelessness. It may only prove long-continued habitual negligence."⁵

In determining the question whether the instrumentality ought to have been inspected by the defendant or his agents, the fact that it was furnished by a competent contractor, or that an express statement as to its condition had been made by such a contractor, under circumstances in which it was apparently justifiable to rely upon his opinion, is in England deemed to be conclusive against the inference of negligence.⁶

c. "Not remedied."—A remedy of a "defect in the condition of the machinery" does not mean putting the machinery in perfect condition for working purposes, but the removal of the source of danger to employees, which may be done by a temporary device, as well as by permanent repairs.⁷

The failure to stop a machine which is not working properly is a failure to "remedy" its defects.⁸

Negligence cannot be inferred where a defect came to the knowledge of the master or superior so short a time before the accident that there was not sufficient time to remedy it.⁹

When the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach.¹⁰

⁵ *Thomas v. Great Western Colliery Co.* (1894) 10 Times L. R. (C. A.) 244, reversing decision of divisional court.

⁶ A master is not liable for injuries caused by the fall of a staging which only the day before had been erected by a contractor. He is not, under such circumstances, bound to inspect the staging himself or to employ anyone specially to inspect it. *Kiddle v. Lovett* (1885) L. R. 16 Q. B. Div. 605, 34 Week. Rep. 518, per Denman, J. (sitting without a jury). The master had paid a sum of money to the servant, and was suing the contractor to recover the amount. It was held that he could not maintain the action.

No negligence is proved where a foreman, relying upon the assurance of a contractor engaged in reinstating a building which had been partially destroyed by fire, that one of the walls had been safely shored up, sends his subordinates back to work near it, after having withdrawn them when he noticed the unsafe condition of the fabric.

Moore v. Gimson (1889) 5 Times L. R. (Q. B. D.) 177, 58 L. J. Q. B. N. S. 169.

⁷ *Willey v. Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395. Defendant had argued that it was not liable because the defect could not have been permanently remedied before the accident.

⁸ *Bacon v. Dawes* (1887) 3 Times L. R. (Q. B. D.) 557.

⁹ *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, 10 So. 87.

¹⁰ *Smith v. Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, Lord Watson said (p. 354) "The employer may, in such cases, protect himself either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent."

The master cannot avail himself of the defense that the defect or obstruction by which an employee was injured was due to the act of a stranger, where it was not remedied or removed within a reasonable time after notice.¹¹

d. "Person intrusted with the duty," etc.—To bring an employee within this description there should be evidence showing that he was charged with the specific duty of keeping the defective instrumentality in proper condition.¹² But it is not necessary to show that he was discharging the functions of a superintendent.¹³

The negligence of a superior employee not charged with that duty, who attempts, at the request of a servant who is using an appliance, to remedy a defect therein, is not imputed to the master.¹⁴ Nor is the clause applicable to an employee whose duty it is, under a rule of his master, to examine for his own security the appliances which he uses.¹⁵ Still less is the master liable for the negligence of a mere

¹¹ *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357.

¹² The employer has been held liable for the negligence of the following agents:

An assistant road master whose duty it is to inspect cars and have them run upon the repair track when they are found to require repairs. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

An employee charged with the duty of fixing a tube in a boiler. *Schwoob v. Michigan C. R. Co.* (1907) 13 Ont. L. Rep. 548.

A supervisor and section foreman in a case where there was a defect in a switch. *Kansas City, M. & B. R. Co. v. Webb* (1892) 97 Ala. 157, 11 So. 888; *Alabama G. S. R. Co. v. Davis* (1898) 119 Ala. 572, 24 So. 862.

A lineman sent out to search for and remedy a defective insulation on an electric wire. *Wiley v. Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395.

A carpenter who understands and looks after machinery, although subject to the orders of a superintendent who is also a salesman. *Copithorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915.

An employee in charge of the stables of a street car company, one of whose horses was in an unfit condition to be worked. *Haston v. Edinburgh Tramway Co.* (1887) 14 Sc. Sess. Cas. 4th series, 621.

A person charged with the duty of

constructing a high platform for the servants to work on. *Linden v. Trussed Concrete Steel Co.* (1909) 18 Ont. L. Rep. 540.

A "fireman" of a mine whose duty it is to inspect the workings before the miners go to work, and report as to the state of the ventilation. *Cowler v. Moresby Coal Co.* (1885) 1 Times L. R. (Q. B. D.) 515.

Any person to whom a railroad company intrusts the duty of seeing that an engine is repaired so as to make it fit to be safely used. *Schwoob v. Michigan C. R. Co.* (1905) 9 Ont. L. Rep. 86, affirmed in (1905) 10 Ont. L. Rep. 647.

In *Canadian Coloured Cotton Mills v. Talbot* (1897) 27 Can. S. C. 198, it was held that evidence showing that an employee called a "loom-fixer," whose duty it was to examine a loom, after being notified that something was wrong with it, had failed to make an examination, justified submitting the case to the jury. And see *Woods v. Toronto Bolt & Forging Co.* (1906) 11 Ont. L. Rep. 216.

¹³ *Copithorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915, where the master was held liable for the negligence of one who attended, under the superintendent's orders, to the adjustment of machinery.

¹⁴ *Thomas v. Bellamy* (1900) 126 Ala. 253, 28 So. 707. Compare § 1664, note 6, *ante*.

¹⁵ *Memphis & C. R. Co. v. Graham*

laborer working under or with others, even though it may be a part of his duty at some particular moment in the progress of the work to look after and attend to certain instrumentalities.¹⁶

Negligence on the part of the employer in respect to providing machinery, or seeing that it is in proper condition, cannot be predicated from the fact that fellow servants of the injured person used an appliance, without any authority, for a purpose for which it was neither suited nor furnished.¹⁷

[A locomotive engineer is not a person in charge of machinery, within the meaning of the Pennsylvania act.¹⁸]

1678. [675] Abnormal conditions resulting from the use of the machines; how far regarded as defects.—Injuries resulting from these abnormal conditions which, in all kinds of industrial work, are temporarily created by the user of the appliances furnished by the master, are not considered to be caused by “defects” within the meaning of these statutes. “The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes.”¹ Especially is this rule applicable when the abnormal con-

(1891) 94 Ala. 545, 10 So. 283 (conductor and brakeman denied to be “persons intrusted,” etc.).

In *United States Cast Iron, Pipe, & Foundry Co. v. Granger* (1911) 172 Ala. 546, 55 So. 244, the court, after quoting the text and citing the *Graham Case* said: “So, without assuming to comprehensively define the duty intrusted, under this feature of the statute, and confining the observation to the nature and scope of the duty so intrusted, it may be safely said that the duty, when the inquiry involves the relation of an employee ranking, in his ordinary sphere, as a laborer merely, must be general, in the sense of effect, as regards the safety of others than the employee using the appliance, and not merely transitory, as the result of the progress of the service in which he is employed.”

¹⁶ *O'Connor v. Neal* (1891) 153 Mass. 281, 26 N. E. 857, where the court refused to hold the master liable for the negligence of a painter's assistant, who aided his principal in moving from place to place the planks and barrels from which a temporary scaffold was constructed, and adjusted one of the barrels so carelessly that the scaffold collapsed.

¹⁷ *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586.

¹⁸ *Remmert v. Pennsylvania R. Co.* (1909) 18 Pa. Dist. R. 372.

¹ *Whittaker v. Bent* (1897) 167 Mass. 588, 46 N. E. 121, denying recovery for an injury resulting from the temporary dampness of moulds used in an iron foundry, which can be ascertained only at the moment when they are set up, the reason assigned being that the moulds were small and numerous, the danger transitory, and any further inspection than that of employees setting them up impracticable.

The absence of stanchions on the sides of a trolley is not a “defect,” where the placing of such stanchions is the duty of the servants who put on the load. *Corcoran v. East Surrey Ironworks Co.* (1888) 5 Times L. R. (Q. B. D.) 103, 58 L. J. Q. B. N. S. 145.

The liability of a bank of earth which an employer is engaged in leveling for the purpose of grading the land of a third person, and upon which laborers are at work, to fall when undermined, if not properly shored up, is not a “defect in the ways,” etc. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

ditions would not have existed if the plaintiff himself had done his duty.² In cases of this class the only ground on which the master can be held liable is that he was guilty of negligence in not warning his servants of the increased risk to which they would, for the time being, be exposed.³

A defect in the "ways" is not predicable, unless there is some alternation in the permanent condition of the way itself. Obstacles lying on or near the way, which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it, are not within the purview of this provision. *McGiffin v. Palmers Shipbuilding & Iron Co.* (1882) L. R. 10 Q. B. Div. 5, 52 L. J. Q. B. N. S. 25, 47 L. T. N. S. 346, 31 Week. Rep. 118, 47 J. P. 70, denying recovery where a car on which a workman was conveying heavy iron balls struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway on which the car ran, the result being that one of the balls fell on him.

The words "ways, works, and machinery" do not cover a pile of lumber in the yard of a lumber dealer. *Campbell v. Dearborn* (1900) 175 Mass. 183, 55 N. E. 1042.

To the same effect see the following cases, where the abnormal conditions were of the nature mentioned in the memorandum of the facts appended to the citations. *Willets v. Watt* [1892] 2 Q. B. (C. A.) 92, 61 L. J. Q. B. N. S. 540 (temporary removal of the cover of a catch pit lying in the line of a path along which servants had to pass in the course of their duties); *May v. Whittier Mach. Co.* (1891) 154 Mass. 29, 27 N. E. 768 (employee stumbled over some small pieces of wood which had been piled against the back of a planing machine near which he had to pass, and was hurt by his hand coming in contact with the machine); *Kansas City, M. & B. R. Co. v. Burton* (1892) 97 Ala. 240, 12 So. 88 (car left standing on a railway track), overruling on this point *Highland Ave. & Belt R. Co. v. Walters* (1890) 91 Ala. 435, 8 So. 357; *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325 (oil box standing near the track, which came in contact with plaintiff's foot while he was standing on the pilot of

an engine, and threw him off); *Carroll v. Willcutt* (1895) 163 Mass. 221, 39 N. E. 1016 (presence of a ledge stone on a scaffolding).

Both on the principle applied in these cases, and also on the ground that the accident was an unexpected one, it has been held that a master could not be held liable under the statute for an injury due to a railway tie with a projecting spike in it, which had been taken up with a view to repairing it, and placed by the side of the road, where the cause of the injury was the fact that a horse which the plaintiff was leading was frightened and backing against him, knocked him down upon the tie. *McQuade v. Dixon* (1887) 14 Sc. Sess. Cas. 4th series, 1039.

Whether the proximate cause of the injury was the negligence of a fellow servant in regard to the mere use of appliances of the work is primarily a question for the jury. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

² A verdict for the plaintiff should be set aside, where his own evidence shows that, if the machine had been properly attended to by himself, the accident would not have happened. *Kay v. Briggs* (1889) 5 Times L. R. (Q. B. D.) 233.

An employer is not liable for the death of an employee while laying pipe in the bottom of a sewer trench in process of construction by the employer, through the caving in of the walls of the trench, due to insufficient shoring and bracing, where such employee was himself intrusted with superintendence of the shoring and bracing, and paid higher wages because of it. *Conroy v. Clinton* (1893) 158 Mass. 318, 33 N. E. 525. This particular situation, however, would seem to be more appropriately referred to the conception of an inability to recover, predicated from the contributory negligence of the injured person.

³ *Willets v. Watt* [1892] 2 Q. B. [C. A.] 92, 61 L. J. Q. B. N. S. 540.

The temporary nature of the abnormal conditions complained of will not, however, protect the master if they amounted to a structural alteration of the appliance in question, and that alteration was made by the employee in charge of it.⁴ *A fortiori*, where such a structural alteration was intended to be permanent the servant will not be excluded from the benefits of the statute simply for the reason that the new arrangements were only completed the day before the accident.⁵ Moreover, it would seem that conditions which, in the first instance, are merely temporary in their nature, will, if they are allowed to become permanent, be assimilated, for the purposes of these statutes, to defects inherent in the substance of the instrumentalities themselves.⁶

When the master keeps a readily accessible stock of simple appliances, he is not bound under the statute, any more than at common law, to see that a servant asks for a new one when that which he has been using is worn out.⁷

The decisions just cited suggest that the temporary or permanent nature of the defect is not the true differentiating factor in this class.

⁴ See *Tate v. Latham* [1897] 1 Q. B. [C. A.] 502, 66 L. J. Q. B. N. S. 349, 75 L. T. N. S. 694, holding the absence of the guard of a saw to be a "defect," where it had been temporarily removed by the sawyer. This decision practically overrules the *dictum* of Fry, L. J., that the defects contemplated by the statute are those of a "chronic character." *Willets v. Watt* (1892) 2 Q. B. 92. In the report in 61 L. J. Q. B. N. S. 540, the phrase used is "somewhat chronic." It was pointed out in the more recent of these cases by Bruce, J. (divisional court), that this theory of the Lord Justice is not necessary to sustain the conclusion arrived at. That conclusion, indeed, might well be put upon the ground that no negligence was established, as the catch pit into which the plaintiff fell had been opened to allow work to be done, and was left unfenced because it was not possible to do the work while a fence surrounded it.

⁵ *Copithorne v. Hardy* (1899) 173 Mass. 400, 53 N. E. 915 (shaft attached to the ceiling of a room by brackets and screws, held not to produce conditions belonging to that transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities).

⁶ This seems to be the rationale of a

Scotch case in which it has been held that a manhole at the side of a railway in a mine, so obstructed with rubbish that a miner is unable to use it as a refuge when cars are approaching is a "defect in the ways." *Ferris v. Cowdenbeath* (1897) 24 Sc. Sess. Cas. 4th series, 615.

⁷ There can be no recovery for the death of an employee, caused by the breaking of a wooden lever by which a fellow workman was helping to raise a heavy iron door on its hinges, causing the door to swing down and strike an iron lever held by deceased, driving it into his abdomen, in the absence of any evidence that the broken stick was defective, or, if so, that the defect could have been discovered. *Allen v. G. W. & F. Smith Iron Co.* (1894) 160 Mass. 557, 36 N. E. 581. The court said: "The whole matter was in the hands of the deceased. He was the person in immediate charge of the furnace. If a new stick was needed, it was his business to know it. The primary duty rested on him; not on the superior officer. Again, if a new stick had been needed, it could have been obtained of the carpenter by the deceased at any time. The defendant kept a stock of lumber of the proper size on hand, and the deceased only had to ask for what

of cases, and that the essential questions are rather (1) whether the abnormal conditions were mere incidents in the progress of the work, or structural; and (2), supposing them to be of the latter description, whether they were brought about by the act or volition of the employee who was in charge of the instrumentality to which the injury was due.

1679. [676] Defects in temporary appliances constructed by the servants themselves not deemed to be chargeable to the employer.—

A special application of the principle exemplified in the preceding section is the doctrine enforced in several American cases, that there can be no recovery under this provision of the statute, where the injury was the direct result of the negligent manner in which the servants themselves constructed a temporary appliance from adequate and suitable materials furnished by the master.¹ This rule

he wanted. If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach."

One of a number of chains furnished for use as required is regarded, when it is applied to the purpose for which it was designed, as a permanent instrumentality, and not one of those small things which go through a rapid course of wearing out and replacement, as to which the rule is that it may be left to the judgment of the workmen when one of them is to be discarded. The making of a link for such a chain, therefore, is not one of those merely transitory adjustments which the master is under no personal obligation to see carefully performed. *Haskell v. Cape Ann Anchor Works* (1901) 178 Mass. 485, 4 L.R.A.(N.S.) 220, 59 N. E. 1113.

¹The action has been held not maintainable where the cause of the injury was one of the following appliances:

Two ladders selected by employees from a supply furnished by the employer, and fastened together for use in painting a building. *McKay v. Hand* (1897) 168 Mass. 270, 47 N. E. 104. The court said: "From the description of the ladder which broke, it is difficult to see from the evidence that the defendant was negligent in keeping it among his lot of ladders and in permitting it to be used; and if the sole negligence was that the ladders were

fastened together and improperly placed against the house, that was the fault of the plaintiff and his fellow workman, and it was known to and appreciated by the plaintiff at the time. A ladder may be a sound light ladder of sufficient strength to be used by itself, but not suitable to be made the butt of two ladders fastened together."

A temporary staging put up for the purpose of erecting a building. *Burns v. Washburn* (1894) 160 Mass. 457, 36 N. E. 199.

A temporary staging put up by workmen themselves who are slating a roof. *Reynolds v. Barnard* (1897) 168 Mass. 226, 46 N. E. 703.

A temporary staging used by painters in painting the walls of a building. *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199.

The master cannot be held liable as for a defect, where a scaffold falls, owing to the fact that a barrel by which it was supported was placed upon some rubbish of an accidental or temporary character, on the floor of the room where the plaintiff was at work. *O'Connor v. Neal* (1891) 153 Mass. 281, 26 N. E. 857.

The employers' liability for injuries sustained by the giving way of a part of a staging is not established where the evidence does not tend to show that they furnished the staging as a completed structure, or that they assumed to exercise any control or supervision as to how it should be built or kept or adapted for work, or that they failed

is the counterpart of the doctrine which, in common-law actions, prevents recovery under similar circumstances (see chapter LXV., subtitle C, *ante*), and is subject to the same qualification as that doctrine, *viz.*, that it does not protect the master, if the defective appliance was one which he was bound to furnish in a completed condition.² From the case cited it would appear that the servant has the burden of proving the existence of such an obligation, whenever the appliance was one which was of an essentially temporary description, and was intended to be used only for the particular piece of work then in progress.

Another possible qualification of the rule is that the master might be held responsible if the temporary appliance was one constructed by a superintending employee, unless it should be held that proof of negligence on the part of such employee would not sustain an allegation of injury caused by a "defect," and that, under the circumstances supposed, the complaint must be based on the words of the provision in the following subsection of the act. In the absence of any direct authority on the point, all that can be said is that, in any case where it may be uncertain whether the master can be held liable simply on the ground of the existence of a defect, it would be well to insert an alternative count averring negligence in the exercise of superintendence.

1680. [677] Duty of servant to report defects.—a. Statutory and common-law doctrines compared.—In a case decided a few years after the passage of the English act, it was laid down by Smith, J., that the defense which is based upon the fact that the servant failed to communicate his knowledge of the defect to the employer or his representative is a new one, given by the statute.¹ According to

to furnish a sufficient quantity of suitable materials, or that they employed incompetent workmen, but does show that the staging in use in the building had been in the care of the workmen themselves for several months. *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

The gravamen of a declaration showing that the plaintiff, a journeyman painter, was injured owing to the negligence of another painter in failing to fasten properly his end of the hanging scaffold on which they were working, is the negligence of a fellow servant in handling or using an appliance, and therefore no cause of action under the

statute is alleged. *Ashley v. Hart* (1888) 147 Mass. 573, 1 L.R.A. 355, 18 N. E. 416.

The provisions of § 6242 of the Ohio Gen. Code 1910 do not apply to a temporary scaffold erected on the land of a third person by a carpenter, for the use of a bricklayer in laying a wall. *Mason v. Ferguson* (1910) 31 Ohio C. C. 623.

² See *Brady v. Norcross* (1899) 172 Mass. 331, 52 N. E. 528.

¹ *Weblin v. Ballard* (1886) L. R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. 395, 54 L. T. N. S. 532, 34 Week. Rep. 455, 50 J. P. 597.

Lord Watson, also, the provision now under discussion puts the employer in a more favorable position than that which he occupied under the common law.² The view of that distinguished judge has been adopted by the supreme court of Canada.³ A similar doctrine

² See *Smith v. Baker* [1891] A. C. 325, where, in the course of his comments on the clause, he remarked: "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favor of the employer."

³ *Webster v. Foley* (1892) 21 Can. S. C. 580. It is perhaps not amiss to introduce here a few remarks as to the singularly unsatisfactory character of the expositions of principles in this case, more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to three of the questions propounded by the trial judge were to this effect: (1) That the plaintiff had complained of the defect to the person who appeared to be the proper person to receive a complaint; (2) that the defendant did not know of the defect; (3) that the member of the defendant firm who was himself acting as manager ought to have been cognizant of the defect.

In view of the first of these findings it is not apparent why the effect of the failure of the servant to notify the master of the defect should have been regarded as a material question in the case. There is no intimation that the evidence was insufficient to warrant the conclusion arrived at by the jury, nor that the notification was inadequate to charge the master with knowledge, for the reason that it was made to a mere fellow servant. So far as the report shows, it may have been made to the manager of the concern, who, as was stated in the third finding, was one of the partners in the defendant firm. But, even if we assume that the first finding could not be treated as an element in the case for some reason, evi-

dential or doctrinal, which is not disclosed, there still remains the difficulty that the jury also declared that this managing partner "ought to have been cognizant" of the defect. That this finding was, so far as defendant's liability was concerned, equivalent to the first finding, is indisputable, both on principle and authority. See *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748, where Blackburn, J., remarked, during the argument of counsel, that an allegation that an instrumentality was known by the defendant to be in an unsafe condition is established by proof that he "ought to have known" that it was in that condition. Other English cases which declare or assume that liability on the master's part is negated by his ignorance of the defect only where it appears that such ignorance was excusable are *Weems v. Mathieson* (1861) 4 Macq. H. L. Cas. 215; *Felltham v. England* (1866) L. R. 2 Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 7 Best & S. 676; *Paterson v. Wallace* (1854) 1 Macq. H. L. Cas. 748; *Roberts v. Smith* (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469; *Webb v. Rennie* (1865) 4 Fost. & F. 608. For the American decisions to the same effect see § 1024, *ante*. In view of this doctrine the finding in question manifestly puts the master in the same position as if notice of the defect had actually been given by the servant, and rendered it a mere matter of supererogation to inquire whether or not he was relieved from liability by the servant's failure to give notice. The defendant firm was plainly answerable on the simple ground that one of its members had been personally negligent in not remedying a defect of which he had constructive knowledge. See *Mellors v. Shaw* (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, 9 Week. Rep. 748; *Ashworth v. Stanwix* (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85.

Thus far we have been discussing the

seems to prevail in Alabama.⁴ But with all deference to these authorities, it seems open to doubt whether the theory thus propounded is correct. There is, it is true, no English decision which in terms lays down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury which he may thereafter receive, owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common-law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle by virtue of which the servant's action was absolutely barred whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The natural result was that, although the failure of the servant to report or complain of a defect was mentioned in some of the cases,⁵ this fact was never treated as a material element in the case, the master's defense being regarded as complete without any reference to the question whether the servant had com-

case on the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the construction put upon the decision in the reporter's headnote, and the reliance placed by Strong, J., upon the passage from Lord Watson's opinion, where this is undoubtedly the import of the words, shows that the court intended, at all events, to assert the doctrine that the servant did not forfeit his right of action by not giving notice of a defect which was known to him. But it may be desirable to advert, in passing, to the ambiguity of phrase "had no notice," which, so far as the words themselves are concerned, may also be taken to mean "had no actual knowledge." The significance of this fact when considered with reference to the substance of the findings above referred to is obvious. Such a construction of the phrase would render Mr. Justice Strong's remarks applicable to the second of those findings, and upon this circumstance, taken in connection with the further circum-

stance, already commented upon, that the findings as to the complaint made by the servant, and the master's possession of constructive knowledge of the defect were not deemed to be conclusive in the servant's favor a plausible argument might be based, that the court also intended to stand sponsor for the doctrine that it is the existence or absence of actual knowledge that determines whether the master is or is not liable. Such a doctrine, as is very plainly shown by the English cases cited above, would be erroneous. But the inquiry is not worth pursuing in the present connection. We have merely drawn attention to the point as being one of the obscure aspects of a case which, to say the very least, is neither a model of lucid statement nor a favorable exemplification of the manner in which a court of review should deal with the special findings of a jury in actions of this sort.

⁴ See *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146.

⁵ For example, *Skipp v. Eastern Counties R. Co.* (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23.

municated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to show his acquiescence in the conditions,—that is to say, as a circumstance corroborating a presumption, already absolute, that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of general principles, the correctness of Lord Watson's theory seems to be equally disputable. It is impossible to adopt it without accepting the conclusion, that, if a jury has in a common-law action found that the servant was guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict's even being rendered may be readily conceded; but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

The general effect of the American decisions in this connection is inconclusive for the same reason as that which has been adverted to in commenting on the English cases. The failure to report a defect is usually treated merely as a cumulative ground for denying the servant's right of recovery, and not as the breach of a specific duty.⁶

Inasmuch as a servant frequently finds himself relegated to his common-law rights owing to his failure to give due notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her colonies, where it has not yet been determined how far the doctrine enunciated in *Smith v. Baker*⁷ may, when the question arises, be held to have modified,

⁶ See, for example, the language used in *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 224, 25 L. ed. 612, 617; *McQueen v. Central Branch Union P. R. Co.* (1883) 30 Kan. 691, 1 Pac. 139; *Pollich v. Sellers* (1890) 42 La. Ann. 623, 7 So. 786.

⁷ [1891] A. C. 325, 60 L. J. Q. B. N.

S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. It is significant that in this case Lord Watson was prepared to hold that, apart from the act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work.

in common-law cases, the theory of the older decisions, that the servant's acceptance of a risk is to be inferred, as matter of law, from his continuance of work with a knowledge of its existence. See § 1192, *ante*. In Massachusetts it seems to be immaterial, in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks is a question for the jury where the statute is relied upon has been definitely repudiated in recent decisions.⁸

b. Position of a servant who fails to report a defect.—In an action brought under a statute which merely declares that the servant cannot recover unless he reports the defect, it has been held that, although he has failed to make the report, and goes on working without knowing that the master is aware of the defect, he may recover for any injuries which he may thereafter receive by reason of its existence, if, as a matter of fact, the master does know of it.⁹

⁸ *O'Maley v. South Boston Gaslight Co.* (1893) 158 Mass. 135, 47 L.R.A. 161, 32 N. E. 1119; *Davis v. Forbes* (1898) 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20. See § 1293, *ante*.

⁹ *Southern R. Co. v. McGowan* (1907) 149 Ala. 440, 43 So. 378. The court said: "The trial court properly overruled the demurrer to the replication to the third plea, and properly sustained the one to the rejoinder. It was not necessary for the plaintiff to notify the defendant of the defect, if the defendant already knew the same. The law does not require the doing of a useless thing. The case of *Thomas v. Bellamy* (1900) 126 Ala. 253, 28 So. 707, merely repeats the statute, which relieves the servant of giving notice if he is aware the master knew of the defect; but we do not think that the statute means that the servant is required to give the notice, whether the master was aware of it or not, unless he knew the master knew it. If the master knew of it, then the servant is relieved of giving the notice, although he may not know that the master knew of the defect."

Some of the earlier Alabama cases, as, for instance, *Mobile & B. R. Co. v. Holborn* (1887) 84 Ala. 133, 4 So. 146, and *Thomas v. Bellamy* (1900) 126 Ala. 253, 28 So. 707, appear to lay down a contrary rule; but, as is shown in the *McGowan Case*, they merely repeat the words of the statute.

The view taken by earlier Alabama cases is discussed in *Columbus & W. R.*

Co. v. Bradford (1888) 86 Ala. 574, 6 So. 90, where the effect of the Alabama act was thus explained: "The existing law was supposed to fall short of the attainment of justice, in that, and only in that, no action was allowed for the negligence of a certain class of persons. The statutory purpose was to charge the master for the negligence of this class of persons in his employment, in the same manner, under like conditions, and to the same extent as he was before charged for his own negligence, or that of superior employees. In the effectuation of this purpose, it became necessary to go further than a mere declaration of liability for the negligence of the fellow servants of the plaintiff, and to guard against a construction of that declaration which would give to the employees redress for the fault of their coemployees, to which they would not have been entitled for that of the employer, or of a superior servant of the common master. To this end—to preserve to the master the same defense against the negligence of his servants as he had against the consequences of his own carelessness—the legislature declared that he should not be liable if the complaining employee knew of the defect or negligence which caused the injury, and, not being aware that the fact was already known to the master, or some person superior in authority, failed to communicate his knowledge to the employer or superior employee."

By the express words of some of the statutes a servant is not bound to give information of a defect where he knows that it has already been discovered to the master.¹⁰

[Of course, if the servant had no knowledge of the defect because of its peculiar character, the fact that he gave no notice thereof will not avail the master.¹¹

The statute does not impose upon the servant the duty of inspection.^{11a}]

c. Position of a servant who has reported a defect.—The rights of action acquired by a servant who duly reports a defect in compliance with the statute, and then goes on working, depend largely upon the significance attributed the maxim, *Volenti non fit injuria*. A full discussion of the meaning and effect of this maxim will be found in chapter LIV., *ante*; but it is necessary to state in the present connection the result of the decisions, in so far as they have a direct bearing upon the provision now under review.

In an oft-cited case Lord Esher expressed the opinion that the effect of this provision was that the servant was always entitled to recover if he gave information of the defect.¹² Bowen, L. J., did not refer specifically to this point, but the theory upon which he and Fry, L. J., proceeded in giving judgment against the plaintiff, *viz.*, that the maxim was, under the circumstances, a bar to the action, necessarily implies a disapproval of the doctrine that the right of recovery became absolute as soon as the servant had made a complaint to the proper person.

In another case decided in the same year Lord Esher remarked that it was very difficult to give a sensible construction to the provision, and enunciated a view somewhat different from that inti-

¹⁰ *Truman v. Rudolph* (1895) 22 Ont. App. Rep. 250.

If the defect is actually known to the master or a superior servant, the employee may recover although he gave no notice of it. *Anderson v. Milliken Bros.* (1908) 123 App. Div. 614, 108 N. Y. Supp. 61, affirmed in (1909) 194 N. Y. 521, 87 N. E. 1114.

If an employee knows that the superintendent knows of a defect, it is not incumbent upon him to notify the superintendent of it. *Keating v. Coon* (1905) 102 App. Div. 112, 92 N. Y. Supp. 474.

If the defendant or its employees who are superior to the plaintiff know of the defect alleged, it is unnecessary, by the terms of the statute, for the plaintiff to give them notice thereof. *St. Louis*

& *S. F. R. Co. v. Phillips* (1910) 165 Ala. 504, 51 So. 638 (Code of 1907).

¹¹ *Urquhart v. Smith & A. Co.* (1906) 192 Mass. 257, 78 N. E. 410; *Murphy v. Marston Coal Co.* (1903) 183 Mass. 385, 67 N. E. 342.

Recovery is not barred on the ground that an employee failed to notify the employer of the defect, when he did not fully know and appreciate the situation. *Lynch v. M. T. Stevens & Sons Co.* (1905) 187 Mass. 397, 73 N. E. 478.

^{11a} *Grasselli Chemical Co. v. Davis* (1910) 166 Ala. 471, 52 So. 35.

¹² *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685 (p. 689), 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

mated in the earlier case, holding the meaning of the words to be that, if the servant did give notice, and the defect was not remedied, he might recover unless he was brought clearly within the maxim.¹³ The plaintiff's action was held by the majority of the court to be maintainable, and the fact that Fry, L. J., who had concurred with the views of Bowen, L. J., in *Thomas v. Quartermaine*, agreed in the judgment and that he did not give any intimation that his views had undergone a change since the earlier case was decided, shows that he did not intend to go to the length of holding that the servant had done everything that was required to give him an indefeasible right of action when he had given notice of the defect. The subsequent decision of the House of Lords in *Smith v. Baker*¹⁴ also falls short of the extreme theory suggested by Lord Esher in *Thomas v. Quartermaine*, as it simply decides that the servant does not forfeit his right of action merely because he goes on working after remonstrating against the manner in which the master's appliances are used.¹⁵

In Alabama it has been held that in order to fulfil his statutory duty as to the reporting of a defect, the servant had only "to give information thereof to the master or employer, or to some other person superior to himself, engaged in the service or employment of the master or employer;" and that a charge was properly refused which made it the duty of the servant to give "notice to the defendant, or to some person intrusted by it with the duty of seeing that its ways and plant are in proper condition."¹⁶ There is, possibly, some support for a similar rule in Ontario.¹⁷ [In an earlier Alabama case the court had apparently laid down a contrary rule.¹⁸]

¹³ *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647 (p. 656), 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, 17 Eng. Rul. Cas. 217.

¹⁴ [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

¹⁵ The testimony on the record was that one of the plaintiff's fellow workers had, in his hearing, complained to the foreman of the danger of slinging stones over their heads with the crane, and that he himself had told the crane driver that this was not safe. But in the various opinions delivered, these facts were referred to merely as evidence tending to show that the servant was fully aware of the risks he was running. The question whether the servant, by giving notice of the abnor-

mal danger, acquires an absolute right to recover damages for such injuries as he may thereafter sustain from the existence of those conditions, was not discussed.

¹⁶ *Cahaba Southern Min. Co. v. Pratt* (1906) 146 Ala. 245, 40 So. 943.

¹⁷ In *Sim v. Dominion Fish Co.* (1901) 2 Ont. L. Rep. 69, Armour, C. J. O., said that if the servant's right of action had depended on the statute it would have been necessary to send the case to a jury in order to determine whether a superior employee knew of the defect,—a remark which may perhaps be construed as an intimation that a notification to any superior employee would have been sufficient.

¹⁸ *Thomas v. Bellamy* (1900) 126 Ala. 253, 28 So. 707.

D. LIABILITY FOR THE NEGLIGENCE OF EMPLOYEES EXERCISING SUPERINTENDENCE.

1681. [678] Introductory.—The provision of the employers' liability acts which will be discussed in this subtitle is that which gives a servant the right to recover damages for an injury caused "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him, while in the exercise of such superintendence." On referring to the text of these statutes in subtitle A, *ante*, it will be found that these words constitute § 1, subs. 2, of the original English act, and also of the acts in force in Newfoundland, New South Wales, Victoria, Queensland, South Australia, New Zealand, and Alabama, and § 3, subs. 2 of the acts of Ontario, British Columbia and Manitoba.

A clause of the same tenor is found in the acts of Massachusetts, New York, Colorado, and New Jersey, an action being declared to be maintainable for an injury caused "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." By Mass. Stat. 1894, chap. 499, § 1, the following words were added to this clause; "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." The recently enacted New York act also embraces this provision.

The Indiana act, which in other respects follows the English one very closely, contains no provision expressly relating to superintending employees.

By § 8 of the English and Newfoundland acts it is declared that the expression, "person who has superintendence intrusted to him," means "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor." The corresponding provision in the acts of Ontario, British Columbia, and Manitoba is § 2, subs. 1, and runs as follows: " 'Superintendence' shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labor." There is no supplementary definition clause in the acts of Alabama, Massachusetts, New Jersey, New York, and Colorado, but the effect of the main provision in the two latter acts is evidently to give the servant a right of recovery for the negligence of agents performing functions not

materially different from those contemplated by the framers of other statutes. See further §§ 1683-1688, *post*, as to the persons who are deemed to be "exercising superintendence" within the meaning of each section of the statutes.

1682. [679] Conditions precedent to recovery; generally.—In order to recover under the provisions declaring employers to be liable for the defaults of servants exercising superintendence the plaintiff must establish these facts:

(1) That the servant was a "superintendent" within the meaning of the acts. (2) That the act which was the immediate cause of the injury was negligent. (3) That the act was done in the exercise of the controlling functions of the superintendent.

These evidential prerequisites to the maintenance of the action will be discussed seriatim in the following sections.

1683. [680] What employees are superintendents under the English, New York, Massachusetts, and Colorado acts.—*a. General remarks.*—The phraseology employed to define the class of persons for whose negligence the master is responsible is, it will be observed, not quite the same in these statutes. They all define a "superintendent" as an employee whose "sole or principal duty is that of superintendence." But the Massachusetts, New York, New Jersey, Pennsylvania, and Colorado acts omit the words which specifically exclude liability for the negligence of an employee who is "ordinarily engaged in manual labour." This complementary clause seems to possess little, if any, real significance, and to be, for practical purposes nothing but the negative expression of a conception which is adequately defined by that which precedes it. In view of the usual system upon which industrial establishments are conducted, it may be regarded as a necessary implication that an employee whose principal duty is that of superintendence is never "ordinarily engaged in manual labour." And the converse of this proposition also holds.

[In a Federal case construing the New York statute, it was held that the formal act of the board of directors of a corporation is not necessary to constitute one of its employees a superintendent.^{1a}]

b. Employees held to be vice principals.—That the negligent employee was "exercising superintendence" within the meaning of these statutes is obviously a warrantable deduction for a jury, whenever the evidence indicates that the authority wielded by him was sufficiently extensive to place him in the category of common-law vice

^{1a} *Proctor & G. Co. v. Williams* (1910) 106 C. C. A. 45, 183 Fed. 695.

principals as that term was understood in England before the judgment of the House of Lords in *Wilson v. Merry*,¹ abrogated the doctrine that masters are liable for the negligence of managing agents, and as it is still understood in all, or nearly all, the American states which stand outside the list of those in which the doctrine obtains that any superior servant represents the master in so far as he may be performing the function of giving orders.² The applicability of these provisions to all employees who are intrusted with the full control of the whole of an establishment, or one considerable department thereof, has never, it is believed, been disputed, and is taken for granted in several of the cases in which the actual questions discussed were whether the act which caused the injury was negligent, and, if so, whether the negligence was in the exercise of superintendence or in the performance of some other function.³ See §§ 1689-1691, *post*.

As regards the lower grades of employees, it may be said that, so far as any general principle can be extracted from the decisions, a court will not disturb a finding that the delinquent employee was exercising superintendence, if the evidence tends to show that he was in full charge of some specific piece of work, and invested with a discretionary power to determine the manner in which the general instructions of the employer or of some higher official should be carried out.⁴ In such cases the inference that the descriptive words of the statute are applicable is sometimes corroborated by specific testi-

¹ (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, 19 Eng. Rul. Cas. 132.

² A complete review of the cases showing the position of the courts of England, the colonies, and the United States with respect to the representative character of controlling employees will be found in chapter LXI., *ante*.

³ Testimony showing the acts of one alleged to be superintendent of defendant's foundry, in putting persons out of the shop, and what he said while doing so, is admissible as tending to show whether or not he was acting as superintendent. *McCabe v. Shields* (1900) 175 Mass. 438, 56 N. E. 699.

The master of a ship is a superintendent within the statute. *Trauffer v. Detroit & C. Nav. Co.* (1910) 181 Fed. 256.

It was apparently assumed without argument that a car despatcher was a superintendent, in *Doe v. Boston & W.*

Street R. Co. (1907) 195 Mass. 168, 80 N. E. 814.

⁴ In *Hurley v. Olcott* (1909) 134 App. Div. 631, 119 N. Y. Supp. 430, affirmed in (1910) 198 N. Y. 132, 28 L.R.A. (N.S.) 238, 91 N. E. 270, the court said: "The statute does not require that the person for whose negligence the master is made responsible shall be a general superintendent, but only that he shall be a person 'intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.'"

Under the New York statute the master is liable for the negligence of his foreman whose principal duty was that of superintendence, to the same extent as he would have been at common law, for his own personal negligence. *Hayward v. Key* (1905) 70 C. C. A. 402, 138 Fed. 34.

Under the New York statute a master who has sole charge of the naviga-

tion of a vessel is a "superintendent." *Trautler v. Detroit & C. Nav. Co.* (1910) 181 Fed. 256.

A carpenter who was directed by the foreman to move a gin pole from one building to another, with the assistance of a gang of men, may be found to be a superintendent. *Farrell v. B. F. Sturtevant Co.* (1907) 194 Mass. 431, 80 N. E. 469.

If the master appoints one of his servants to make a safe scaffold for his workmen, and that servant appoints another to perform the duty, the latter, while so engaged, is a vice principal. *Cleveland, C. C. & St. L. R. Co. v. Austin* (1906) 127 Ill. App. 281 (Indiana statute).

One who has charge of the work of setting telephone poles, directing the men where and how to set the poles, may be found to be a superintendent. *Barrett v. New England Teleph. & Teleg. Co.* (1909) 201 Mass. 117, 87 N. E. 565.

The boss of a gang of twenty-four men at work in a quarry, who gave orders to the men, who sometimes discharged men, and marked the places where the drilling was to be done, but never drilled himself, and was frequently the only man present to give any directions, is a superintendent. *Mahoncy v. Bay State Pink Granite Co.* (1903) 184 Mass. 287, 68 N. E. 234.

A superior servant who is known as the foreman by all the men on the work, and gives orders as to the prosecution of that work, may be held to be intrusted with and to be exercising superintendence in the service of the defendant. *Randall v. Holbrook, C. & D. Contracting Co.* (1904) 95 App. Div. 336, 88 N. Y. Supp. 681.

A foreman in charge of the laying of particular sections of a conduit, and from whom the orders under which the work was done came, and who employed and discharged the men engaged in the work, and the only manual labor which he performed was done in order to show how such work should be done, may be found to be a superintendent within the statute, although the whole undertaking was under the general charge of another person. *Pierce v. Arnold Print Works* (1902) 182 Mass. 260, 65 N. E. 368.

A car despatcher to whom is intrusted the management of cars on a street railroad is a superintendent within the

statute. *Fitzgerald v. Worcester & S. Street R. Co.* (1908) 200 Mass. 105, 19 L.R.A.(N.S.) 239, 85 N. E. 911.

A section foreman having charge of a gang of five men, whose duty it was, under the foreman's instructions, to unload or transfer freight from one car to another while he selected the cars that were to be unloaded, and checked the freight as it was transferred, may be found to have been intrusted by the railroad company with superintendence over the members of the gang, within the meaning of the statute. *Murphy v. New York, N. H. & H. R. Co.* (1904) 187 Mass. 18, 72 N. E. 330.

A foreman of a section gang upon a railroad, not at work himself, but looking on and seeing that the work is done, and, in addition to the performance of other functions, giving warning of the approach of trains to the section men, may be properly found to be a vice principal. *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070, distinguishing *Shepard v. Boston & M. R. Co.* (1893) 158 Mass. 174, 33 N. E. 508, where it was laid down in unqualified terms that a section foreman is not a person intrusted with and exercising superintendence, so as to render the railroad company liable for personal injuries to a section hand, occasioned by negligence in running a hand car on which the gang is riding.

Under § 42a of the New York railroad law, a foreman of track laborers is a vice principal. *Laplaca v. Lake Shore & M. S. R. Co.* (1908) 127 App. Div. 843, 111 N. Y. Supp. 797, affirmed in (1909) 194 N. Y. 562, 87 N. E. 1121. And an engineer is a vice principal of the brakeman on his train. *Breed v. Lehigh Valley R. Co.* (1909) 131 App. Div. 492, 115 N. Y. Supp. 1019.

An employee in charge of the work of loading machines into a wagon may be found to be a superintendent. *Cunningham v. Atlas Tack Co.* (1904) 187 Mass. 51, 72 N. E. 325.

A stevedore's foreman superintending a subdivision of the work of unloading a ship may properly be found to be a vice principal. *Wright v. Wallis* (1885) 3 Times L. R. (C. A.) 779.

Evidence that the delinquent was a section foreman who had immediate charge and superintendence of a gang of five men engaged in handling freight, and that it was his duty to take re-

mony which tends to show that the superior servant did not work, and was not expected to work, with his hands.⁵ But it does not appear that the absence of such testimony is of itself a sufficient reason for denying the plaintiff's right to recover. Compare § 1691, *post*.

It is also well settled that, if the existence of the other elements of liability is made out, a court will not say, as matter of law, that the plaintiff must fail in his action because the negligent employee did a certain amount of manual labor in connection with the work which he supervised. That fact is not conclusive upon the question whether his principal duty was that of superintendence.⁶ See also § 1691, *post*.

ceipts, check the freight into the cars, and see that it was loaded into the right cars, warrants a finding that his principal duty was that of superintendence. *Mahoney v. New York & N. E. R. Co.* (1894) 160 Mass. 573, 36 N. E. 588.

A subforeman or "pusher," who has power to direct the operations of men under him, is a "superintendent" under the New York statute. *Pennsylvania Steel Co. v. Lakkonen* (1910) 104 C. C. A. 513, 181 Fed. 325.

An employee in a spring factory who occasionally "set up the machines" for the operators, and "did a little of everything," may be found to be a superintendent. *Peterson v. Morgan Spring Co.* (1905) 189 Mass. 576, 76 N. E. 220.

An employee in a thread factory who has charge of the operatives of a certain class of machines, and whose duty it is to make all repairs, is a superintendent. *Gregory v. American Thread Co.* (1905) 187 Mass. 239, 72 N. E. 962.

One who has charge as foreman of a shift of six men, whose duty it is to look after everything in a certain department, who tells the men what to do, and who has the right to decide whether or not certain machinery should be run, is a superintendent under the New York statute. *Castner Electrolytic Alkali Co. v. Davies* (1907) 83 C. C. A. 510, 154 Fed. 938.

A stable foreman was assumed to be a superintendent, in *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, 17 Eng. Rul. Cas. 217.

⁵ See, for example, *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007,

where the delinquent was the foreman of a gang of men employed on a pile driver, with authority to employ and dismiss men, who frequently had charge of the work, and who gave all the directions which were given at the time the injury was received.

The jury is warranted in finding that an employee was a superintendent within the employers' liability act, where there was evidence that he was paid more than the other employees, that he did manual work only when he felt like it, that it was his duty to tell how many men he wanted, and to report them if they did not work properly, and that it was his duty to tell the men where to work and when to stop, and also that it was his duty to tell the engineer when to run the machinery and when to stop. *Hourigan v. Boston Elev. R. Co.* (1907) 193 Mass. 495, 79 N. E. 738.

One who is on the ground, dissevered from all other authority, and having full power at the time over the work to be done, even though only temporarily, may be "exercising superintendence" under the Massachusetts statute. *Munroe v. Fred T. Ley & Co.* (1907) 84 C. C. A. 278, 156 Fed. 468.

⁶ "If you have a person whose sole or principal duty is to superintend the work of others, the master will be liable for injuries to those who act in obedience to his orders, even though such superintendent should himself casually do manual labor." Smith, J., in *Kel-lard v. Rooke* (1887) L. R. 19 Q. B. Div. 585, 588.

See also *Crowley v. Cutting* (1896) 165 Mass. 436, 43 N. E. 197 (superintendent of quarry sometimes helped to attach the dogs by means of which

The fact that a foreman is paid higher wages than the ordinary laborers is a circumstance to be considered in connection with other

heavy stones were hoisted); *Reynolds v. Barnard* (1897) 168 Mass. 226, 46 N. E. 703 (superior servant here was a foreman of slaters); *McCabe v. Shields* (1900) 175 Mass. 438, 50 N. E. 699 (superior servant who participated in the work, and, in the absence of the employer, gave directions).

The expression, "person who has superintendence intrusted to him," means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor. *Falconer v. McCabe* (1901) 3 F. 210.

That the boss of a gang of workmen is engaged, a greater portion of the time, in working with his hands, does not necessarily show that he is not at the same time giving superintendence to the work, within the meaning of a statute making the employer liable for injury to his employee "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." *Cunney v. Walkcine* (1901) 58 L.R.A. 33, 51 C. C. A. 53, 113 Fed. 66. See also *Wellington v. Pelletier* (1909) 26 L.R.A. (N.S.) 719, 97 C. C. A. 458, 173 Fed. 908.

The mere fact that an employee did manual work also, even for the greater part of his time, does not necessarily require the conclusion that his principal business was not that of superintendence. *New England Teleph. & Teleg. Co. v. Butler* (1907) 84 C. C. A. 217, 156 Fed. 321.

Where the character and extent of the manual work performed by a superior servant is wholly within his own discretion, he does not become a fellow servant merely by performing some manual labor. *Robertson v. Hersey* (1908) 198 Mass. 528, 84 N. E. 843.

If a superintendent is negligent in causing an engine to be started, the fact that he himself does the manual work of starting it does not relieve the master from liability. *McPhee v. New England Structural Co.* (1905) 188 Mass. 141, 74 N. E. 303.

A superintendent who is directing the moving of a heavy bar of iron by means of a truck does not lose his character of superintendent by taking a board

and using it as a lever to raise a wheel of the truck out of a depression in the floor. *Meagher v. Crawford Laundry Mach. Co.* (1905) 187 Mass. 586, 73 N. E. 853.

It is error to nonsuit a plaintiff, where the evidence is that an employee denominated a "walking superintendent or foreman" gave the negligent order from which the injury resulted, although it was also proved that he helped his subordinates to perform the work to which his order related. The jury should be asked whether he was one of those persons whose duty it was not to work himself, but to see that others work. *Ray v. Wallis* (1887) 51 J. P. (C. A.) 519, affirming (1886) 3 Times L. R. (Q. B. D.) 777.

In *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675, it appeared that a staging which fell was erected in the yard of the defendant's sawmill, by the side of a wood pile, for the purpose of enabling the workmen to pile the wood higher. There was evidence for the plaintiff that the staging was built by C., who was in the defendant's employ, assisted by a member of the piling gang; that no one gave any orders to this gang except C.; that he was the foreman of the gang; that he sometimes worked with his hands; but worked when he pleased, and did whatever work he pleased; that when he was working he was overseeing the men and giving them directions; that he placed the men at work whenever he saw fit; and that he hired workmen at different times, upon their application to him for work. Two of the defendant's witnesses testified that C. had general authority over the gang of workmen. Held, that the jury would be warranted in finding that C.'s principal duty was that of superintendence.

Whether A., employed by the defendant as foreman of its yard but who at times worked with his own hands, is one whose "principal duty is that of superintendence," is a question for the jury, where the plaintiff was injured by the falling upon him of a large iron pump which, loaded upon a truck, he with others was moving from one place to another in the defendant's works, in accordance with A.'s directions. *Gelo-*

evidence upon the question whether his sole or principal duty is that of superintendence.⁷

[Frequently the court characterizes the act as one of superintendence, rendering the master liable if negligently performed, and the status of the negligent employee is not discussed.^{7a}]

c. Employees for whose negligence the master is not liable.—The courts have taken the position that something more than the mere exercise of control is necessary to constitute an employee a superintendent within the statute. This provision, in other words, is not

neck v. Dean Steam Pump Co. (1896) 165 Mass. 202, 43 N. E. 85.

The testimony of an employee that it took most of his time telling the other employees what to do and giving them their work, and that during the whole day he kept run of the men, and kept them at work, and told them what to do and what not to do, justifies a finding by the jury that his principal duty was that of superintendence, notwithstanding his later testimony that he worked about three quarters of the time with his own hands, and that during that time he was bossing the men. *Riou v. Rockport Granite Co.* (1898) 171 Mass. 162, 50 N. E. 525.

⁷ *O'Brien v. Look* (1898) 171 Mass. 36, 50 N. E. 458, where the servant was allowed to recover upon evidence showing that the delinquent, besides receiving higher wages, employed and discharged men, and that he had seventeen or eighteen men working under him and subject to his orders as to the time of beginning and quitting work, and as to the manner of its performance.

A "boss" of a gang of men engaged in the erection of a gas holder, who, when the superintendent was away, gave orders which the men were bound to obey, and who was paid a much higher salary than the other men, may be found to be a superintendent. *Devine v. Hayward* (1908) 128 App. Div. 705, 113 N. Y. Supp. 898.

In *Abrahamson v. General Supply & Constr. Co.* (1906) 112 App. Div. 318, 98 N. Y. Supp. 596, the negligent servant was the leader of a gang of structural iron workers, and received somewhat higher wages than the other members of the gang, but it was held that his act in giving a negligent signal for the starting of the engine was not an act of superintendence, rendering the master liable for the resulting injuries,

where the extent of his authority was merely to push the work along, and to keep the men in his gang intelligently employed.

^{7a} The sending out of a train by a train despatcher or one acting in his place is an act of superintendence. *McHugh v. Manhattan R. Co.* (1904) 179 N. Y. 378, 72 N. E. 312.

The act of a foreman in charge of moving timbers, in starting a horse used to draw the timbers, may be found to be an act of superintendence. *Coates v. Soley* (1907) 194 Mass. 386, 80 N. E. 464.

The selection of a piece of rope for lashing a ladder to be used in descending into the hold of a vessel is an act of superintendence. *Hourigan v. Boston Elev. R. Co.* (1907) 193 Mass. 495, 79 N. E. 738.

A direction that a machine in a soda ash factory be started, given by an employee to whom is intrusted the sole power to stop and start the machine, is an act of superintendence. *Guilmartin v. Solvay Process Co.* (1907) 189 N. Y. 490, 82 N. E. 725.

The removal of a support to a scaffold by a superintendent cannot be said to be the act of a fellow servant. *Berthelson v. Gabler* (1906) 111 App. Div. 142, 97 N. Y. Supp. 421.

The act of a foreman in examining a stone to find whether or not there was unexploded dynamite in it was not the act of a fellow servant of a laborer in the quarry. *Di Stefano v. Peckskill Lighting & R. Co.* (1905) 107 App. Div. 293, 95 N. Y. Supp. 179.

The jury may find that it requires an act of superintendence to decide the method of getting back onto a skid from which it had fallen, an unwieldy piece of iron, weighing 3 tons. *Devine v. Hayward* (1908) 128 App. Div. 705, 113 N. Y. Supp. 898.

construed as being declaratory of the "superior servant" doctrine, which prevails, under the common law, in some jurisdictions. See chapter LXI., subtitle D., *ante*. This conception of the meaning of the statute is doubtless warranted by the fact that cases of the mere exercise of control have been provided for by the succeeding subsection of the statute. But it seems to be fairly open to question whether some of the decisions cited below have not construed the facts with undue rigor to the plaintiff's disadvantage. The result of the view thus taken is that the master is not responsible for the negligence of an employee who habitually participates in the work done by his subordinates, and whose authority over them is limited to giving directions in respect to that work.⁸

⁸ It has been held that no action can be maintained for the negligence of the following employees:

A workman who was being assisted by another in the simple operation of unloading a cart. *Allmarch v. Walker* (1885) 78 L. T. Journ. (Q. B. D.) 391.

A man ordinarily engaged in manual labor, although he in fact superintended his fellow workmen as a "ganger" or "gang foreman." *Hall v. North Eastern R. Co.* (1885) 1 Times L. R. (Q. B. D.) 359 (new trial ordered to determine whether an employee in charge of a body of men engaged in loading cars was a superintendent or ordinarily engaged in manual labor).

A foreman who worked "at getting out lumber and piling it up, and in operating saws." *O'Brien v. Rideout* (1894) 161 Mass. 170, 36 N. E. 792 (plaintiff was a common laborer put to work at a saw).

One employed as a common painter, receiving the same pay and doing the same work as the other men on the job. *Adasken v. Gilbert* (1896) 165 Mass. 443, 43 N. E. 199.

Where there can be no pretense that the accident happened by reason of the negligence of an employee intrusted with and exercising superintendence, the statute is not in any way applicable. *McDonnell v. Oceanic Steam Nav. Co.* (1906) 74 C. C. A. 500, 143 Fed. 480.

The leader of a gang of structural iron workers whose duty is to keep things moving, to see that the men work to advantage, is not exercising superintendence in giving a signal to start a stationary engine for the purpose of carrying on a detail of the work. *Abra-*

hamson v. General Supply & Constr. Co. (1906) 112 App. Div. 318, 98 N. Y. Supp. 596.

A servant charged with the duty merely to give the signal when the engineer was to stop or start the elevator which the plaintiff was cleaning is merely a fellow servant of the plaintiff. *Falk v. Havemeyer* (1908) 123 App. Div. 657, 108 N. Y. Supp. 140.

The giving of a signal to raise or lower a hod-hoisting elevator cannot be held to be an act of superintendence, where any one of the employees could have given the signal. *McDonnell v. Andrew J. Robinson Co.* (1910) 136 App. Div. 598, 121 N. Y. Supp. 47.

Mere incidental authority to supervise the work of his assistants does not make a servant a superintendent under the statute. *Bovi v. Hess* (1908) 123 App. Div. 389, 107 N. Y. Supp. 1001.

A foreman whose duty was to see that the superintendent's instructions in regard to the erection of structural iron work were carried out, and to assist in the work, is not a superintendent in fastening down a boom. *Pratt v. McKee* (1909) 135 App. Div. 752, 119 N. Y. Supp. 967.

The operator of an elevator used by the employees is not a superintendent within the meaning of the statute. *Lee v. Western Electric Co.* (1909) 135 App. Div. 60, 119 N. Y. Supp. 775.

The superintendence referred to in the statute is something more than the superintendence required of a street car conductor and of a car driver. *McLaughlin v. Interurban Street R. Co.* (1905) 101 App. Div. 134, 91 N. Y. Supp. 883.

A person ordinarily employed as a laborer, but occasionally selected to act as a hatch-mouth man, whose duties at the time of the accident were to superintend the lowering of goods into the hold, and to take the chain of the winch ashore, and to attach the hook to the goods, and who had complete control over his squad, and could dismiss any member of it, who was paid by the hour, but received higher wages than the men under him, was a person ordinarily engaged in manual labor, and could not be regarded as a person having superintendence intrusted to him, in the sense of the act. *Falconer v. M' Cabe* (1901) 3 F. 210.

The fact that a workman by reason of his greater experience acted as the foreman of a small gang of linemen to which he belonged, and gave such directions as the nature of the work required, does not constitute him an employee whose sole duty or principal duty is that of superintendence. *Mulligan v. McCaffery* (1902) 182 Mass. 420, 65 N. E. 831.

A plumber does not, with reference to his helper, exercise superintendence, within the meaning of an employers' liability law rendering the master liable for injuries to employees caused by the negligence of a person intrusted with and exercising superintendence. *McConnell v. Morse Iron Works & Dry Dock Co.* (1907) 187 N. Y. 341, 10 L.R.A.(N.S.) 419, 80 N. E. 190, 10 Ann. Cas. 205.

An experienced lineman who was one of a gang of four engaged in the common work of digging holes, setting poles, putting on brackets, and stringing wires, who received the same pay as the other men and did the same work, cannot be said to be one whose sole or principal duty was that of superintendence, although, by virtue of his greater experience, he also acted as foreman of the small gang to which he belonged, and gave such directions as the nature of the work required. *Mulligan v. McCaffery* (1903) 182 Mass. 420, 65 N. E. 831.

The testimony of the foreman of gang of slaters, called by the employer, that he worked with his hands nine tenths of the time, is not conclusive as to that fact as bearing upon the question whether the witness's principal duty was that of superintendence, but presents a question for the jury, although

the fact, if proved, takes the case out of the statute. *Reynolds v. Barnard* (1897) 168 Mass. 226, 46 N. E. 703.

Evidence that a person employed by another as superintendent of the blasting of a ledge of rock by means of dynamite exploded in drill holes by electricity worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labor, which occupied the most of his time, will not warrant a finding that his "principal duty is that of superintendence." *O'Neil v. O'Leary* (1895) 164 Mass. 387, 41 N. E. 662.

In *Cashman v. Chase* (1892) 156 Mass. 342, 31 N. E. 4, the delinquent employee was the engineer of the engine by means of which a hoisting apparatus, used for transferring a ship's cargo to a lighter, was operated. His station was on the lighter, and the hold of the vessel was out of his sight. There were four men in the hold whose work was to collect the bundles of laths into heaps, around which they put a rope. When the fall was lowered the hook was attached to the rope, and a signal given to the stageman, who signaled to the engineer to raise or lower as the work in the hold required. The engineer employed the men in the first instance, and set them at work. He went into the hold on several occasions, for a few moments at a time, and showed them how to adjust the rope around the bundles of laths. He discharged and employed men. The unloading of the vessel took two or three days, and the men were paid by the defendant in person, who was there several times for a little while on each occasion. The engineer did no manual labor, except the running of the engine. "Upon the facts," said the court, "it might be competent to find that the engineer was to some extent a superintendent. The employment and discharge of workmen, setting them at work, and showing them how to do work, are acts consistent with superintendency. But these acts in connection with the evidence that his station was on the lighter, and his work there the continuous labor of running the engine in accordance with orders transmitted to him from others, show that neither his sole nor principal duty was that of superintendence."

1684. [681] —under the Alabama act.—As the master is by this act made liable for the negligence of employees who have “any superintendence intrusted to them,” and these very general words are not qualified by any limiting or explanatory expressions, the inference would seem to be that the legislature intended to create a larger class of vice principals than that which is constituted by the acts commented upon in the last section. But how much wider the responsibility of the master really is cannot be determined with any degree of precision from the decisions, as they stand. The only case in which it seems impossible to avoid the conclusion that the result would have been different if the action had been brought under the acts just mentioned is one in which it was held that a railroad company must answer for injuries to a brakeman resulting from the negligence of an engineer running the engine.¹ Under those acts, of course, an action may be maintained for such an injury, if the declaration is based on the subsection expressly declaring engineers to be vice principals. But in view of the decisions cited in the last section, by which the master’s liability for the negligence of an employee operating a piece of machinery is denied (see note 8), it is difficult to draw any other inference than that this ruling indicates a real difference between the scope of the Alabama and of the other acts. It must be admitted, however, that the real scope of this case, considered as one which illustrates an application of a general principle, and not as one which was determined with reference to the special facts involved, is rendered quite obscure by two later cases. In one of these an operator of a steam crane was treated as the representative of the master in respect to controlling its movements.² In another, recovery was refused for an injury received by a mechanic engaged in repairing a stationary engine, owing to the negligence of

A finding that a direction given as to the disposal of goods was an act of superintendence is not warranted, where the injured servant testifies that the delinquent used to give orders to some twelve or thirteen persons in the room where the goods were, but subsequently qualifies this statement by saying: “When anybody gave what I call orders with respect to the load or weight, it was to tell where the load was to go, and that was all there was of it.” *Sullivan v. Thorndike Co.* (1899) 175 Mass. 41, 55 N. E. 472 (holding an instruction to be correct by which the jury were told that, if the delinquent had the right to say to the plaintiff, “Take these

goods upstairs,” and it was the duty of the injured servant to obey this direction, that would be a superintendence; but that, if the delinquent merely pointed out where the goods were to go, that would not be a superintendence).

In an English case it was laid down by Smith, J., *arguendo*, that a “ganger, the foreman of a gang of laborers, who is working with his hands all the day, is not a vice principal.” *Kellard v. Rooke* (1887) L. R. 19 Q. B. Div. 585, 588.

¹ *Louisville & N. R. Co. v. Mothershed* (1893) 97 Ala. 261, 12 So. 714.

² *Anniston Pipe Works v. Dickey* (1890) 93 Ala. 418, 9 So. 720.

the engineer in starting the engine while the work was going on.³ As will be seen when we recur to the second of these cases, in a later section (1691), the essential and ultimate ground upon which the decision proceeded was that the negligent act, being a manual one, was not done in the exercise of superintendence. This element, however, though it was not specifically referred to, was clearly present in the other cases, and cannot legitimately be adduced as a differentiating factor. To obtain a ground upon which these cases can be reconciled, it seems necessary to have recourse to the theory relied upon in a still later decision, that, as to certain operations, a locomotive engineer exercises both control and superintendence, while as to others he exercises merely control, and that a railway company is liable only for negligence in respect to operations of the former description.⁴ But this is a refinement of doctrine for which it seems difficult to find a warrant in the ordinary meanings of the words thus opposed to each other. Superintendence cannot, it is submitted, be exercised without at the same time exercising control.⁵

In the other decisions in this state, the conclusion arrived at is not affected by the omission of the qualifying words inserted in the English, Massachusetts, Colorado, New Jersey, and New York acts. Employers have been held to be answerable for the defaults of all superior servants, whatever their rank, who are invested with discretionary powers as respects the choice of the means by which the particular work in hand shall be executed.⁶

³ *Dantzler v. De Bardeleben Coal & I. Co.* (1893) 101 Ala. 309, 22 L.R.A. 361, 14 So. 10. The court said: "Whether . . . there may possibly be a case of superintendency purely of machinery, or not, it is most clear to us that Gould's position involved no such case, dissociated from consideration of the fact that he had a helper, whose duties are shown in the evidence. Whether he had any superintendence intrusted to him, in view of this consideration, is a question not necessary to be decided in this case. If any such superintendency existed in that connection, it was not a general superintendency over the helper and the machines, not a general power of having the machines operated as he directed by the hand of the helper, but only a special superintendence to direct the helper to assist him, Gould, in the manual labor of operating them."

⁴ *Culver v. Alabama Midland R. Co.* (1895) 108 Ala. 330, 18 So. 827, hold. M. & S. Vol. V.—326.

ing, in an action by a fireman, that it was error to direct a verdict for the defendant, where the injury was caused by the negligence of a railway engineer in not seeing that the coal on the tender was loaded properly by the gang assigned to the work.

⁵ The definition of the word "superintend," in the Century Dictionary, is "to direct the cause and oversee the details of (some work, etc.); regulate with authority; manage."

⁶ Actions have been held maintainable where the negligent persons were the following employees:

The superintendent of a mine. *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442; *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793; *Sloss-Sheffield Steel & I. Co. v. Green* (1909) 159 Ala. 178, 49 So. 301.

The superintendent of an iron company's business. *Woodward Iron Co.*

1685. [682] —under the Canadian and Australian acts.—The precise significance of the express declaration in the Ontario, British Columbia, and Manitoba acts that the master is responsible, whether the person exercising superintendence is or is not ordinarily engaged in manual labor (see § 1681, *ante*), has not yet been determined. But the words preceding the clause certainly contemplate something different from that informal superintendence which is often exercised by one member of a gang of men who are sent, without any regularly appointed foreman, to do some particular piece of work.¹

[In a number of cases, the decision upon this question is undoubtedly the same as if rendered under the statutes discussed in the preceding sections.²]

The Australian acts employ virtually the same phraseology, and must therefore receive the same construction, as the English act.

v. Andrews (1896) 114 Ala. 243, 21 So. 440.

A yardmaster, superior to all other railroad employees present, who personally takes the place of the engineer and is running an engine at the time a car is derailed, or is present directing and controlling the engineer. *Louisville & N. R. Co. v. Mothershed* (1893) 97 Ala. 261, 12 So. 714.

A yardmaster while engaged in making up trains. *Kansas City M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88; *Louisville & N. R. Co. v. Bouldin* (1898) 121 Ala. 197, 25 So. 903, first appeal (1895) 110 Ala. 185, 20 So. 325; *Highland Ave. & Belt R. Co. v. Dusenberry* (1893) 98 Ala. 239, 13 So. 308; *Richmond & D. R. Co. v. Hammond* (1890) 93 Ala. 181, 9 So. 577; *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507.

A conductor. *Alabama Midland R. Co. v. McDonald* (1895) 112 Ala. 216, 20 So. 472; *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764; *Southern R. Co. v. Robertson* (1909) 7 Ga. App. 154, 66 S. E. 535 (Alabama statute).

The superintendent of a pile driver. *Southern R. Co. v. Shields* (1898) 121 Ala. 460, 77 Am. St. Rep. 66, 25 So. 811.

A superintendent or foreman employed by a street railway company. *North Birmingham Street R. Co. v. Wright* (1901) 130 Ala. 419, 30 So. 360.

The superintendent of a manufacturing company. *Decatur Car Wheel &*

Mfg. Co. v. Mehaffey (1901) 128 Ala. 242, 29 So. 646.

The superintendent of a wrecking crew. *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586.

The duty of a fire boss of a mine to examine the conditions of the mine, when gas is known to exist therein, before men are permitted to enter for work, is a duty of "superintendence." *Pratt Consol. Coal Co. v. Davidson* (1911) 173 Ala. 667, 55 So. 886.

An employee charged with the duty of superintending the employees in a blast foundry at night is a superintendent within the statute. *Williamson Iron Co. v. McQueen* (1906) 144 Ala. 265, 40 So. 306.

But the lowering of a push bar by a car hostler is not an act of superintendence. *Louisville & N. R. Co. v. Andrews* (1911) 171 Ala. 200, 54 So. 553.

¹ The fact that one of a small gang of workmen possessed more experience than the rest, and took upon himself to give directions as to the manner of executing a general order of their regular foreman with regard to a certain piece of work, is not of itself sufficient to show that he was exercising superintendence. *Garland v. Toronto* (1896) 23 Ont. App. Rep. 238, reversing (1895) 27 Ont. Rep. 154. Compare the cases cited under § 1683, subd. c, *ante*.

² A foreman intrusted with the duty of hiring men is a superintendent within the act. *Lawson v. Packard Electric Co.* (1908) 16 Ont. L. Rep. 1.

A "hooker" in defendant's coal yards,

1686. [683] Employees controlling machinery; status of.—The superintendence contemplated by the statutes is that which is exercised over other men, not over inanimate appliances.¹ So far as regards most of the jurisdictions, therefore, with which we are now concerned, it is clearly settled that a master cannot be held liable, as for negligence in the exercise of superintendence, where the culpable person was an employee whose duty was essentially the operation of a piece of machinery, though in so doing he necessarily exercised some control over other employees who were affected by its movements.² The Alabama decisions which point, in some measure at least, to a different theory, are discussed in § 1684, *ante*. Still less is the master liable where the negligent employee merely controlled the movements of machinery, in the sense that it was his duty to inform the employee actually operating it at what precise moment it was to be started or stopped.³

An employee whose usual work is merely to operate a machine is not made a vice principal by the fact that it is his duty, when the

who had put upon him the superintendence of the men doing the shoveling, the control of the motor to the extent of the place where and the time when the chain or crane was to be lowered with the empty buckets and hoisted with the full buckets, is a superintendent. *Flocks v. Canadian Northern Coal & Ore Docks Co.* (1911) 3 Ont. Week. N. 381, 20 Ont. Week. Rep. 652.

A road master is a superintendent. *White v. Canadian N. R. Co.* (1910) 20 Manitoba L. Rep. 57.

A foreman in charge of the construction of a concrete dam is a superintendent within § 3, subs. 2 of the act. *Quinto v. Bishop* (1911) 19 Ont. Week. Rep. 313, 2 Ont. Week. N. 1152.

A foreman of a gang of men engaged in blasting in a tunnel, who is charged with the duty to direct the men where to work, and to warn them of danger, is a superintendent. *Christensen v. Vancouver Power Co.* (1911) 19 West. L. Rep. (Can.) 619.

¹ *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88. See further, as to this case, § 1742, *post*.

But an employee who is operating a hydraulic hammer in riveting the plates of a boiler must necessarily be charged with the superintendence of the whole operation. *Shea v. John Inglis Co.* (1906) 12 Ont. L. Rep. 80.

² *Farnham v. New Bank Coal Co.* (1896) 23 Sc. Sess. Cas. 4th series, 722 (denying recovery where the negligence was that of the engineer of a hoisting cage in a mine).

A person in charge of the lever by which a steam hammer is worked, and whose duty it is to raise or let fall the hammer at the word of command, is not a "superintendent." *Hannan v. Hudson* 7 W. N. (New South Wales) 105.

See also § 1683, note 8, *ante*, where two other cases to the same effect are cited.

An elevator man is not a superintendent. *Carnahan v. Robert Simpson Co.* (1901) 32 Ont. Rep. 328.

³ No superintendence is exercised by a workman whose duty it is to guide by means of a guy rope the beam of a crane used for lowering sacks of wheat into a ship's hold, and to give direction when the chain-fall is to be lowered or hoisted. *Shaffers v. General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 656, 47 J. P. 327.

Nor by a brakeman engaged in loading a barge, whose duty is to give signals to the drawer of the crane when to raise and lower the bucket. *Clawton v. Mowlen* (1888) 4 Times L. R. (C. A.) 756.

machine gets out of order, to notify the employee who does the repairs to put it in order.⁴

1687. [684] Master liable though injured servant was not under the control of the negligent employee.—The mere fact that the “superintendence” was not exercised over the person hurt will not prevent him from recovering.¹

1688. [685] Deputy superintendents; liability for negligence of.—In some of the reported cases the servant’s right to recover for the negligence of an employee who was temporarily acting as foreman was denied on the ground that the evidence did not warrant a finding that his sole or principal duty was that of superintendence.¹ These decisions are unsatisfactory in this respect, that they do not

⁴ *Roseback v. Aetna Mills* (1893) 158 Mass. 379, 33 N. E. 577.

¹ *Williamson Iron Co. v. McQueen* (1906) 144 Ala. 265, 40 So. 306 (general manager killed by negligence of superintendent left in charge at night); *Ray v. Wallis* (1887) 51 J. P. (C. A.) 519.

It has been held by Denman, J., in a nisi prius case, that the statute is applicable wherever there is a common master, though the injured servant is employed in a department distinct from that controlled by the negligent servant. *Kearney v. Nicholls* (1880) 76 L. T. Journ. 63 (machinist killed owing to negligence of person superintending structural alterations on a mill).

In *Kansas City M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88, the court reasoned thus: “We are unable to agree with counsel that ‘the superintendence which comes within the contemplation of the statute shall be a superintendence over the person who complains of the negligence of the person intrusted with it.’ The remedy for negligence of superior in the control of inferior employees whereby injury results to the latter is given by subs. 3. Under subs. 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negligent and the injured person. If the former has superintendence intrusted to him, and is negligent in the exercise of it to the injury of any ‘servant or employee in the service or business of the master,’ whatever be the relation *inter se* of the servants, the master is made liable therefor by the very terms of the

statute. If a yard master charged with the duty of keeping the tracks clear should negligently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it cannot be doubted that the latter would have to respond in damages.”

¹ *Kellard v. Rooke* (1887) L. R. 19 Q. B. Div. 585, (1888) L. R. 21 Q. B. Div. 367, 4 Times L. R. 709, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820. There the theory upon which the court proceeded was that the very fact of the negligent person being merely a temporary superintendent acting as such during the absence of the defendant, who usually directed the work, showed conclusively that he was ordinarily engaged in manual labor.

In *Dowd v. Boston & A. R. Co.* (1894) 162 Mass. 185, 38 N. E. 440, the evidence was that under the general superintendent there was a foreman who hired men and exercised superintendence, more or less, in the superintendent’s absence, of that part of the work where the negligent employee was engaged, and that the negligent employee received orders from the superintendent or this foreman in regard to his own work and that of the men working with him, and gave these men directions about the work in the absence of the superintendent. The negligent employee was doing the same kind of work and receiving the same wages as his fellow laborers.

The temporary absence of a foreman does not make a common laborer designated to take his place a vice principal, so as to free the master from liability

deal with the question which is obviously involved in the facts in evidence, *viz.*, whether the spirit, if not the letter, of the statutes does not require the conclusion that any employee exercising superintendence for a definite period, as the deputy of the person regularly discharging that function, should be regarded as a representative of the master. On general principles, of course the master could not be held liable unless the delegation of superintendence was authorized, but, assuming this point to be settled in the servant's favor, it is submitted that, in cases of this type, a court is concerned solely with the relations of the parties during the actual period of deputed superintendence, and that, as to that period, the deputy may justifiably be said to be exercising duties of superintendence, whatever may be his functions at other times.

So far as Massachusetts is concerned, this is now the law by virtue of the clauses added in 1894 to the original statute. See § 1658, *ante*.²

[A similar provision is found in § 2 of the New York statute.³]

for injuries to him because of defects for which the foreman was responsible. *Cleveland, C. C. & St. L. R. Co. v. Beale* (1908) 42 Ind. App. 588, 86 N. E. 431.

In *Williams v. Citizens' S. B. Co.* (1907) 122 App. Div. 188, 106 N. Y. Supp. 975, it was held error to give a charge permitting a recovery for the negligence of a servant who acted as superintendent during the absence of the regular superintendent, when the latter was present at the time of the negligence and injury.

² Under this amendment a master has been held liable for the negligence of an employee in a small foundry who, when his master was not present, directed the men as to their work, but also participated in that work himself. *McCabe v. Shields* (1900) 175 Mass. 438, 56 N. E. 699.

Where the defendant's general superintendent intrusted to a subordinate the duty of supervising the work of lowering a heavy shaft, and did not take charge of the work himself, and was not present when the injury was received, the jury is warranted in finding that the employee who directed the work was acting as superintendent with the authority and consent of the defendant and in the absence of the defendant's superintendent. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

And see *Carney v. A. B. Clark Co.* (1911) 207 Mass. 200, 93 N. E. 647, following the *Knight Case*.

³ A foreman may be found to be exercising superintendence where the general superintendent intrusted to him all of the details of the work, which was so dangerous as to require supervision. *Anderson v. Pennsylvania Steel Co.* (1908) 61 Misc. 504, 115 N. Y. Supp. 570, affirmed in (1909) 132 App. Div. 928, 133 App. Div. 892, 118 N. Y. Supp. 1092 and by the court of appeals without opinion in (1910) 197 N. Y. 606, 91 N. E. 1109. The court said: If . . . the superintendent fails to perform the duties of superintendence, and, with the approval or consent of the employer, directs or permits another employee to assume the authority and actually perform the duties of superintendence, the employer cannot escape liability for such other employee's acts."

A machinist's helper who was assisting a millwright in taking down a dead shafting may recover for injuries received because of the negligence of the millwright, where the work was of such a character as to require supervision, and the general superintendent had directed the millwright to take the shafting down, and then paid no further attention to the manner in which the work was done. *Proctor & G. Co. v.*

1689. [686] Necessity of proving that the injurious act was negligent.—In cases where it is established or conceded that the person whose act or omission was the immediate cause of the injury complained of was a “superintendent” within the meaning of the statutes, and that such an act or omission was one pertaining to the exercise of superintendence, the plaintiff will still fail in his action unless he can show that the act or omission constituted a breach of duty. In the subjoined note are collected a number of rulings upon the simple question whether there was or was not negligence. Other cases involving similar groups of facts, but actually turning upon the question whether the employee alleged to be the defendant’s representative was exercising superintendence, are cited in the following sections.¹

Williams (1910) 106 C. C. A. 45, 183 Fed. 695.

An employee, although designated as foreman or inspector, may be found to be intrusted with and to be exercising superintendence where it is shown that at the time in question the general superintendent was absent, and the foreman was acting as such with the authority and consent of the employer, such authority or consent being evidenced by the manner of doing business, extending over a period of several years. *Faith v. New York C. & H. R. R. Co.* (1905) 109 App. Div. 222, 95 N. Y. Supp. 774, affirmed in (1906) 185 N. Y. 556, 77 N. E. 1186.

An employee who, in the absence of the regular superintendent or foreman, always took charge of the work of cleaning ashes from the engines in the ash pit of a railroad yard, and who had control of the men, directing them in the handling of the engines, decided whether the engines should be dumped, and when and where to be removed, and within his sphere was in supreme command, is acting as superintendent within the meaning of the employers’ liability act. *Mikos v. New York C. & H. R. R. Co.* (1907) 118 App. Div. 536, 102 N. Y. Supp. 995, affirmed in (1908) 191 N. Y. 506, 84 N. E. 1116.

A foreman who had been track supervisor for years, with full charge of loading and unloading rails, there being no evidence that there was any limitation of his authority, may be found to be exercising superintendence with the authority or consent of the railroad company. *Vincenzo v. Delaware*

& H. Co. (1908) 126 App. Div. 481, 110 N. Y. Supp. 589.

¹ (a) *Master not exempt from liability as matter of law.*—A superintendent may properly be found negligent in absenting himself from the place of work, and delegating his duties to another, when operations of peculiar difficulty and danger are to be carried out. *Cook v. Stark* (1886) 14 Sc. Sess. Cas. 4th series, 1.

Where the evidence leaves it uncertain whether it was the duty of the superintendent of a mine to stop or continue the running of a suction fan when a fire is discovered in the mine, and also how much time elapsed after the fire began before he learned where it was, and whether or not he acted promptly, and there is also testimony tending to show that the fan was stopped once and then started again, it is for the jury to say whether the superintendent was reasonably careful in seeing that the fan was not started again, even if it was properly stopped in the first instance, although a large number of people were congregated round the mouth of the mine, and it is not clear who started the fan for the second time. *Drennen v. Smith* (1896) 115 Ala. 396, 22 So. 442.

The question as to whether an injury to an employee from the explosion of dynamite in a conduit was due to the negligence of the superintendent of the contractor while exercising superintendence is for the jury upon evidence that the latter knew on the Saturday before the accident that a hole loaded with dynamite had not been fired, and that

In order to hold an employer for positive acts of negligence on the part of his superintendent, if these facts relate to a matter in

on the Monday following he directed the plaintiff to drill a new hole which pointed towards the loaded hole, and the explosion resulted from contact with the dynamite in drilling the new hole. *Dean v. Smith* (1897) 169 Mass. 569, 48 N. E. 619.

The question as to whether a superintendent was guilty of negligence, while exercising superintendence, in directing dynamite to be put into a hole while the rock was heated by a recent explosion, is for the jury upon evidence that, under such circumstances, an explosion was likely or liable to occur, and the explosion which followed and caused the death of the deceased was the result of such direction. *Green v. Smith* (1897) 169 Mass. 485, 48 N. E. 621.

Cotton waste in a chimney belonging to defendant company caught fire, and its superintendent sent a man up the chimney to put it out; and in doing so the man threw down two planks which were burning, which act the superintendent approved. Afterwards a second fire broke out, and the superintendent ordered plaintiff's husband and others to assist in putting it out, and the same man was sent up the chimney and threw down a burning plank, as at the former fire; and just as it was thrown, without warning, plaintiff's husband stepped inside the chimney and was instantly killed by the plank. Held that the fact that the employee who was sent up the chimney failed to give deceased warning of the danger from planks being thrown down did not necessarily show negligence of a fellow servant, since the jury might have found that the fellow servant did all that he should have done, and that it was the duty of the superintendent to give deceased warning. *Cote v. Lawrence Mfg. Co.* (1901) 178 Mass. 295, 59 N. E. 656.

Where the complaint alleges negligence on the part of defendant's superintendent, or one exercising superintendence, it is proper to admit evidence of statements to defendant's foreman, and in his presence, of the dangerous character of the trench and the need of bracing. *Bartolomeo v. McKnight* (1901) 178 Mass. 242, 59 N. E. 804.

The fact that it suited the convenience of the consignee of the cargo of a car

left standing in dangerous proximity to an adjacent track to unload it at that place will not relieve the railway company from liability for the negligence of the yard master in leaving it in that position, the consequence being that a switchman on the adjacent track was injured by collision with the car. *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88.

Allowing an oil box in a railway yard to be so near the track as to catch the foot of a switchman, casually allowed to slightly protrude beyond the end of the footboard of an engine on which he is riding, is negligence in the person whose duty it is to keep the tracks in the yard free from obstructions. *Louisville & N. R. Co. v. Bouldin* (1898) 121 Ala. 197, 25 So. 903, reiterating opinion expressed in first appeal in (1895) 110 Ala. 185, 20 So. 325.

The question as to negligence by a superintendent in failing to take any precaution to protect an employee while in an elevator well picking up paper is for the jury, whether the superintendent did or did not promise to look out for him, where the circumstances warrant an inference that he knew that such employee or some other employee would have to go into the well. *Scullane v. Kellogg* (1897) 169 Mass. 544, 48 N. E. 622.

An employer is answerable for the negligence of a superintendent in stationing a laborer underneath a large overhanging rock which was known to be likely to fall. *Collins v. Greenfield* (1898) 172 Mass. 78, 51 N. E. 454.

(b) *Cases in which negligence cannot be inferred.*—Negligence in regard to the piling of planks, some of which fell on plaintiff, cannot be inferred simply from the fact that the foreman had directed him to lower the stack, especially where he and his witness admit that they did not observe anything unsafe in the appearance of the stack. *Connell v. Surrey Dock Co.* (1887) 3 Times L. R. (Q. B. D.) 630.

A servant injured by the falling of bales of hay in a shed cannot recover on the ground of negligence of the superintendent, in the absence of evidence that he had anything to do with piling the hay, or that he appointed the par-

regard to which the employer has no duty to perform, it should be made clearly to appear that the employer has undertaken to do by

ticular place at which the servant was to work at the time of the injury, or that he knew or ought to have known that the hay was liable to fall. *Fitzgerald v. Boston & A. R. Co.* (1892) 156 Mass. 293, 31 N. E. 7.

An engineer is not necessarily chargeable with knowledge of the manner in which coal is loaded on the tender. *Utess v. Erie R. Co.* (1912) 204 N. Y. 324, 97 N. E. 722.

The mere fact that a ledge stone is left two or three days on a staging used in the construction of a building, projecting to such an extent that it is liable to fall if it is hit or the staging jarred, does not show that the foreman was negligent in exercising superintendence, where he had no occasion to visit that part of the work while the stone was there, and did not have actual knowledge that it was there, and the amount the stone projected could not be seen from below. *Carroll v. Willcutt* (1895) 163 Mass. 221, 39 N. E. 1016.

Where the evidence shows that while plaintiff was working in an elevator well, with a lighted lantern between his feet, shoveling a ground product of bone, rock, and slaughter-house refuse, defendant's superintendent started some machinery, which caused a current of air to carry the dust from such product to the flame of plaintiff's lantern, causing an explosion which injured plaintiff, he cannot recover where it does not also appear that such superintendent knew, or ought to have known, that the dust was inflammable, or that it was a matter of common knowledge that it was inflammable. *O'Reilly v. Bowker Fertilizer Co.* (1899) 174 Mass. 202, 54 N. E. 534.

Negligence cannot be predicated of the act of a foreman in failing to examine personally a shaky wall which he had requested a contractor,—an expert at such matters,—to shore up. *Moore v. Gimson* (1889) 5 Times L. R. (Q. B. D.) 177, 58 L. J. Q. B. N. S. 169.

A foreman has no reason to expect that an employee will, without any authority remove a stay from a scaffold erected in the course of building operations, and cannot be held liable for failing to discover such removal, and to see that other employees suffer no in-

jury from the dangerous conditions thus created. *Kelly v. Davidson* (1900) 31 Ont. Rep. 524.

An averment that defendant's foreman did not keep closed a trap door by which goods were raised and lowered between two floors of a laundry does not show negligence on his part. *Moore v. Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

An employee who, while rolling a cotton bale, was struck by another bale thrown down from a pile by a fellow servant, cannot recover for the injury sustained, although the defendant's superintendent previously told the fellow servant to "throw down cotton." Such a direction is construed, in respect to the master's liability, as being merely an order to throw the cotton in a proper way and in a proper place. *Gouin v. Wampanoag Mills* (1898) 172 Mass. 222, 51 N. E. 1078.

The foreman of a switching gang in a railroad yard, whose duty it is to direct on which track a train shall be put while it is being made, is not negligent as to an employee engaged in making up a train at one end of the yard, in failing to give special warning or notice as to cars at the other end of the yard on the same track, where the custom of the yard to switch cars in at both ends of the siding on the same track is well known. *Caron v. Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

A person charged with superintendence cannot be held guilty of negligence where the situation was as obvious to the plaintiff, who was an experienced hand, and the superintendent did not omit doing anything which, in view of the plaintiff's experience, he ought to have done. *Sampson v. Holbrook* (1906) 192 Mass. 421, 78 N. E. 127.

A telephone company is not liable for injuries resulting from its superintendent's ordering a lineman to climb a pole without examining the condition of the pole, where the lineman was experienced and understood the conditions as well as the superintendent. *La Duke v. Hudson River Teleph. Co.* (1908) 124 App. Div. 106, 108 N. Y. Supp. 189.

An operator of a steam crane is not chargeable with reckless indifference to

his superintendent that which he was not called upon to do. An act done voluntarily by the superintendent in that field, without the

consequences, in swinging back the crane in the usual manner, because of the presence of other employees in the way, when he knows that such employees are aware of the operation and are instructed to get out of the way of the crane, and they have always previously done so. *Anniston Pipe Works v. Dickey* (1890) 93 Ala. 418, 9 So. 720.

Proper superintendence of a foundry does not require that the superintendent must stand over every pot to see that it is properly filled, which the employees may see as well for themselves. *Tennessee Coal, Iron & R. Co. v. Bonner* (1909) 164 Ala. 57, 41 So. 145.

There is no obligation on the part of the general superintendent of a building to oversee every detail of the work. Hence his employer cannot be held liable on the theory that he was negligent in omitting to instruct masons accustomed to build their own scaffolds as to the way in which the work should be done, or to be present when any particular scaffold was being erected. *Burns v. Washburn* (1894) 160 Mass. 457, 36 N. E. 109.

The master is not responsible for the death of a workman killed, while hoisting planks to an upper story, by the fall through a hole in the floor of a heavy truck which a fellow workman was using, with the roller upwards, to land the planks, but which he had neglected to block, though means for so doing were very simple and always at hand. *O'Keefe v. Brownell* (1892) 156 Mass. 131, 30 N. E. 479. The court said: "When placed upon the floor with the roller down, the instrument could be easily moved about with a load resting upon a plank. When placed with the plank down, the instrument was intended to remain stationary, and beams or planks could then be moved by resting them upon the roller and moving them while so supported. The truck was in use by the latter method when the accident occurred. It was a movable tool, designed and adapted for various uses, and in different places about the building. It was complete and in good order, and only dangerous, as any heavy object is dangerous, if carelessly allowed to fall from above upon a person below. When used for

certain purposes, for which it was, among others, designed, it would have a tendency to be displaced by the motion of the articles put upon it, to facilitate the motion of which its roller was designed and adapted to be used while the truck was stationary. If so used at the edge of an open well, it might fall into the well; to prevent this, it could be fastened to the floor on which it rested, or blocked with a cleat. But when used as a vehicle on which to transport articles by its own motion, fastening or blocking would wholly prevent its use. The absence, therefore, of any appliance for blocking or fastening, did not make it a defective tool or machine. Like a barrow, an inclined plane, a roller, a screw, or blocking timber, and many other utensils used in building, it was to be often moved about, and the means of avoiding danger in its use varied constantly with its situation and the work. It was a common and well-known tool, and the duty of using it in a safe manner was the duty of the ordinary workmen who handled and used it, rather than a duty of the employer or a duty of superintendence. The means of blocking or fastening it when necessary were of the simplest, and always at hand, being only nails and bits of wood suitable for cleats. It was not the duty of the employer, but of the ordinary workmen, to see that they were used. The omission to use them was not negligence of a superintendent, or want of superintendence, but mere negligence of fellow workmen in the use of a familiar, simple, and complete tool well adapted to the work for which it was then in use, and for other work."

A superintendent in charge of the running of trains over a single track of a double-track road during a snow blockade, who ordered a west-bound train to proceed to a certain station on the east-bound track, was not negligent in failing to direct the switchman at such station to open the switch leading from the east-bound to the west-bound track, or so to set the signals as to indicate that it was closed, notwithstanding that a snow plow was on the east-bound track a short distance west of the switch, as he might assume that the

direction or approval of the employer, would not be an act of superintendence.²

1690. [687] Acts constituting negligence in the exercise of superintendence.—An analysis of the decisions shows that negligence in the exercise of superintendence is deemed to have been committed if the superintendent has been guilty of any of the various breaches of duty specified below. The authorities are arranged under headings designed to facilitate comparison with chapter LXII., *ante*, in which the official acts of common-law vice principals are classified. It will be observed that the acts there reviewed cover practically the same range of incidents as those which import liability under this subsection of the statutes.¹

switch would be rightly set, or, if not, that the signal would indicate that fact to the trainmen. *Fairman v. Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613.

It has been laid down that the mere fact that a foreman sees a workman doing a piece of work in an unusual manner, and does not interfere, is not a ground for holding the master liable for the consequences of what the workman does. *Milligan v. Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18. But this statement cannot be accepted without some qualification, as it may clearly be a duty pertaining to superintendency to see that an improper method of doing work is corrected. See next section.

A railroad company is not liable for the failure of a foreman to warn an employee of a danger of which the foreman was ignorant. *Chicago & E. R. Co. v. Lain* (1906) — Ind. App. —, 79 N. E. 547.

The master is not liable for the failure of a superintendent to take certain precautions, where there was no evidence, until the accident happened, to show that such precautions were necessary. *Mattson v. Phoenix Constr. Co.* (1909) 135 App. Div. 234, 120 N. Y. Supp. 566.

Negligence cannot be predicated of the failure of a superintendent to order a timber which was being carried, to be lowered sooner than he did, when he was not aware of any danger. *Bertholet v. J. W. Bishop Co.* (1904) 187 Mass. 32, 72 N. E. 342.

² *Shea v. Wellington* (1895) 163 Mass. 370, 40 N. E. 173, holding that an employee in a quarry could not recover

from the owner for the negligence of the superintendent in failing to tell him of a defective exploder given him by such superintendent for use, the reason assigned being that, no duty could be predicated to inspect the exploders, as they had been purchased from a reputable manufacturer.

¹ (a) *The adoption of an improper method of doing the work in hand.*—The master's liability is for the jury under the following circumstances: Where a staging fell under the injured servant in consequence of the superintendent's having ordered a whole cart-load of wood to be put on the staging, the usual custom being to put only half a load of wood on it at one time. *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675; *Feeney v. York Mfg. Co.* (1905) 189 Mass. 336, 75 N. E. 733.

Where the superintendent of a pile driving gang directed one of the gang to stop a car on which the pile driver was placed, by laying a crowbar on the track in front of the car while it was being drawn down a slight incline, a distance of about 5 feet, by attaching a rope to a heavy pile and setting the pile driver in operation, instead of moving the car to the proper place by means of crowbars, which was the customary mode. *Southern R. Co. v. Shields* (1898) 121 Ala. 460, 77 Am. St. Rep. 66, 25 So. 811.

Where a foreman failed to have a bank which was being undermined properly shored up. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

Where a foreman of a quarry undertook to have an unusually large stone

When the alleged act or omission was one which prima facie indicates a breach of the duty of a mere servant, the plaintiff cannot, in

hoisted without drilling holes in it so that it might be more securely held by the points of the dogs. *Crowley v. Cutting* (1896) 165 Mass. 436, 43 N. E. 197.

Where a superintendent of a factory started a loom which the operator had stopped for the purpose of cleaning. *American Mfg. Co. v. Bigelow* (1911) 110 C. C. A. 77, 188 Fed. 34.

Where a superintendent failed to give proper instructions as to the method of putting into the shears a heavy gate which was to be cut up preparatory to being melted. *Madden v. Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55.

Where a superintendent who was experienced in transporting timbers upon a gear of a given make, and knew that the road over which it was to be carried was rough and uneven, loaded a timber with its narrow sides at the top and bottom and directed the employees to get on and hold it down. *Gagnon v. Seaconnet Mills* (1896) 165 Mass. 221, 43 N. E. 82.

Where an engineer allowed or directed coal to be loaded in the tender of his engine in such a manner as to be dangerous to his fireman. *Culver v. Alabama Midland R. Co.* (1895) 108 Ala. 330, 18 So. 827.

Where the superintendent of a quarry instructs a laborer to unload an unexploded hole, and stands by him for several minutes while he is undertaking to do the work with an iron scraper. *Grinaldi v. Lane* (1901) 177 Mass. 565, 59 N. E. 451.

If a superintendent knew, or had reason to know, that there was danger of the caving of a trench, and had no materials for bracing it, and no power to procure them, it was negligence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent, the principal is answerable, and cannot escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting. *Connolly v. Waltham* (1892) 156 Mass. 368, 31 N. E. 302.

The risk that the plaintiff's employer—a quarryman—or his superin-

tendent, will negligently attempt to remove a charge of gunpowder by drilling into a hole that has been charged, before ascertaining that the charge has exploded, is not one of the risks of his employment which the plaintiff assumes. *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83, distinguishing common-law rule as exemplified by *Kenney v. Shaw* (1882) 133 Mass. 501.

In an action for injuries occasioned by the falling upon plaintiff of a large iron pump which, loaded upon a truck, he with others was moving from one part of the defendant's works to another, evidence as to other appliances which were at hand, and other methods which might have been used to move the pump, is admissible upon the question whether the defendant's superintendent was at fault in causing it to be moved as he did. *Geloneck v. Dean Steam Pump Co.* (1896) 165 Mass. 202, 43 N. E. 85.

In *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890, a heavy shaft which was being lowered slipped in the hitch of the chain fall by which it was lowered, and struck the plaintiff. It was held that it could not be said, as a matter of law, that there was no negligence of an employee for whose acts the master was responsible, inasmuch as there was evidence from which it might be inferred that the superintendent failed to see that the shaft was evenly balanced on each side of the chain fall by which it was supported, and that, although the hitch which proved defective had been made by one of the workmen, the superintendent had afterwards seen it and made no objection to it, and was thus guilty of a breach of duty in not seeing that everything was right.

In *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793, the plaintiff's decedent was suffocated in a mine in which a fire had broken out. It was held that the owners might properly be held liable on the theory, first, that it was the duty of the superintendent of a mine in which a fire started, while employees were in the mine, to telegraph for and have appliances for flood-

any event, recover under this provision of the statute, unless he shows that the person answerable for the conditions complained of was a

ing the mine sent by express, if the lives of the employees could not properly be saved by any other method, and, secondly, that the fact of the superintendent's having consulted the operatives as to the expediency of bratticing up the mine, and that in their opinion it was the best thing to be done, did not relieve the operator of the mine from liability for the death of an employee resulting from such action, where another course, by which his life could have been saved, should have been pursued in the exercise of due care and diligence. Third, that the proprietor of the mine should not be relieved from liability for the death of the employee on the ground that, because of the supersensitiveness of the superintendent's nerves, he failed to use proper means to save the employee's life.

A superintendent may be found negligent in allowing a heavy stone weighing about 5 tons to be placed on a sloping bed of stone chips, and to remain there a long time. *Lammi v. Milford Pink Granite Quarries* (1907) 196 Mass. 336, 82 N. E. 26.

The acts of a superintendent in placing barrels of sugar one upon the other, rim to rim, in the defendant's warehouse, so that the weight of the upper one crushed in the lower one, may be found to be negligence. *Mungovan v. O'Keeffe* (1911) 208 Mass. 304, 94 N. E. 277.

The mere fact of driving one car against another which the conductor knew might be undergoing inspection may be found to be negligence,—especially when the conductor knew that the car so driven had no brakeman upon it to check or control its speed, and, as the jury could find, no one was sufficiently near to it to be able to exercise such control before it would crash against the stationary car. *Anthony v. New York, N. H. & H. R. Co.* (1911) 208 Mass. 11, 94 N. E. 300.

(b) *The giving of improper directions with respect to particular details of the work.*—A foreman may be guilty of negligence in giving an order to hoist a pile while the fall is caught on the checking guard. *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

The act of an employee in charge of men engaged in lowering a safe, in directing the men when the safe stuck, for some reason not investigated by him, to pull all together, may be found to be an act of superintendence, and negligent. *Shannon v. Shaw* (1909) 201 Mass. 393, 87 N. E. 748.

An order to clean machinery in motion may be found to be a negligent one. *Marley v. Osborn* (1894) 10 Times L. R. (Q. B. D.) 388.

An order to go between cars on a siding, without ascertaining whether the cars were likely to be moved or not, may be found to be negligent, where the person giving the order assured the laborer that it could be done in safety. *Brulott v. Grand Trunk P. R. Co.* (1911) 24 Ont. L. Rep. 154, 19 Ont. Week. Rep. 514.

The act of a foreman of a yard gang in directing and hurrying a member of the gang to go between cars standing on a track while another car was being kicked down the track was an act of superintendence. *Onesti v. Central New England R. Co.* (1907) 121 App. Div. 554, 106 N. Y. Supp. 233.

A foreman who had power to stop machinery in case of emergency, in directing an employee to assist in making repairs, without stopping the machinery, is exercising superintendence. *Guilmartin v. Solvay Process Co.* (1907) 189 N. Y. 490, 82 N. E. 725.

An order by a superintendent, given to an elevator man while on his elevator, to leave the car at a certain floor and deliver a bundle, and the assurance that the superintendent would wait for him in the car until his return,—were acts of superintendence rendering the master liable for injuries due to the superintendent's moving the car while the elevator man was carrying out his instructions. *Martin v. Cornell* (1910) 136 App. Div. 585, 121 N. Y. Supp. 119.

The act of a superintendent supervising the raising of sand by an elevator, in directing the engineer to raise the elevator in response to an unexpected signal, was an act of superintendence. *Boyle v. McNulty Bros.* (1908) 129 App. Div. 412, 113 N. Y. Supp. 240.

Evidence that the superintendent of a street railway company gave an order to the motorman of a derailed car, which placed him in a dangerous position if a car should come forward on the other track, and that while the motorman was in this position he gave an order to the motorman of a car on the other track standing 6 or 8 feet from the end of the derailed car to come ahead,—is sufficient to warrant a finding that the superintendent was guilty of negligence contributing to the injuries of the motorman, who was caught between the guard rails of the two cars. *O'Brien v. West End Street R. Co.* (1899) 173 Mass. 105, 53 N. E. 149.

A foreman who, in the absence of the general superintendent, has charge of the prosecution of the work in excavating a tunnel, the preparation and firing of the blast, and the removal of the men to a place of safety, is the representative of the master, for whose failure properly to warn the men of an impending blast the master is liable. *McBride v. New York Tunnel Co.* (1905) 101 App. Div. 448, 92 N. Y. Supp. 282, second appeal (1906) 113 App. Div. 821, 99 N. Y. Supp. 571.

A complaint is not demurrable which alleges that a section hand was killed through the negligence of his foreman in charge of hand cars, in permitting such cars to be run at a rapid and reckless rate of speed in such close and reckless proximity to each other that they collided. *Highland Ave. & Belt R. Co. v. Dusenberry* (1893) 98 Ala. 239, 13 So. 308.

A section foreman is not, as matter of law, free from negligence in giving a signal for two hand cars moving close together rapidly over a trestle of a river bridge to check their speed at the same time, where a section hand on the rear car, understanding the signal properly, applies the brake in the customary way, but the rear car is not stopped before a collision with the front car. *Alabama Mineral R. Co. v. Jones* (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507, holding that an instruction based on the theory that the act of the section hand absolves the defendant from responsibility is properly refused. On the second appeal of this case (121 Ala. 113, 25 So. 814), it was held that the giving of the

signals simultaneously was not negligence, as a matter of law.

The boss of an employee is guilty of negligence in ordering the employee to pry an engine off "top center," where the steam would not move it, when he knew that the steam had been turned on, and that the engine would turn rapidly the instant it was moved off center; and the fact that the boss was himself the engineer, and had turned the steam on, is immaterial. *Sloss-Sheffield Steel & I. Co. v. Austell* (1909) 161 Ala. 418, 49 So. 685.

It is negligence for a superintendent to instruct a workman with only sixteen days' experience to remove a cap from a pipe leading to a caustic-soda kettle, without seeing whether the pressure is on or not. *Haley v. Solway Process Co.* (1908) 127 App. Div. 753, 112 N. Y. Supp. 25.

The failure of a train despatcher upon whom, by the rules of the company, were imposed the functions of the making up of trains and their despatch from the yard, to ascertain that an engine had been connected with cars, and that the employee engaged in that labor had withdrawn to a place of safety before giving the signal for the engine to move ahead, renders the company liable for resulting injuries. *McHugh v. Manhattan R. Co.* (1904) 179 N. Y. 378, 72 N. E. 312.

The issuance by a train despatcher of an order for a street car to proceed upon a single track, when he knew or ought to have known that another car from the opposite direction had not yet passed is negligence rendering the railway liable, although if the conductor had obeyed the rules he would not have proceeded. *Doe v. Boston & W. Street R. Co.* (1907) 195 Mass. 168, 80 N. E. 814.

A superintendent of an abattoir may be found to be negligent in directing an inexperienced employee to use both hands in pressing fat into a hasher. *Byrne v. Learnard* (1906) 191 Mass. 269, 77 N. E. 316.

The master is liable for the negligence of a foreman in directing the plaintiff to use appliances unfitted for the purpose. *Braunberg v. Solomon* (1905) 102 App. Div. 330, 92 N. Y. Supp. 506.

For the purposes of legal liability it is clear that the following defaults in respect to the direction of work must

be placed on the same footing as specific orders:

Allowing a subordinate to do something which ought not to have been done. *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793 (where the fan in a mine which was on fire was stopped by one of the servants.) See further, as to this case, subd. (a), *supra*.

The omission to give an order which should have been given. *Crowley v. Cutting* (1896) 165 Mass. 436, 43 N. E. 197 (where the foreman of a quarry did not see that holes drilled for the dogs which were to hold an unusually heavy stone while it was being hoisted).

The failure to countermand an order when due care requires that it should not be executed. *Cavagnaro v. Clark* (1898) 171 Mass. 359, 50 N. E. 542 (where the superintendent saw that an employee, not being aware that an order was given, was about to place himself in such a position that the execution of the order would imperil his safety).

The right of recovery under this head is of course conditional upon proof that the order was within the scope of the superintendent's authority. See an unreported and somewhat peculiar case mentioned in Ruegg on Employers' Liability Act, 5th ed. p. 34, where, in an action alleging negligence, the evidence was that a master stevedore's foreman, not being satisfied with the way a laborer was doing his work in the hold of a ship, said to a man near him: "Get hold of a block of wood and chuck it down on his—head." The order was obeyed, and the laborer's skull was fractured. A divisional court held that there could be no recovery.

Whether the giving of directions as to how a pile of packing cases should be moved is an act of superintendence is a question for the jury. *Lewis v. Koller & Smith* (1911) 186 Fed. 403.

(c) *Failure to furnish proper appliances*.—A judgment awarding damages to a boy injured while cleaning out a brick-pressing machine with his hands should not be set aside, where the evidence tended to show that "scrapers" for doing this work were not furnished in sufficient number by the foreman. *Race v. Harrison* (1893) 10 Times L. R. (C. A.) 92, reversing (1893) 9 Times L. R. 567.

A sufficient cause of action is stated by an averment that a person to whom

the defendant had intrusted superintendence "negligently caused or allowed the use of means or appliances in or about attempting to get said car on said rails, which would likely cause or allow said car to fall," and by an averment that such a person negligently "caused or allowed the attempt to get said car upon said rails without proper appliances." *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586. In that case, where the negligence complained of was that of the superintendent in charge of such work in using jack screws to support the car which was being lifted, it was also held that an instruction which predicated non-culpability if jack screws were suitable appliances to use, and thus took from the jury the question of whether there was negligent superintendence in omitting the use of supports in addition to the jack screws, was erroneous, and properly refused.

The fact that a stable foreman knew of the unfitness of a horse, and nevertheless took no steps to prevent it from being used, tends to show negligence on his part. *Yarmouth v. France* (1887) 19 Q. B. D. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283, 17 Eng. Rul. Cas. 217.

Where one of the counts alleges that the defective condition of a brake "was not remedied or discovered, owing to the negligence of the defendant, or of some person in his employ intrusted with and exercising superintendence, or whose sole or principal duty was superintendence," it is error to exclude testimony going to show that no inspection was made of a foreign car which came from a certain line. Such evidence, if it is offered merely for the purpose of showing a single omission of duty, is incompetent for the reason that the car inspectors are the fellow servants of the trainmen. But it has a tendency to show under what rules, instructions, and superintendence the inspectors were acting, and that these were insufficient to provide proper inspection. *Coffee v. New York, N. H. & H. R. Co.* (1891) 155 Mass. 21, 28 N. E. 1128.

The common-law rule that where a sufficient supply of proper temporary appliances has been provided, from which his servants may make a selection to replace those which have become unsuitable, if a choice is made of a defective appliance whereby one of their

number is injured the master is not liable for the negligence of a fellow servant, is not, under Rev. Laws, chap. 106, § 71, applicable to a person intrusted by the master with superintendence. *Doherty v. Booth* (1909) 200 Mass. 522, 86 N. E. 945.

The master is liable for injuries due to the failure of the superintendent to properly guy a derrick, although the master had furnished materials for so guying it. *Bellegarde v. Union Bag & Paper Co.* (1904) 90 App. Div. 577, 86 N. Y. Supp. 72, affirmed in (1905) 181 N. Y. 519, 73 N. E. 1119.

An accident to a workman, due to the fall of a staging, may be found to be due to neglect in superintendence, where it was constructed according to the directions of one who designated the stock and supplies to be used on the job and despatched the men thereto, and who knew, or by the exercise of reasonable diligence ought to have known, that a part of the scaffold which he directed to be used was defective. *Donahue v. C. B. Buck & Co.* (1908) 197 Mass. 550, 18 L.R.A.(N.S.) 476, 83 N. E. 1090.

The failure of a superintendent to replace a defective hook in a chain with a safe one is negligence. *English v. Milliken Bros.* (1909) 132 App. Div. 501, 118 N. Y. Supp. 31.

The master is liable if he intrusts the building of a scaffold to his superintendent, and he in turn intrusts it to subordinates who, although competent workmen, are negligent in this work. *Sloss-Sheffield Steel & I. Co. v. Holloway* (1906) 144 Ala. 280, 40 So. 211.

A verdict cannot be directed for defendant in an action against an employer for injuries to an employee, through the fall of a staging upon which he was working, because of the use of defective boards, improperly selected, upon which to rest the timbers supporting the staging planks, where there is evidence from which it can be found that it was the duty of the superintendent in charge of the men not to allow the staging to be used until he had exercised due diligence to see that it was properly assembled and secured, and that the accident resulted from his failure to perform this duty. *Solari v. Clark* (1905) 187 Mass. 229, 68 L.R.A. 243, 72 N. E. 958.

(d) *Employing servants not compe-*

tent for the work to be done.—The foreman employed on a pile driver may be guilty of negligence in allowing a workman apparently drunk to handle a fall liable to become caught on the choking guard which holds the driving hammer in place, while another workman is engaged in swinging the pile to its place. *McPhee v. Scully* (1895) 163 Mass. 216, 39 N. E. 1007.

Since a general manager exercises superintendence in choosing incompetent workmen, the master is liable for an injury caused by their incompetence, whether the manager was present or not while the work was being done. *Behm v. McDougall* (1892) 14 Australasian Law Times (Victoria) 47.

(e) *Allowing abnormally dangerous conditions to exist in the place of work.*—Negligence may properly be found on the principle of *res ipsa loquitur* (see opinion of Kay, L. J.), where a manager of a colliery allowed an inflammable brattice cloth to stand within 2 feet of a winding engine having a wooden brake, which, as he must have known, frequently emitted sparks. *Thomas v. Great Western Colliery Co.* (1894) 10 Times L. R. (C. A.) 244, reversing judgment of Divisional Court.

For one having superintendence of railway tracks and cars in a railway yard to direct or allow a car to be placed too near another track, or, upon its being there without his fault, to suffer it to remain, is negligence while in the exercise of his superintendence. *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88.

In *McCauley v. Norcross* (1892) 155 Mass. 584, 30 N. E. 464, the evidence was that 3½ feet from an open hole in a floor a few iron beams were placed; that they had been there for two or three days, and that the defendant's superintendent, being on crutches, and walking about the floor upon which the beams were placed, in order to pass between a pile of planks and these beams, pushed one of the beams with his foot, so that it swung around on the other beams and fell down through the hole on to the plaintiff. The court said: "Upon these facts, the jury might find that the iron beams were negligently so placed and left that one of them would be liable, from a slight inadvertent push of the foot of a passerby, to fall through the hole. Being left in this condition for two or three

days, the jury might infer a lack of due and proper superintendence. Allowing such things to be negligently left for so long a time in a position where they were likely or liable to be toppled over, and one of them to fall through the hole in the floor, would warrant a finding of negligence on the part of the superintendent in exercising superintendence."

A foreman directly authorized to carry on the work in one branch of defendant's steel plant is exercising superintendence when he directs a servant to take up several planks forming a temporary floor, and not to replace the same. *Heffron v. Lackawanna Steel Co.* (1907) 121 App. Div. 35, 105 N. Y. Supp. 429, affirmed in (1909) 194 N. Y. 598, 88 N. E. 1121.

The failure of a superintendent to remove the overhanging crust of a pile of coal, of which he had been notified, is negligence. *Stenbida v. Tonawanda Board & Paper Co.* (1907) 121 App. Div. 70, 105 N. Y. Supp. 513, affirmed in (1908) 193 N. Y. 623, 86 N. E. 1133.

(f) *Failure to give instructions under circumstances which indicate the propriety of doing so.*—Evidence warranting the inference that there was, under the circumstances, an obligation to give the plaintiff instructions regarding the manner in which his work ought to be done, and that his injury was caused by his foreman's failure to give those instructions, is sufficient to sustain a verdict in his favor. *Race v. Harrison* (1893) 10 Times L. R. (C. A.) 92, reversing 9 Times L. R. 567. See also *Madden v. Hamilton Iron Forging Co.* (1889) 18 Ont. Rep. 55, cited in subd. (a), *supra*.

(g) *Failure to warn a servant as to the existence of an abnormal danger.*—The failure to notify the second of two relays of workmen engaged in repairing a marine engine, that the crank shaft had been disconnected during the first shift, the result being that the shaft swung round and crushed one of the men in the second relay, is negligence in the exercise of superintendence. *Aitken v. Newport Slipway Dry Docks Co.* (1887) 3 Times L. R. (Q. B. D.) 527.

A section foreman was negligent in ordering an inexperienced servant to tap the last bolt holding a buckled rail, with his wrench, while standing be-

tween the rails, when he knew or ought to have known that the buckled rail, the bolts being removed, was liable to spring with great force. *Southern R. Co. v. Blevins* (1904) 66 C. C. A. 40, 130 Fed. 688.

Setting an inexperienced servant at work in a dangerous place without warning him of the danger is negligence in a superintendent, for which the master is liable. *Reardon v. Byrne* (1907) 195 Mass. 146, 80 N. E. 827.

A workman who is struck by a bundle of iron which is being unloaded from a ship, in consequence of his foreman's omitting to warn him to stand out of the way, is entitled to recover on the ground that the negligence was committed in the exercise of superintendence. *Wright v. Wallis* (1885; C. A.) 3 Times L. R. 779. Lord Esher said: "An argument has been addressed to the court which amounts to this,—that if you order a man to stand in a certain place, and then throw something at him, and injure him, the injury is not caused by his conforming to the order, but solely by the subsequent act. If these refinements are to be introduced into real life, real life cannot go on as it does. The order to stand there, and the throwing down of the iron, were all part of the same occurrence."

A section man engaged upon a railroad track does not take the risk that a foreman stationed to give him warning of the approach of trains will be negligent in the discharge of that duty. *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070.

The failure to have a flag placed as a signal that the track is obstructed is an act of superintendence. *Campbell v. Long Island R. Co.* (1908) 127 App. Div. 258, 111 N. Y. Supp. 120.

The failure of a section foreman to give notice of an approaching train is negligence. *Inglese v. New York, N. H. & H. R. Co.* (1909) 133 App. Div. 198, 117 N. Y. Supp. 392.

To start an engine without any warning in a yard where workmen are engaged in their duties may be found to be negligence. *Hines v. Stanley-G. I. Electric Mfg. Co.* (1908) 199 Mass. 522, 85 N. E. 851.

A dock company is liable for injuries received owing to the negligence of its foreman in not informing the plaintiff that a piece of the machinery which he was employed to repair had been so

loosened that there was a risk of its falling. *Aitken v. Newport Slipway Dry Docks Co.* (1887) 3 Times L. R. (Q. B. D.) 527.

A charge that the risk of a heavy shaft slipping out of the hitch of the chain fall by which it was being lowered was a transitory risk, of which defendant was not required to notify a servant who was struck by it, is properly refused. The risk is not one incident to, and ordinarily to be expected to occur in, the prosecution of the work in which deceased was engaged. *Knight v. Overman Wheel Co.* (1899) 174 Mass. 455, 54 N. E. 890.

The facts in evidence may sometimes suggest the existence of this duty as an alternative obligation which ought to be discharged in the event of the servant's environment not being made as safe as it would have been if some other duty had been adequately performed. If an inexperienced workman, while engaged in undermining a bank of earth, is injured by the falling of the bank upon him during the temporary absence of his employer's superintendent, whose duty it is to watch the bank and to warn him of the danger of its falling, it is a question for the jury whether it was not negligence in the superintendent to allow the plaintiff to work under the bank without shoring up the top of it, or stationing someone to give warning. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

A superintendent of a street railway was not bound to anticipate that the engineer of a dummy engine hauling a material train on the road just before its conversion into a trolley line would hear a noise of rattling and knocking rods underneath his seat in the cab, or that, if he did hear such a noise, he would protrude his person so far out of the window as to be struck by a trolley pole 2 feet distant, one of several which had just been erected; since, if the disorder was slight and immaterial, looking at it was unnecessary, while if it was serious and material, looking at it would not remedy it, and in either case the most natural thing for the engineer to do would be to stop his engine, alight, and examine it from the ground. The superintendent therefore was not guilty of negligence in failing to warn the engineer as to the position of the posts. *North Birmingham*

Street R. Co. v. Wright (1901) 130 Ala. 419, 30 So. 360.

(h) *The violation of rules promulgated by the master.*—In so far as specific rules define the course to be pursued in regard to matters pertaining to the duty of superintendence, it is clearly not open to dispute that their violation may properly be found to be negligence for which the master is responsible. Hence, a verdict against a railway company will not be disturbed where the injury was due to the omission of a foreman of track repairers in a yard to set a lookout to warn them of the approach of trains, such duty being imposed on him by the company's rules. *Duthie v. Caledonian R. Co.* (1898) 24 Sc. Sess. Cas. 4th series, 934, 35 Scot. L. R. 726.

Nor where the injury resulted from a collision between a hand car and a work train, caused by the failure of a section foreman to give the signals required by the rules of the road. *Richmond & D. R. Co. v. Hammond* (1890) 93 Ala. 181, 9 So. 577.

Nor where the evidence is that in violation of a rule that the engineer should slow up, and, if necessary, stop his engine before reaching a switch, to ascertain whether it is properly set, the person running the engine pushed the cars over the switch at a rapid rate when the switch was improperly set, and caused a derailment and the injury complained of. *Louisville & N. R. Co. v. Mothershed* (1893) 97 Ala. 261, 12 So. 714.

It would seem, however, that if the injurious act was one which, under the principles developed in the next section, would not be considered as having been done in the exercise of superintendence, the mere fact that the act constituted a breach of some rule ought not to affect the master with responsibility. But no case has been found in which this precise situation was presented.

(i) *Starting machinery negligently.*—The master is liable for the act of a superintendent in starting the plaintiff's machine while the latter was on another floor adjusting the shafting. *Roche v. Lowell Bleachery* (1902) 181 Mass. 480, 63 N. E. 943.

The master is liable for the act of a foreman who had taken personal charge of the repair and adjustment of machinery, in directing the engine to be started, after a stop of two hours

foreman or superintendent.² Whether proof of that fact will enable him to maintain the action depends upon the principles discussed in the following section. On the other hand, if the evidence tends to show that the accident was caused by a breach of what the jury may properly find to be a duty pertaining to superintendence, and one of the counts of the declaration is based upon the words of the subsection, the master is not entitled to a ruling that, as there was no evidence of the negligence of the defendant, the plaintiff cannot recover under this count.³

1691. [688] Acts done by superintendents while participating in the work; liability of master for.—The intention of the legislature that the master shall be answerable for the negligence of superintending employees only when it is committed in the exercise of superintendence is somewhat less explicitly stated in the statutes of Massachusetts, New York, New Jersey, and Colorado than in those of England, Alabama, and the British colonies. But it is well settled that, under the former statutes, no less than under the latter, the fact that a person is engaged in superintendence does not make his employer liable for every act which he does while so engaged.¹ On the other hand, all the courts are agreed that the action is not barred simply by proof that the default of the superintendent was committed while he was assisting the plaintiff in manual labor.² A collation of the

for the repairs and adjustments without exercising reasonable care to see that the workmen engaged in the labor of repair and adjustment were in places of safety. *Carlson v. United Engineering & Contracting Co.* (1906) 113 App. Div. 371, 98 N. Y. Supp. 1036.

A superintendent who puts a servant to work in a place that is dangerous if the machinery starts owes him the duty of seeing that the machinery does not start. *Greenstein v. Chiole* (1905) 187 Mass. 157, 72 N. E. 955.

² *Trimble v. Whitin Mach. Works* (1898) 172 Mass. 150, 51 N. E. 463 (want of gang plank caused injury to a workman helping to place a machine in a car).

An unqualified direction to find for the plaintiff if certain dynamite which exploded had been "carelessly left buried by the defendant, or its servants or agents in the discharge of their duty," is erroneous. *Sheffield v. Harris* (1893) 101 Ala. 564, 14 So. 357.

³ *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

¹ *Joseph v. George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639, per Holmes, J. See also the cases cited in the following notes.

In order to hold the master liable under the act, it must be shown not only that the negligence was that of one exercising superintendence, but that he was engaged in an act of superintendence at the time. *Hess v. Furst* (1909) 117 N. Y. Supp. 939.

Under the statute, no liability exists for an order given as a mere detail of the work. *Beauregard v. New York Tunnel Co.* (1910) 136 App. Div. 834, 121 N. Y. Supp. 865.

Under § 42a of the New York railroad law, it is only where the negligence complained of is due to the superintendent in directing the performance of duties that the statute applies. *Cavanagh v. Central New England R. Co.* (1909) 131 App. Div. 856, 116 N. Y. Supp. 343.

² *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88; *Ray v. Wallis* (1887) 51 J. P. (C. A.)

authorities, however, discloses considerable divergence of opinion as to the theory upon which the boundary line is to be drawn between the acts for which the master is and is not responsible.

Some cases present little or no difficulty. Thus, there is clearly no ground upon which the master can be held liable for a merely manual act done by an employee whose characteristic functions are not those of a superintendent at all.³ Compare § 1683, subd. *c*, *ante*. Again it is obvious that, wherever the duties of an employee are susceptible of a definite segregation into two specific classes, so that it is possible to say that the duties in one class are those of a superintendent, while the duties in the other class are those of a mere servant who is engaged in manual labor or discharging some function which is characteristic of, and customarily intrusted to, subordinate workmen, the exercise of superintendence cannot, without doing violence to the express ends of the statute, be predicated as to what is done in performing the latter class of duties.⁴ The position taken is that, "when a person is employed to work with his hands, as well as to exercise superintendence . . . the line must be

519, affirming (1886) 3 Times L. R. 777; and the cases cited in note 6, *infra*.

That the boss of a gang of workmen is engaged, a greater portion of the time, in working with his hands, does not necessarily show that he is not at the same time giving superintendence to the work, within the meaning of a statute making the employer liable for injury to his employee "by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." *Canney v. Walkeine* (1901) 58 L.R.A. 33, 51 C. C. A. 53, 113 Fed. 66 (Massachusetts statute).

In *New England Teleph. & Teleg. Co. v. Butler* (1907) 84 C. C. A. 217, 156 Fed. 321, the court in passing upon a case arising under the Massachusetts statute said even working at all times with his hands would not necessarily prevent a superior servant from exercising superintendence in such a way that superintendence would be his principal duty.

An employee's sole or principal duty may be that of superintendence, although he occasionally works with his hands. *Buckley v. Beinbauer* (1910) 136 App. Div. 540, 121 N. Y. Supp. 180,

affirmed in (1911) 201 N. Y. 572, 95 N. E. 1224.

See note to *Rippy v. Southern R. Co.* 21 L.R.A. (N.S.) 601.

³ The starting of a table used for the transfer of cars in a street-car barn by a car shifter whose duty was to get cars ready for the conductors and motormen was not an act of superintendence as to a conductor who was injured by the table. *Whelton v. West End Street R. Co.* (1899) 172 Mass. 555, 52 N. E. 1072.

An engineer operating the engine used in unloading a vessel is not engaged in an act of superintendence in running the engine, although he may at the time be in charge of the work. *Moore v. Curran* (1908) 198 Mass. 60, 84 N. E. 113.

The act of a railroad engineer in placing a ladder against a boiler of an engine for his fireman to mount so as to turn off the steam cannot be regarded as an act of superintendence. *McDonnell v. New York, N. H. & H. R. Co.* (1906) 192 Mass. 538, 78 N. E. 548.

⁴ In *Kellard v. Rooke* (1887) L. R. 10 Q. B. Div. 585, where an employee alleged to have been intrusted with superintendence habitually engaged in the manual labor of hauling and throwing

drawn somewhere between what are acts of superintendence and what are acts of manual labor, or all that he does must be regarded

bales of wool into a ship's hold, and the injury was caused by one of these bales falling upon the plaintiff, it was held that, assuming this to be the situation, it could not be said to come to anything more than this,—that an employee who was a superintendent for some purposes, and who was also an ordinary working man engaged in the work in which the plaintiff was likewise engaged, was guilty of negligence whereby his fellow workman was injured, and that the negligence, having been committed whilst he was in the exercise of the manual labor in which he was engaged, was not in the exercise of superintendence.

In *Cashman v. Chase* (1892) 156 Mass. 342, 31 N. E. 4, where it was held that the act of an engineer of a hoisting apparatus in improperly raising the fall when ordered to lower it was not an act of superintendence, for the reason that in operating the engine he was doing the work of a laborer, acting upon the directions of others, and not directing them, the court said: "The negligence for which the statute makes the employer liable is that of a person 'intrusted with and exercising superintendence.' The employer is not answerable for the negligence of a person intrusted with superintendence, who at the time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor,—the duty of a common workman. The law recognizes that the employee may have two duties; that he may be a superintendent for some purpose, and also an ordinary workman; and that if negligent in the latter capacity the employer is not answerable. . . . Unless the act itself is one of direction or of oversight, tending to control others and to vary their situation or action because of his direction, it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise of superintendence. For the negligence of such a person in doing the mere work of an ordinary workman, in which there is no exercise of superintendence, the employer is not made responsible by the statute."

In *Flynn v. Boston Electric Light Co.* (1898) 171 Mass. 395, 50 N. E. 937, a verdict for the defendant was sustained

where the foreman of a gang of linemen used to labor as an ordinary workman, and caused the injury while he was helping to pull back an electric wire which caught the branch of a tree which the plaintiff was cutting, and broke it off, allowing him to fall.

Negligence in the exercise of superintendence intrusted to an employee is not predicable in the case of an engineer whose duty it is personally to operate an engine, although he usually has a helper, where the evidence is that, in the absence of the helper, by the negligence of the engineer in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine was killed. *Dantzler v. De Bardeleben Coal & I. Co.* (1893) 101 Ala. 309, 22 L.R.A. 361, 14 So. 10. The court said: "It being his duty personally to perform—not merely direct—this labor, and his right only to have the other man help him to perform it, his relation to the machinery being primarily that of a laborer, it cannot be said that he was in the exercise of any superintendence while he was discharging this primal duty of a manual laborer. His superintendence, if any he had, extended only to his actual direction of the helper, and ceased whenever he did any act in person and in the line of his duty as the engineer in charge of these machines. . . . The evidence in this case is without conflict to the effect that when the engine moved or was set in motion Gould's helper was not even on the premises, and that, if the engine was started by Gould, it was the direct negligent act of a manual laborer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of subsec. 2 of § 2590 [of the Code]. The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted, 'while in the exercise of such superintendence.' On the other hand, had the jury concluded that Gould did not start the engine, but that it was set in motion by some third person in consequence of his failure to prevent outside interference, the result must have been the same. On this

as superintendence or as manual labor, which manifestly would be unjust." ⁵

But the solution of that class of cases in which the injury is due to the negligence of a superintendent in regard to a manual act casually done for the purpose of expediting the work is less easy.

The conception underlying some of the decisions is that these incidental digressions into the functions of a mere servant do not carry him outside the scope of his duties of superintendency. This doctrine has the merit of avoiding the logical incongruity involved in the hypothesis that the juridical effect of the same physical event may be different according as it resulted from the personal negligence of

hypothesis Gould was a mere watchman, for whose negligence the company was not responsible to his fellow servant, McKay. *Roberts & W. Liability of Employers for Injuries to Workmen*, 260. In no possible aspect of the evidence was the plaintiff entitled to recover. The affirmative charge for defendant was properly given."

Following the *Dantzler Case*, it was held in *Freeman v. Sloss-Sheffield Steel & I. Co.* (1903) 137 Ala. 481, 34 So. 612, that an engineer in charge of an engine which moved a steam shovel back and forward was not a superintendent.

The negligence of a conductor of a freight train while engaged in unloading freight, causing an injury to a brakeman assisting him, is that of a fellow servant. *Louisville, N. A. & C. R. Co. v. Southwick* (1896) 16 Ind. App. 486, 44 N. E. 263.

The foreman of a crew engaged in repairing bridges is not, while gathering fuel for a fire to thaw out materials, exercising any duty of a superintendent. *Bannon v. New York C. & H. R. R. Co.* (1906) 112 App. Div. 552, 98 N. Y. Supp. 770.

The act of a superintendent in jerking a belt which he, together with the plaintiff, was adjusting to a machine, was that of a fellow servant of the plaintiff. *Kujava v. Irving* (1907) 122 App. Div. 375, 106 N. Y. Supp. 837.

A foreman is a fellow servant with the employees under him, where both are engaged in throwing rails upon a car. *Louisville, N. A. & C. R. Co. v. Isom* (1894) 10 Ind. App. 691, 38 N. E. 423.

The driving of an automobile truck

by which the defendant was moving from one factory to another was not an act of superintendence, but was manual labor. *Buckley v. Dow Portable Electric Co.* (1911) 209 Mass. 152, 95 N. E. 222.

In *Smith v. Pioneer Min. & Mfg. Co.* (1906) 146 Ala. 234, 41 So. 475, it was held that the master was not liable for the acts of a foreman performed merely because of the absence of the workman whose duty it was to perform them.

Where a painter works both as common laborer and as a boss, and is expected to work with and as the other workman, his act in attempting to hold a ladder, and letting it slip, is not an act of superintendence, but of mere manual labor. *Hoffman v. Holt* (1904) 186 Mass. 572, 72 N. E. 87.

⁵ *Riou v. Rockport Granite Co.* (1898) 171 Mass. 162, 50 N. E. 525. There it was held that the act of an employee in a quarry whose principal duty was that of superintendent, in placing a can of powder preparatory to blasting where it was hit by a swinging tag rope attached to a derrick, was not an act of superintendence. The court said: "If the work of blasting was in some sense in the nature of superintendence, the mere act of fetching and putting down a can of powder preparatory to blasting could hardly be described as an act of superintendence, or as anything more than an act of manual labor on the part of Labelle. There was nothing in it involving any control over or direction to or oversight of any other workman, or requiring any skill, or distinguishing it from any other act of manual labor."

the superintendent himself, or the negligence of a subordinate in carrying out his orders.⁶

⁶The incongruity noted in the text is illustrated in *Gallagher v. Newman* (1908) 190 N. Y. 444, 16 L.R.A. (N.S.) 146, 83 N. E. 480, where a foreman threw a shaft in motion while a workman was adjusting a belt. The court said: "If, without taking any part in the actual adjustment of the belt on the pulleys, he [the foreman] had superintended the operation, and had directed the shifting of the lever which put the shaft in motion and injured intestate, there could be little doubt as to the character of his act being one of superintendence. That, however, is not the case. He took actual part with the others in the manual labor directed toward the readjustment of the belt, the others working at one end of it and he at the other, and, as we have already said, it seems permissible to infer that his act in putting the shaft in motion was a mere continuance of his labor for the purpose of permitting the belt to be still further rolled onto the pulley." It should be noted, however, that the court held merely that it could not be said, as a matter of law, that the foreman was acting as a superintendent.

This incongruity is also apparent in *Buckley v. Beinhauer* (1910) 136 App. Div. 540, 121 N. Y. Supp. 180, affirmed in (1911) 201 N. Y. 572, 95 N. E. 1124, where the court says that had the superintendent ordered a signal man to give the signal to the engineer to lower the hoist it would be plainly an act of superintendence, but as the superintendent himself gave the signal it was not as clear a case, although it was held that the question whether it was an act of superintendence should have been submitted to the jury.

In *Osborne v. Jackson* (1883) L. R. 11 Q. B. Div. 619, 48 L. T. N. S. 642, recovery was allowed where the injury was caused by the negligence of a foreman in handling a plank, the other end of which was held by the plaintiff. The foreman took the plank, and, in effect, directed the plaintiff to take it when he could not do so safely, and thus thrust on him a duty he could not safely perform. The court said: "If Thomas [the foreman] had directed another to do what he did himself, he would surely have been negligent in the exercise of

superintendence." *Denman, J.*, distinguished *Shaffers v. General Steam Nav. Co.* (1883) L. R. 10 Q. B. Div. 356, 52 L. J. Q. B. N. S. 260, 48 L. T. N. S. 228, 31 Week. Rep. 656, 47 J. P. 327, on the ground that the negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident, while in the case before him the foreman was generally superintending the work on which the plaintiff was employed.

It has also been laid down by the English court of appeal that the mere fact that a superintendent undertakes to do some manual work himself does not preclude the inference that, while doing such work, he is exercising superintendence. *Ray v. Wallis* (1887) 51 J. P. (C. A.) 519 (walking foreman of a stevedore pushed some planks which he had given orders to lower, and knocked plaintiff off a platform).

The act of a foreman of stevedores who, by way of pushing on the work, takes hold of a case which is being lowered into the hold of a ship, and impatiently "cants" it over to one side, the result being that it falls and injures a servant, is done by him as superintendent, and not as a mere servant temporarily engaging in manual labor. *Donnelly v. Spencer* (1898) 1 Sc. Sess. Cas. 5th series, 1109, 36 Scot. L. R. 876. In this case it was suggested that a foreman is not to be regarded as having exchanged his functions of superintendent for those of a mere servant engaged in manual labor, unless he engages in such labor some "appreciable length of time."

A conductor undertaking to make a coupling between two cars, which, if not made properly, will affect the safety of a brakeman who has been ordered to make a coupling between two other cars, is apparently assumed to be acting as a superintendent in *Alabama Midland R. Co. v. McDonald* (1895) 112 Ala. 216, 20 So. 472. But the decision was put upon the ground that no negligence was established.

A superintendent is not relieved from the obligation to use due care for the safety of the employees by taking the place of the plaintiff's companion, temporarily, to assist in the work. *Jordan*

Another conception is that a superintendent who, during however brief a period, engages in manual labor, is *prima facie* deemed to have abdicated his functions of superintendence, and to be acting *ad hanc vicem* in the capacity of a mere workman.⁷ An extreme application of this doctrine is found in a case which seems to embody the principle that an act which is deemed to have been done as a mere servant, for the reason that it is manual, communicates its quality, as an act of that character, to acts incidentally connected

v. *New England Structural Co.* (1908) 197 Mass. 43, 83 N. E. 332.

The mere fact that a superintendent sometimes lent a hand to hasten the work does not change his status. *Hurley v. Olcott* (1909) 134 App. Div. 631, 119 N. Y. Supp. 430, affirmed in (1910) 198 N. Y. 132, 28 L.R.A.(N.S.) 238, 91 N. E. 270.

The mere fact that the foreman of a gang of men engaged in setting telephone poles performs some slight manual labor in fastening a chain and rope to a pole does not prevent his sole or principal duty from being that of superintendence. *Barrett v. New England Teleph. & Teleg. Co.* (1909) 201 Mass. 117, 87 N. E. 565.

The master is liable for the acts of his superintendent, even if he momentarily held the handles of a truck by means of which iron girders were being raised. *Connolly v. Booth* (1908) 198 Mass. 577, 84 N. E. 799.

A superintendent is not relieved from the duty of using due care for the safety of employees because he temporarily takes the place of a laborer. *Jordan v. New England Structural Co.* (1908) 197 Mass. 43, 83 N. E. 332.

A foreman superintending the loading of a ship, who, upon finding the sling loader absent from his place, undertakes to do the work himself, so as not to retard the loading, is, while so acting, still in the exercise of superintendence. *Boon v. Brown* (1910) 16 West. L. Rep. (Can.) 120.

⁷ It is not an act of superintendence to push a heavy beam with the foot, so that it falls through a hole in the floor. *McCauley v. Norcross* (1892) 155 Mass. 584, 30 N. E. 464.

It is not an act of superintendence to close the tail board of a coal wagon after the load has been removed. *Hope v. Scranton & L. Coal Co.* (1907) 120

App. Div. 595, 105 N. Y. Supp. 372.

The act of a person whose principal duty was that of superintendence, in permitting himself or another laborer to be in the neighborhood of a third laborer with a crowbar in his hands, can not be found to be negligent superintendence merely because the event showed that it was possible to harm the latter employee by negligently handling or dropping the bar. *Fleming v. Elston* (1898) 171 Mass. 187, 50 N. E. 531.

A street railway company is not liable for injuries to a servant due to negligence of the superintendent of its paint shop, where at the time of the injury the superintendent was acting as motor-man. *Brittain v. West End Street R. Co.* (1897) 168 Mass. 10, 46 N. E. 111.

A foreman on an elevated railroad in giving the signal when ties should be thrown to the ground below is engaged in a mere detail of the work. *Larson v. Brooklyn Heights R. Co.* (1909) 134 App. Div. 679, 119 N. Y. Supp. 545.

A foreman of a gang of men engaged in cutting branches from trees to allow the stringing of electric-light wires, whose only acts of direction and oversight consist in pointing out the trees to be trimmed, is not in the exercise of superintendence in holding a rope attached to a limb being sawed, in order that it may fall to the ground. *Lowrey v. Huntington Light & P. Co.* (1907) 121 App. Div. 245, 105 N. Y. Supp. 852, affirmed in (1908) 193 N. Y. 629, 86 N. E. 1127.

The master is not liable for injuries caused by the negligence of a superintendent, where the negligence lay in the careless manner in which he did the act, and not in deciding that such an act should be done. *Sarrisin v. S. Slater & Sons* (1909) 203 Mass. 258, 89 N. E. 529.

with it, which would otherwise have been regarded as pertaining to superintendence.⁸ The conclusion thus arrived at, though in a sense logical, seems to ignore the essential rationale of the theory of differentiation which the court professes to be applying. It is submitted that, if the mere doing of a manual act implies *ad hanc vicem* a temporary divestiture of the functions of superintendence, the discharge of one of those functions, even when it is intimately associated with the manual act in question, should be regarded as involving *pro tanto* the resumption of these functions. Under any other theory, it is clear, the master will enjoy all the advantages, and be subject to none of the drawbacks, of the doctrine that the applicability of the statute is to be tested solely by the character of the functions in regard to which negligence is alleged.

The severe doctrine adopted in the cases just cited is qualified to the extent of allowing the servant to recover when the manual act in question was so connected with a plan or order coming from him in the exercise of his authority as to show that the plan was ill conceived or the order negligent.⁹ But this qualification is not construed

⁸ In *Whittaker v. Bent* (1897) 167 Mass. 588, 46 N. E. 121, it was held that a superintendent of an iron foundry does not exercise superintendence in setting up molds and inspecting them with reference to their condition as to dampness, or in assuring an employee that they are all right, where such acts are mere matters of detail and of recurring necessity. According to the plaintiff's testimony he asked the superintendent if the molds were all right, and received the answer, "Yes, go ahead, Bob." It was argued that, assuming the superintendent not to have acted as such in setting up the mold, he did exercise superintendence in what he said to the plaintiff, according to a distinction pointed out in *Kalleck v. Deering* (1894) 161 Mass. 469, 470, 42 Am. St. Rep. 421, 37 N. E. 450. But the court said: "We think that the answer, 'Yes, go ahead,' was not the direction of a superior, but merely the assurance, in a customary colloquial form, of the fellow workman who had inspected the mold, that all was safe. A doubt might be raised as to the effect of a previous statement by the plaintiff that the foreman gave him a ladle of iron to pour, which looks at first like a direction to do what the foreman ought to have known to be dangerous. But it appears

from the context that it means only that the foreman that morning was doing the manual work of filling the ladles, and handed one to the plaintiff. It was part of the plaintiff's regular business to pour."

In a later case it was laid down that "the employer is not made answerable by the statute for acts of superintendence negligently performed in his service by an ordinary workman, or by one who is both workman and superintendent, in making declarations which may be interpreted either as orders of a superintendent or as assurances of a fellow workman, if in fact they are merely such assurances." *Cavagnaro v. Clark* (1898) 171 Mass. 367, 50 N. E. 542.

⁹ *Joseph v. George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639, per Holmes, Ch. J. The authority for this proposition, cited by the learned judge, was *O'Brien v. Look* (1898) 171 Mass. 36, 50 N. E. 458, where it was held that the manual labor of a superintendent who directed the method of lowering the fore and after into its socket, in unwinding a rope from the drumhead, cannot be separated from his duty as superintendent, so as to relieve the master from liability for injury to a servant, resulting from the superin-

as involving the conclusion that every act done by a superintendent, even to help in carrying out an order which he himself has given, should be regarded as part of his superintendency.¹⁰ *A fortiori* is the master not liable where the act of the superintendent has no proper connection with his duties. "The question whether the connection is close enough is," as has been observed by Chief Justice Holmes, "one of degree, and naturally different people will draw the line at different points."¹¹

The cases cited in this section should be compared with the common-law decisions reviewed in §§ 1473-1476, *ante*.

tendent's negligence in unwinding the rope when it was in a wet condition.

In *McCabe v. Shields* (1900) 175 Mass. 438, 56 N. E. 699, the acting superintendent in a foundry directed the plaintiff to use a mold for a casting, in which he had made a perforation with a rusty piece of iron. The evidence tended to show that, when the molten iron came in contact with the rust in the mold left there by the iron used in perforating it, it caused an explosion resulting in plaintiff's injury. It was held that the superintendent in placing the dangerous mold in plaintiff's hands, and directing him to use it, acted as a superintendent, but whether the act of perforation itself was one of superintendence was not decided.

In *Malcolm v. Fuller* (1890) 152 Mass. 160, 25 N. E. 83, it was held that, as a foreman of a quarry was exercising superintendence in determining, after the firing of a blast, that the tamping should be cleared out of a drill-hole by drilling, a servant injured by an explosion while the work was being done might recover, regardless of the fact that the superintendent himself struck the drill.

In *Crowley v. Cutting* (1896) 165 Mass. 436, 43 N. E. 197, where a stone which was being hoisted slipped out of the dogs which held it, for the reason that no holes had been drilled to receive them, a verdict for a servant injured by the fall of the stone was upheld, although the superintendent adjusted one of the dogs himself.

In *Ray v. Wallis* (1887) 51 J. P. (C. A.) 519, the court mentioned, as an additional reason for holding the defendant liable, the fact that the manual work was connected with an order

previously given, but the decision was independent of this factor.

¹⁰ *Joseph v. George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639.

¹¹ *Joseph v. George C. Whitney Co.* (1900) 177 Mass. 176, 58 N. E. 639. There the plaintiff was at work on an embossing machine which was not running, and had his hands between its jaws, when another workman called the superintendent, who leaned over between plaintiff's machine and another to give directions to the second workman, and accidentally touched the shipper, thereby starting plaintiff's machine, and causing the injury. Held, that plaintiff could not recover. "The precise place," it was said in the opinion of the court, "in which Meyer, the superintendent, should be while giving his directions, the way in which he should stand or sit, and his care in managing his body in the place he selected, were too much the accident of his independent personality, and too remote from the act of giving the orders, for us to charge the defendant with the consequences of his neglect in that regard. The matter may be stated in a different form. If the motion of Meyer which caused the injury be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as such, and that when, as here, it had nothing to do with the injury *qua* superintendence, the case is not within the act."

Even if a superintendent traveling on a street car as a passenger is a superintendent to the extent of having his eye on the way in which the car is managed, his superintendence, as such,

E. LIABILITY FOR INJURIES CAUSED BY THE NEGLIGENCE OF A PERSON TO WHOSE ORDERS THE INJURED SERVANT WAS BOUND TO CONFORM.

1692. [689] Introductory.—In section 1, subs. 3, of the English act, it is provided that a servant shall have a right of action against his employer, whenever injury is caused to a workman “by reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to conform, and did conform, where such injury resulted from his having so conformed.” This provision is inserted verbatim in the Canadian and Australian Acts. The statutes of Alabama and Indiana include a clause of essentially the same purport, but no provision of this tenor is found in those of Massachusetts, New York, or Colorado.

This subsection may be regarded as being, broadly speaking, declaratory of the “superior servant doctrine” (see chapter LXI., subtitle D, *ante*), which, as we have had occasion to remark in § 1683, subd. c, *ante*, is not embodied in the preceding subsection of the act. The decisions based upon that doctrine, however, have not, so far as appears, influenced the courts to any extent in their construction of this provision. The specific language used by the legislatures has alone been considered on ascertaining the extent of the master’s statutory liability, and it is therefore merely from the standpoint of com-

does not contribute to an injury received by the conductor through striking against a tree close to the track in consequence of his having to step round the superintendent while he is standing on the running board. *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668.

“That a negligent act, although committed by one intrusted with superintendence by the common employer and while in the exercise of such superintendence, is not an act for which the employer is responsible, when it is not an act of superintendence under the statute, is clear upon reason and is settled by the authorities.” *Western R. Co. v. Milligan* (1902) 135 Ala. 205, 93 Am. St. Rep. 31, 33 So. 438 (plaintiff was injured by sportive act of superintendent).

The act of a foreman in turning on electric power, which he is unauthorized to do, is not an act of superintendence. *Quinlan v. Lackawanna Steel Co.* (1905)

107 App. Div. 176, 94 N. Y. Supp. 942, affirmed in (1908) 191 N. Y. 329, 84 N. E. 73.

A railroad conductor cannot be said to be acting as superintendent in the absence of the regular superintendent, when he violates an order which the rules require to be strictly conformed to until fulfilled, superseded, or annulled. *Crosby v. Lehigh Valley R. Co.* (1905) 70 C. C. A. 199, 137 Fed. 765.

On the other hand, it has been held that a jury is justified in finding that a superintendent in general control of the entire work of digging a new trench was engaged in an act of superintendence in walking along the bank, and in stopping to look down at the work, in the course of which he precipitated a fall of the bank. *McCoy v. Westborough* (1899) 172 Mass. 504, 52 N. E. 1064. See also *McCauley v. Norcross* (1892) 155 Mass. 584, 30 N. E. 464, the facts of which are stated under § 1690, note 1, subd. (f) *ante*.

parative jurisprudence that the decisions which apply the doctrine in question are of any interest or utility in the present connection.

1693. [690] Conditions precedent to recovery.—The establishment of the following propositions is an essential prerequisite to the maintenance of an action under this provision:

(1) That the directing employee was invested by the master with authority to give orders which the injured employee was bound to obey.

(2) That the particular order given was one within the scope of the authority thus conferred on the directing employee.

(3) That the act of the injured employee which led to his receiving the injury was done in compliance with an order actually or impliedly given.

(4) That there was a causal connection between the giving of the order and the injury received.

(5) That the directing employee was wanting in due care either with respect to the order itself or with respect to some duty in the performance of which he represented the master.

These constituents of the plaintiff's right of action will be discussed in the following sections.

1694. [691] To what superior servants the subsection is applicable.—As the fact that the injury resulted from conformity to an order is the sole prerequisite to recovery under this provision, it would seem to be applicable to any employee who is authorized to give an order in respect to the subject-matter, whether he is or is not a superintendent or foreman, as that term is commonly understood. And on the whole this is the effect of the decisions on which the question has been directly raised, though, in reference to the facts involved, it can scarcely be said that they are entirely consistent.¹

¹ Recovery has been allowed for the negligence of the following employees:

A carman under whose directions the plaintiff was unloading a van. *Millward v. Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453.

An employee who was sent with a small gang of men to construct an elevator, and who was the only person on the premises authorized to give orders about the work. *Wild v. Waygood* [1892] 1 Q. B. (C. A.) 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389.

A machineman in a foundry who directed the workmen as to what they were to do, although he could not discharge them, and could only enforce his directions by an appeal to the foreman of the works. *Dolan v. Anderson* (1885) 12 Sc. Sess. Cas. 4th series, 804, 22 Scot. L. R. 529.

An employee in a switchyard who orders and directs the switching of the cars and the movements and the actions of the men is a superintendent. *Terre Haute & L. R. Co. v. Rittenhouse* (1901) 28 Ind. App. 633, 62 N. E. 295.

A complaint is not demurrable which in effect alleges that the injury was due

Under any theory it is clear that the master cannot be held liable for the negligence of an employee who has not been authorized, either expressly or by implication, to give orders in respect to the subject-matter.²

to the negligence of the employer in appointing an incompetent person to superintend a work requiring such special skill as the pulling down of a building. *Flynn v. McGaw* (1891) 18 Sc. Sess. Cas. 4th series, 555.

In *Consumers' Paper Co. v. Eyer* (1903) 160 Ind. 424, 66 N. E. 994, it was held that an engineer was bound to conform to the orders of the president of the company in an emergency, where the superintendent was absent.

But in *Hooper v. Holme* (1897) 13 Times L. R. 6, affirming 12 Times L. R. 537, the defendant was held not to be liable for the negligence of a mere foreman of a small gang consisting of two masons and two mason's laborers, told off to do some repairs on a railway viaduct. In the divisional court this decision was put by Mathews, J., upon the ground that, to make an employer liable, there must be someone who had authority to give orders—that is, who had a mandate from the employer. It may be that the decision in the court of appeal was really intended to rest upon the hypothesis that there was, as a matter of fact, no "mandate" from the employer. Or the theory of the ruling may be, in part at least, that there was no proof of any order influencing the plaintiff's action. See § 1697, *post*, where the case is referred to. Unless these special reasons be regarded as the rationale of the conclusion arrived at, the effect of the decision, when taken in connection with that in *Wild v. Waygood* [1892] 1 Q. B. (C. A.) 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, seems to amount to little more than this—that the employee who is thus, in a sense, placed in charge of a small gang of this description, is presumed not to be one of those to which this provision of the statute is applicable, but that this presumption may be rebutted by showing that, as a matter of fact, he was authorized to give orders. It would appear, however, that there is really some difference of opinion among English judges in regard to the applicability of this section of the statute to such employees, for we find Smith, J.,

remarking, *obiter*, in an earlier case, that the master is not liable for the negligence of "a mere foreman of a gang of laborers." *Kellard v. Rooke* (1887) L. R. 19 Q. B. Div. 585, 588. Hawkins, J., expressed no definite opinion in that case; nor did the justices of appeal (L. R. 21 Q. B. Div. 367, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820).

In an action for injuries resulting in plaintiff's death an instruction that, if the jury found that the decedent, while in the defendant's employ, was directed by the conductor in charge of defendant's train to set the brake on a car, it was intestate's duty to obey such direction, using due caution, is not erroneous, where the evidence clearly showed that intestate was under the conductor in charge of the train and subject to his orders at the time. *Hunt v. Conner* (1901) 26 Ind. App. 41, 59 N. E. 50.

² As, where a fellow workman directed the plaintiff to take a load of iron stanchions on a trolley with the sides unprotected. *Corcoran v. East Surrey Ironworks Co.* (1888) 5 Times L. R. (Q. B. D.) 103, 58 L. J. Q. B. N. S. 145.

In *Brown v. Furnival* (1896) 23 Sc. Sess. Cas. 4th series, 492, the judges doubted whether a workman who calls other servants to his assistance and directs them as to the loading of a heavy piece of machinery onto a truck is within this section; but this seems to be, beyond all question, a case in which there was no mandate from the employer.

The conductor of a railroad freight train has a right to employ a person to perform the necessary duties of a brakeman or trainman suddenly becoming ill, or otherwise unable to fill his place; and a person receiving personal injuries while so temporarily employed will be treated as an employee of the company, in an action for damages for such injuries; but not if plaintiff was merely a bystander, and ordered by the conductor to connect the coupling, but was under no obligation or agreement to obey the order. *Georgia P. R. Co. v. Propst* (1887) 83 Ala. 518, 3 So. 764, where it

This section is applicable only to employees who are intrusted with the function of giving directions which are orders in the legitimate and ordinary acceptation of that term. An employee whose duty it is merely to give signals is not a representative of the master.³

Where both the complainant and the negligent employee occupied positions which implied the possession of a power to control other employees, the master's liability must, of course, be determined with reference to the question, whether, as a matter of fact, the complainant was subject to the directions of the negligent employee.⁴

Whether the defendant can be held liable under this provision for the negligence of an intermediate employer depends upon whether that employer is an independent contractor or a person who, with his workman, has entered into the service of the defendant and is subject to his control.⁵

1695. [692] Temporary substitutes for regular foremen, status of.—
It seems to be laid down as an unqualified principle in an Indiana

was held that a night watchman about a station, who had voluntarily taken passage on a freight train to a place where he took his meals, could not recover for injuries received in complying with the conductor's order or request to couple two cars.

This case was followed in a later one, where it was held that a mere direction by a conductor to turn a switch, given to an occasional employee of the company, who boarded the train of his own accord, while off duty, did not render the company liable for an injury sustained by such employee while complying with the direction. *McDaniel v. Highland Ave. & Belt R. Co.* (1890) 90 Ala. 64, 8 So. 41.

³ A person employed in a mine, whose duty it was to notify by signal when conditions were such that work which the miners were bound to do might be safely proceeded with, is not a person "to whose orders and directions a workman is bound to conform," within the meaning of the employers' liability act. *Metcalf v. Great Boulder Proprietary Gold Mines* (1906) 3 Austr. Comm. L. R. 543.

An employee who merely tells another that the time has arrived for setting in motion a machine which they are both engaged in operating is not a representative of the master. *Howard v. Bennett* (1888) 58 L. J. Q. B. N. S.

129. Lord Coleridge said: "I do not think that such a communication as this as to starting a machine, from one workman to another, is an order or direction within the meaning of the words of the subsection, which are more applicable in my view to a man in a superior position, and do not apply to fellow workmen, who are not in the least in a position of superiority to each other, or amenable even to the suggestions of one another." Compare the common-law decisions to the effect that employees whose functions are to give signals are not performing a non-delegable duty. See § 1537, *ante*.

⁴ A man charged with the operation of the furnaces in a foundry cannot properly be held a person to whose orders a master mechanic is bound to conform, where the evidence is that each is supreme and of equal degree in his peculiar department. *Birmingham Furnace & Mfg. Co. v. Gross* (1892) 97 Ala. 220, 12 So. 36.

⁵ A mine owner has been held answerable for the negligence of the employer of "butty" men, *i. e.*, men who joined together to get out coal at so much a ton, the evidence showing that the defendant had the right to discharge such employees. *Brown v. Butterley Coal Co.* (1885) 2 Times L. R. (Q. B. D.) 159, 53 L. T. N. S. 964, 50 J. P. 230.

case that, in the absence of specific evidence of authority to appoint a substitute, a court will presume that a superintendent or foreman exceeds his powers in temporarily delegating his functions of control to one of his subordinates, and that for this reason a workman who is injured by conforming to the orders of the delegate cannot recover damages from the master.¹ This doctrine seems to be a much more dubious application of the maxim, *Delegatus non potest delegare*, than the decisions which deny the servants' right to recover for injuries caused by the defaults of a temporary superintendent. See § 1688, *ante*. The only condition precedent to recovery under this provision of the statutes is that the plaintiff shall have been bound to conform to the orders of the negligent fellow employee. The essential question, therefore, in such cases seems to be, not whether the delegation of powers was authorized, but whether employers, as a class, would accept, as a valid excuse for disobedience to the orders of the substituted foreman, the plea that he was not a legally appointed deputy. If this question must, as seems inevitable, be answered in the negative, the theory of the court in this case is clearly erroneous, for the proposition that disobedience to such orders will, in the large majority of cases at least, draw down upon a servant the displeasure of the employer, and even expose him to imminent risk of dismissal, may reasonably be said to involve the proposition that conformity to the orders is obligatory upon him. It is true that, if a servant was really justified in disobeying an order of a deputy foreman, the master would not be justified in dismissing him because the order was disobeyed, and it may therefore be urged that the law cannot test the existence or absence of a duty with reference to any other assumption than that the master will act as he ought to act in the premises. To this reasoning there is, it may be conceded, no direct answer, but its effect would seem to be adequately countervailed by the practical consideration that it is neither fair to the servants themselves, nor conducive to the interests of the master, to lay down a rule which would impose upon subordinates the duty of inquiring, in each particular instance of the appointment of a deputy by a foreman, whether or not the appointment has actually been authorized by the master. Such a rule is open to the very same objections as those which have been deemed conclusive against the theory that a master is exempt from responsibility if the order to which the plaintiff conformed was one which

¹ *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

the directing employee was expressly forbidden to give. See next section. The most rational principle, it is submitted, which can be laid down for the solution of such cases is that subordinates are entitled to regard themselves as being bound to comply with an order of an employee temporarily acting as foreman, unless the delegation of authority has, to their knowledge, been expressly prohibited by the master, or the order which they are required to execute is manifestly beyond the scope even of the authority conferred upon the regular foreman himself.

1696. [693] To what orders a servant is bound to conform.—(See also the preceding section, *ad finem*, and § 1698, *post*.) All the powers which are reasonably incidental to the exercise of his general power are deemed to have been impliedly conferred upon a supervising employee.¹

Where injury is caused to a workman by reason of his conforming to a negligent order of an employee whose orders he was bound to obey, the master is liable, although the order was to do something expressly forbidden by the employer's rules.² But an exception to this application of a familiar principle of the law of agency to actions brought under the statute is admitted to exist wherever the forbidden order was one which the plaintiff knew to be outside the scope of the authority of the directing employee.³

1697. [694] When a servant is deemed to have acted under orders.—To entitle an injured servant to maintain an action it is not necessary to prove that an order was given by means of words. An order within the meaning of the statutes may be implied from circum-

¹ If the coupling of cars in a certain way will save time, a conductor is authorized to direct them to be coupled in that way. *Grand Trunk R. Co. v. Weegar* (1894) 23 Can. S. C. 422, per King, J. This point was not noticed by the other members of the court, nor by the lower courts ([1893] 23 Ont. Rep. 436 [1893] 20 Ont. App. Rep. 528).

² *Marley v. Osborn* (1894) 10 Times L. R. (Q. B. D.) 388, where Cave, J., said: "The legislature did not intend to leave it to the workman to go into the question whether the order given was right, if it was an order he was bound to obey, but intended that in every case in which a superior had given an order which an inferior would be bound to obey, the master would be liable for the consequences."

³ In *Bunker v. Midland R. Co.* (1883)

47 L. T. N. S. 476, 31 Week. Rep. 231, the plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen, and was aware that there was a rule of the company that no van guard under the age of fifteen was ever to drive a van. The defendant's foreman ordered him, the plaintiff, to drive a van load of fish to market, and said he would be paid extra money for so doing. The boy did drive the van, and in consequence was thrown down from his seat and seriously injured. Held, that he was properly nonsuited, on the ground that, as he was not obliged to obey the order so given, the foreman was not a person to whose orders in regard to the subject-matter he was bound to conform, and that the true cause of the accident was his own contributory negligence.

stances, and it is primarily a question for the jury whether it shall be so implied.¹ Among the circumstances which may justifiably furnish a basis for the inference that the plaintiff was acting under orders is the customary course of proceeding on previous occasions when similar work was to be done.²

Where the injury resulted from the adoption of some particular method of doing the work assigned to the plaintiff, the master is responsible if that method was specifically designated by the superior servant in giving his order.³ In the absence of specific directions, a

¹ *Millward v. Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453, per Day, J. (p. 70).

According to Rigby, L. J., in *Reynolds v. Holloway* (1898) 14 Times L. R. 551, one, at least, of the grounds of the decision in *Hooper v. Holme* (1897) 13 Times L. R. 6, where the plaintiff was injured while mixing cement in a place where he was liable to be struck by passing trains, was that an order could not be implied from the fact that the foreman of the gang was himself doing similar work in an equally dangerous place. See further as to this case § 1694, note 1, *ante*.

An express order to go between an engine and a car to uncouple them will be implied from a special order to uncouple at a time and under circumstances when it was necessary to go between them to conform to the special order. *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145.

² *Millward v. Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453. There the plaintiff was not expressly ordered to do the work in the manner which resulted in injury to him, but he testified that he did it in that manner without orders because he had done so on previous occasions, and that his superior saw what he was doing and made no objection. The contention of defendant's counsel that the act did not apply because no direct order was given at the time the injury was received did not prevail. Day, J., said: "Surely the order need not be by express words. The jury might think that an order was implied from the circumstances." Mathew, J., said: "The plaintiff was doing what, according to his evidence, it was

the ordinary course for him to do in unloading similar goods. Is it necessary in order that the subsection may apply, that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?"

This case was followed in *Cox v. Hamilton Sever Pipe Co.* (1887) 14 Ont. Rep. 300, where it was laid down that recovery is not dependent upon proof of the giving of a specific order at the time of the accident, general prior orders being sufficient.

A verdict for the plaintiff will not be disturbed where the evidence was that he lost his hand while taking some stuff out of a mixing machine while it was in motion, and that his foreman had taught him to do this, and it was the usual method of doing the work. *Medway v. Greenwich Inland Linoleum Co.* (1898) 14 Times L. R. (C. A.) 291.

³ *Weegan v. Grand Trunk R. Co.* (1893) 23 Ont. Rep. 436, affirmed in (1893) 20 Ont. App. Rep. 528 (no opinion) (1894) 23 Can. S. C. 422 (conductor told a brakeman to arrange the coupling apparatus in a certain way for the purpose of coupling an engine to a car, and then signaled for the engine to back up before he had ascertained whether or not the coupling had been completed).

In a case where there is evidence going to show that the accident was caused by that form of negligence which consists in ordering one man to do work which cannot be safely done unless two are assigned to it, it is a misdirection to tell the jury that there was a "special" order within the act, and a verdict for the defendant rendered after such a charge will be set aside. *Barber v. Burt* (1894) 10 Times L. R. (Q. B. D.) 383.

The master is liable for injuries re-

general direction is deemed to authorize the doing of a thing in the manner reasonably proper for doing it.⁴

[The "order or direction" must be held to refer to some specific, in contradistinction to general, duty which the offending servant has authority to impose.^{4a}]

A servant is deemed to have been injured by conforming to an order, where, in carrying out a general direction, he uses the means which, to a person possessing his limited knowledge of the conditions, it might seem reasonable to adopt under the circumstances, though an expert would have adopted a different method.⁵

[The pressing of a signal button is an instruction within the meaning of the act.^{5a}]

1698. [695] Necessity of establishing a causal connection between the order and the injury.—To entitle a plaintiff to recover under this provision he must, in fact, have conformed to the order of the negligent coemployee in respect to the particular act which he was doing at the time when he was injured.¹ Hence, an action in which the plaintiff seeks to recover on the theory that he was injured by con-

ceived by the servant while engaged in work being done in accordance with the specific directions received from a superintendent, not only as to the particular work to be done, but as to the manner of doing it, including the position to be occupied by him, when the injuries were directly caused by a negligent act of the superintendent done after the order to the employee was issued. *Toledo, St. L. & W. R. Co. v. Pavey* (1906) 39 Ind. App. 284, 79 N. E. 529.

To make the subsection apply, it is necessary that the order from conforming to which the injury resulted should be particular to the effect of superseding the exercise of the workman's own private judgment and discrimination, and substituting therefor the behest of the person to whose directions he is bound to conform. *Canavan v. Green* (1905) 8 Sc. Sess. Cas. 5th series, 275.

⁴ King, J., in *Grand Trunk R. Co. v. Weegan* (1894) 23 Can. S. C. 422. This point was not noticed in the Ontario court of appeal or divisional court.

^{4a} The statute does not apply to general, as distinct from special, orders. *Indianapolis Street R. Co. v. Kane* (1907) 169 Ind. 25, 80 N. E. 841, rehearing denied in (1907) 169 Ind. 40, 81 N. E. 721. See also *Pittsburgh, C. C. & St. L. R. Co. v. Ross* (1907) 169 Ind.

3, 80 N. E. 845; *Richey v. Cleveland, C. C. & St. L. R. Co.* (1911) 47 Ind. App. 123, 93 N. E. 1022.

It must be made to appear that the injured employee was acting under some special order or direction of the person to whose order he was bound to conform, when injured; and it is not enough to show that he was performing his general duties. *Indiana Mfg. Co. v. Buskirk* (1903) 32 Ind. App. 414, 68 N. E. 925.

A statute making the master liable for injuries received by an employee while obeying the order or direction of a vice principal does not apply to orders which are as broad as the whole service, so that at the time of the injury the person injured was governing himself according to his own judgment as to what was proper. *Southern Indiana R. Co. v. Harrell* (1903) 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262.

⁵ *Hamilton Bridge Co. v. O'Connor* (1895) 24 Can. S. C. 598, affirming (1892) 21 Ont. App. Rep. 596 (1894) 25 Ont. Rep. 12.

^{5a} *Tennessee Coal, Iron & R. Co. v. Cottrell* (1911) 173 Ala. 538, 55 So. 791.

¹ *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Clear Creek Stone Co. v. Carmichael* (1905) 37 Ind. App. 413, 73 N. E. 935, 76 N. E. 320.

forming to an order to take up the position which he occupied at the time of the accident is not maintainable, where the only possible inferences from the evidence are either that no such order was given at all or that the order actually given was to stand away from that position;² nor where the superior servant, although he had authority to direct the plaintiff to perform the duty which brought him to the place where he was injured, had no authority to send him to that place rather than to any other.³

The fact that a superintendent directed a servant engaged in using a sledge to strike harder, and to use a "swinging" blow instead of an "up and down" blow, does not render the master liable for injuries to a servant who was holding the buffer which was being struck by the sledge, where such injuries were due to the sledge being diverted by coming in contact with a stone projecting from a wall, and striking the servant's hands, several accurate blows having been struck after the superintendent's directions were given. *Wilkinson Co-op. Glass Co. v. Dickinson* (1905) 35 Ind. App. 230, 73 N. E. 957.

² *Kellard v. Rooke* (1888) L. R. 21 Q. B. Div. 367, 57 L. J. Q. B. N. S. 599, 36 Week. Rep. 875, 52 J. P. 820 (plaintiff struck by a bale, while standing under the hatchway of a ship).

³ One employed to work at a machine in a shed, who is subject to directions from a carpenter as to what work he shall do, but in no other respect, who while working overtime in the evening is injured by the negligence of the carpenter, who was stacking timber in the shed, in which it was not safe for them both to work at the same time, cannot recover against the employer. *Snowden v. Baynes* (1890) L. R. 24 Q. B. Div. 568, affirmed in (1890) L. R. 25 Q. B. Div. 193. In the divisional court, Wills, J., argued thus: "It seems to us that there is no connection between his doing that piece of work rather than any other, and the accident. Sellick [the carpenter] had no authority to send him to any other place to work, or to exercise any discretion, or give any orders as to where he should go to do the work. Whatever work Sellick had told him to do, he would have been in the same place, so that it was in no sense the exercise by Sellick of an authority vested in him and exercised by him that brought the plaintiff into what ulti-

mately proved to be a place of danger. We think the order which is contemplated by this subsection must be one which is really that of the person in the position of Sellick, and which is the direct offspring of some choice or exercise of judgment and will on his part; if not, it is not his order at all. Sellick had authority to say, 'You shall do this bit of work or that bit of work,' but not 'You shall do it at this place or that place.' The choice of place rested with someone else. So far as the evidence goes upon this point, the shed in question was the plaintiff's regular place of work, and it has not been suggested that either he had any choice, or Sellick any control, in respect of the place where the work should be done. . . . We think it right, however, to point out that, besides the broad distinction we have already dealt with, there is one obvious difference (whether affecting the right of action or not), between a case in which the circumstances of danger are brought about by the performance on the part of the person injured of acts the direct result of obedience to an order then and there given, and which then expose him to immediate risk if the person giving the order be careless, and a case in which obedience to the order is accompanied by no circumstance of present risk from the negligence of the person giving the order, and in which, if the mere fact that obedience to the order involves the presence of the workman in a spot where he is afterwards endangered by the act of the person giving the order is sufficient to give a right of action, the liability may flow from an order given a week or a month before the accident happened. In such a case it is obvious that such an order might amount to very little more than the mere selection of a particular workman to be employed upon a particular job, and it is difficult to suppose that such a

It is not enough to prove that there was negligence in a servant of the defendant which caused the injury, nor that that negligence was the negligence of the person to whose orders the plaintiff was bound to conform. It must be proved that the injury arose, not alone from the negligence of such a person, but also from his having conformed to the order.⁴ If the only negligence charged is that which inheres in the order itself, the two ingredients of the right of action thus specified will, in the nature of the case, be merged in the single question, whether the injury was the consequence, in a legal sense, of the servant's obedience to the order. This question is one partly of fact and partly of law and is determined by the same tests as those ordinarily employed for the solution of similar problems.⁵ See chapter LXVII., *ante*.

But if the alleged breach of duty was in respect to something done or omitted after the servant had complied with an order which was

case could be within the act." In the court of appeal Lord Esher thus tersely stated his view: "Unless the plaintiff can show that Sellick had authority to tell him where he was to work and at what time, he cannot succeed in his action. I cannot see any evidence of such an authority. The evidence shows that the only authority of Sellick was to tell the plaintiff what work he was to do. There is no evidence that Sellick had any authority to tell the plaintiff to work overtime, or that under his agreement with the defendant the plaintiff was bound to work overtime if Sellick told him to do so. There is, therefore, no evidence of any order given to the plaintiff by Sellick which led to the accident." Fry, L. J., based his judgment on the ground that "the accident arose from the plaintiff's working overtime by his own voluntary act."

⁴ *Wild v. Waygood* (1892) 1 Q. B. 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389, per Lord Herschell. In the same case Lindley, J., expressed his views as follows: "Negligence must be proved, but something more must be proved, and when you come to examine the section you must prove this much more,—that the negligence was that of a person in the employ of the defendant, to whose orders the plaintiff was bound to conform; and, secondly, that the injury to the plaintiff resulted from his having conformed to those orders. The whole,

I think, comes to this,—that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section."

⁵ The order of a foreman to be quick is not the "cause" of an injury received by a workman through stumbling over some loose bricks, and falling under a car, where the expression was not used in such a manner as to imply that extraordinary diligence was to be used, but merely in the ordinary sense of a direction to proceed with his work. *Martin v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. (Q. B. D.) 216.

See also *Harris v. Tinn* (1889) 5 Times L. R. (Q. B. D.) 221, the facts of which are stated in the following section.

Where an injury was received by a brakeman in consequence of a fellow brakeman's having given to another brakeman a wrong signal, which was finally transmitted to the engineer by the conductor, it was held that the cause of the injury was the negligence of the first brakeman who gave the signal, and that there could be no recovery under this provision of the statute. *Grand Rapids & I. R. Co. v. Pettit* (1901) 27 Ind. App. 120, 60 N. E. 1000.

not an improper one considering the circumstances under which it was given, the analysis of the causation is less simple. In a case involving this situation, it has been held by the English court of appeal that the servant is not required to prove that the injury resulted from his conformity to orders, as its *causa causans*, but merely that such conformity was the *causa sine qua non* of the injury.^{5a} That this doctrine is subject to some limitation, and that it does not render the master liable for all subsequent delinquencies of the directing employee, is apparent from the opinions of the lord justices. But neither this nor any other reported decision indicates with any clearness the principle upon which the line is to be drawn between the acts for which the master is or is not responsible.⁶ In Alabama the view is taken that the injured servant cannot recover unless the

^{5a} See *Alabama Steel & Wire Co. v. Tallant* (1910) 165 Ala. 521, 51 So. 835.

⁶ In the case referred to (*Wild v. Waygood* [1892] 1 Q. B. (C. A.) 783, 61 L. J. Q. B. N. S. 391, 66 L. T. N. S. 309, 40 Week. Rep. 501, 56 J. P. 389), the plaintiff was held entitled to recover for an injury resulting from the negligence of his foreman in starting an elevator, while he was standing, in compliance with the foreman's directions, on a plank extending across the elevator shaft. Lord Herschell said: "Now, in this case it appears to me,—and I do not propose to lay down any general rule upon the subject,—that it is quite clear the injury did result from the plaintiff having conformed to an order, when he was told to go to a place which was, and must have been known to be, a dangerous place, if the person who told him to go there was guilty of negligence. That person having been guilty of negligence, created the danger, and caused the injury, it seems to me the case is within the very terms of the act. It is not necessary to endeavor in the present case to determine or lay down any general rule as to the construction of this section, beyond this,—that I am quite clear it is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words in the act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this,—

that I do not think it essential to show that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order." Kay, L. J., discussing the three possible constructions that might be put on the section said: "The first point that has been urged before us is that it only means an injury from conforming to a negligent order—the negligence being in the order itself. The second is that it means anything that may occur while conforming to an order; and the third is that it means only such direct or indirect results as are closely connected with the order that has been given. I think the first construction argued for is inadmissible. The section clearly shows that it is not confined to an injury caused by a negligent order, but that it must be caused by the negligence of the person giving the order, and must result from conforming to the order given. I do not think that it would be the proper construction of that subsection; I think it would be much too narrow to say that it refers merely to negligence in giving the order. Then I think the second construction would also be much too wide. To say that it includes every case of negligence after an order has been given which the workman was bound to conform to at the time would make it extend to a case where the order was a

superior servant was negligent in giving the directions which were conformed to.⁷ That this construction of the words of the statute

general order to assist the person who gave it in certain work, and which might be given days or weeks before; and the accident might result from the negligent act of that person while the workman was assisting him. I am not prepared at present to say that the construction of the subsection is so wide as that. It seems to me the third construction is the most reasonable construction of the section—that it relates to negligence which has an intimate connection with the conforming of the workman to an order given him at the time of the injury, and to which he was conforming at the time of the injury. . . . The negligence was really a combination of those two things. If the workman had not been on the plank, there would have been no negligence in pulling the string. It was because the workman was there at the moment, conforming to the order given to him by Duplea, that the pulling of the string by Duplea was an act of negligence. Therefore, the injury may be said to have resulted from conforming to the order, the act being done by Duplea whilst the workman was conforming to his order.”

This decision overrules *Howard v. Bennett* (1888) 58 L. J. Q. B. N. S. (Q. B. D.) 129, 60 L. T. N. S. 152, 53 J. P. 359, 5 Times L. R. 136, in so far as it was based on the proposition that conformity to orders was not the cause of an injury which resulted from the premature starting of a machine, while the plaintiff's hands were in a dangerous position, in which he had placed them while in the act of complying with the order. In criticising the theory of Lord Coleridge in the earlier case, that the injury resulted, not from the directions, but from the machine being set off too soon and at too great a speed, Lord Herschell said: “I most respectfully express my dissent from the view of the lord chief justice there indicated. Of course, it may be that the person who started the machine was not a person to whose orders the plaintiff was bound to conform; but supposing the plaintiff was bound to conform, and that the person to whose orders he was bound to conform in working a machine tells him to put his hand in a certain part of the machine and then negligently starts it

while the man's hand is there, I own I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and, his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can conceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time. Therefore, with great respect to the learned chief justice, I am unable to concur in the view that the conformity with the order must be in that sense the *causa causans* of the injury.” But the denial of the right to recover in the earlier case was probably justifiable on the other ground assigned, *viz.*, that the negligent employee was not a person to whose orders the plaintiff was bound to conform, within the meaning of the statute. See § 1694, *ante*.

It is an error to take the case from the jury, where the evidence is that the plaintiff, while at work in the sweat-box of a sewer-pipe company and engaged in placing clay in the press, was injured by the act of the employee in charge of the press in causing the plunger to come down before the plaintiff had given the word. *Cox v. Hamilton Sewer Pipe Co.* (1887) 14 Ont. Rep. 300, adopting the general principle that the servant may recover without showing that the order was a negligent one.

⁷ This is one of the four prerequisites to the maintenance of the action mentioned in *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145.

It has been held, on the ground that it was perfectly proper to order the plaintiff to cut down a tree in which another had lodged, that the failure of the superior servant to inform the subordinate when it had become unsafe for him to further chop on the tree did not authorize a recovery from the employer.

is opposed to the weight of authority is apparent from the decisions already cited. The case in which it was adopted antedates *Wild v. Waygood* (see note 4, *supra*), and it may be questioned whether a different theory would not have commended itself to the court if the arguments upon which that decision was based had been before it.

In one Indiana case the court proceeded upon the principle that an injury due to negligence of the superior servant, which was committed subsequently to the giving of the order, did not constitute a cause for action, the reason assigned being that under such circumstances the injury did not result from conforming to his orders, but from the subsequent act or omission.⁸ But this doctrine has been qualified by later decisions. One of these permits recovery where the direct cause of the injury was something done or omitted by the plaintiff's fellow servants in compliance with a second order.⁹ In another the action was held maintainable where the injury was due to the negligence of a superintendent in bringing a naked lantern close to a place where gas was escaping, and where the plaintiff was working by his orders. The court of appeals declined to accept the contention that the statutory provision was not applicable for the reason that the injury occurred long after the order had been given and obeyed, and as a result of the negligent handling of the lantern.¹⁰ If the supreme court should ultimately adopt the doctrine of this last case, the law in this state will, it seems, be virtually the same as it is in England, and the *Hodges Case* (see note 8, *supra*), which, strange to say, is not referred to in the later opinions, would be discredited.

It is clear that, under any theory of the effect of this provision, no action can be maintained where the evidence indicates that the efficient cause of the injury was a mere accident,¹¹ or an act of negligence committed, while the plaintiff was executing a proper order, by a co-employee to whose directions he was not subject.¹²

Postal Teleg. Cable Co. v. Hulsey (1896) 115 Ala. 193, 22 So. 854.

⁸ *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383.

⁹ In *Louisville, N. A. & C. R. Co. v. Wagner* (1899) 153 Ind. 420, 53 N. E. 927, the plaintiff assumed a dangerous position in obedience to his foreman's orders, and was injured in consequence of his fellow workmen obeying the foreman's orders to let loose a truck. The court said: "The order to loose the truck was the proximate cause of plain-

tiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was thus bound to enter, and then ordering the truck turned loose upon him without warning, that constitutes the actionable wrong."

¹⁰ *Indianapolis Gas Co. v. Shumack* (1899) 23 Ind. App. 87, 54 N. E. 414.

¹¹ *Harris v. Tinn* (1889) 5 Times L. R. (Q. B. D.) 221; *McManus v. Hay* (1882) 9 Sc. Sess. Cas. 4th series, 495.

¹² *Elliott v. Tempest* (1888) 5 Times L. R. (Q. B. D.) 154.

A railroad company is not liable

1699. [696] Necessity of showing negligence on the part of the superior servant.—As pointed out in the preceding section, the negligence for which the master is required to answer under this provision of the statutes may be either in regard to the order to which the plaintiff conformed, or in regard to some subsequent act or omission of the directing employee. In either case the question is simply as to what would have been the conduct of a prudent person under the given circumstances.¹

where a brakeman, who assumed a position between cars separated from each other, for the purpose of coupling them, after the conductor should have made a coupling between the first car and the cars attached to the engine, is injured by reason of the failure of the conductor to make the first coupling, as he had stated he would do, if that failure was not due to negligence or recklessness, but to the speed at which the engine came back against the first car. *Alabama Midland R. Co. v. McDonald* (1896) 112 Ala. 216, 20 So. 472. The court said that an action possibly lay for the negligence of the engineer under subs. 4 of the act. See following subtitle.

1(a) Negligence in regard to the order itself.—In the absence of something in the context to qualify the statement, it is a misdirection to tell the jury that, if they were of opinion that the delinquent superintendent thought the conditions were such as to render it safe to give the order in question, he would not be guilty of negligence. The real test is, What would a sensible man have done under the circumstances? *Nash v. Cunnard S. S. Co.* (1891) 7 Times L. R. (C. A.) 597.

In *Hooper v. Holme* (1896) 13 Times L. R. (C. A.) 6, affirming 12 Times L. R. 537, it was assumed that putting a laborer to work on a railway viaduct without setting a look-out to warn him as to the approach of trains was negligence.

A verdict for the plaintiff will not be disturbed where the evidence is that the servant was a "ganger" who knew nothing about pulling down houses; that he was ordered by his foreman to save a certain partition; that while engaged in this work the joists supporting the ceiling came down with the roof and killed him; and that the foreman had not examined the joists to see how they were

fixed. *Reynolds v. Holloway* (1898) 14 Times L. R. (C. A.) 551.

A brakeman does not assume the risk of the unexpected negligence of a conductor while the latter is exacting and receiving implicit obedience to a specific order. *Pittsburgh, C. C. & St. L. R. Co. v. Nicholas* (1906) 165 Ind. 679, 76 N. E. 522.

No negligence is established by evidence showing merely that the foreman ordered the plaintiff to go into a hole which had been broken through a wall for the purpose of excavating a cellar, and that, while he was picking at the wall above him, it gave way and allowed the earth behind it to fall on him. *Booker v. Higgs* (1887) 3 Times L. R. (Q. B. D.) 618.

A signal by a section foreman to a brakeman on a hand car to stop the car, does not require him to do so without warning other men thereon, and thereby imperil their safety. *Thacker v. Chicago, I. & L. R. Co.* (1902) 159 Ind. 82, 59 L.R.A. 792, 64 N. E. 605.

A direction to a servant using a sledge to tamp a cement floor, to strike harder blows, does not render the master liable for the negligence of the servant in striking a "swinging" blow instead of an "up and down" blow, where the superintendent giving the order did not know that he was striking as hard as he could with the up and down blow. *Wilkinson Co-op. Glass Co. v. Dickinson* (1905) 35 Ind. App. 230, 73 N. E. 937. For another case involving similar facts see *Rainbow Coal & Min. Co. v. Martin* (1905) 35 Ind. App. 658, 74 N. E. 902.

The master is liable for injuries to a miner who was ordered to do some blasting in a place known to him, but not to the miner, to be dangerous. *Gunn v. Le Roi Min. Co.* (1903) 10 B. C. 59.

The mere fact that the plaintiff's foreman had ordered him to lower a stack of planks before the time when it fell

Construing the subsequent provision of the Indiana act, which corresponds to § 1, subs. 5, of the English act, the supreme court of that state has held that, as it merely particularizes other and different classes of employees for whose negligence the master is to be responsible, the scope of the subsection now under review is in no way limited by the restrictive phrase which, in the Indiana act, declares the recovery of the plaintiff to be conditional upon proof that the negligent

on him will not justify the inference that it was top-heavy at the time the order was given, and that its condition was known to the foreman, especially when the plaintiff and his witness admitted that they had observed nothing unsafe in the stack. *Connell v. Surrey Shipway Commercial Dry Dock Co.* (1887) 3 Times L. R. (Q. B. D.) 630.

The plaintiff obeyed an order to insert a bar of iron under a flat piece of iron on which a roll of iron was laid, and lift the roll so as to get it into a furnace lengthwise. While it was being lifted, it fell off the piece of iron on which it lay, in consequence of its not being properly scotched, and, striking the bar, threw the plaintiff backwards. Held, that the mere fact that the roll of iron fell was not sufficient evidence of negligence to submit to the jury, and that, for aught that appeared, the accident might have occurred owing to the manner in which the lifting was done by himself and his coworkers. *Harris v. Timm* (1889) 5 Times L. R. (Q. B. D.) 221.

A foreman of one set of artisans working on a building is not negligent in sending them, without making an inspection, to work on a scaffold, built by a competent mechanic for the use of another set. *Kettlewell v. Paterson* (1886) 24 Scot. L. R. 95.

The plaintiff, who operated a machine in defendant's factory, was ordered by the superintendent to start the machine. The superintendent had reason to know that plaintiff might understand the order as a command to see if the machine was all right, by resuming work. She so understood it, and was justified in such understanding. While starting the machine, in the exercise of due care, plaintiff's hand was thrown from its usual place by the unusual shaking of the machine and injured. Held, that under the circumstances, the order of

the superintendent was negligent, and plaintiff might recover. *Eaves v. Atlantic Novelty Mfg. Co.* (1900) 176 Mass. 369, 57 N. E. 669.

To prescribe an improper method of unloading heavy articles from a vehicle is negligence. *Milward v. Midland R. Co.* (1884) L. R. 14 Q. B. Div. 68, 54 L. J. Q. B. N. S. 202, 52 L. T. N. S. 255, 33 Week. Rep. 366, 49 J. P. 453 (iron window frames were left standing unsecured on a van).

No negligence is predicable of the omission of a foreman to instruct a boy sent to perform hazardous work, where he understands how to do that work and what danger it involves. *Worthington v. Goforth* (1899) 124 Ala. 656, 26 So. 531. For another illustrative decision, see *Martin v. Connah's Quay Alkali Co.* (1885) 33 Week. Rep. (Q. B. D.) 216, referred to in the preceding section, note 5.

In an action by a switchman for damages for injuries sustained by being thrown from a car by the sudden jerking or checking of the car, alleged to have been caused by the negligence of the switching crew foreman or the engineer of the switch engine, an instruction that, "although the jury may believe from the evidence that said car was suddenly stopped, and that the speed of said car was suddenly checked, and that said car was otherwise jarred at the time plaintiff was injured, yet they must find for the defendant unless they further believe from the evidence that said sudden stopping of said car, or the sudden checking of said car, caused an unusual shaking or jarring of said car," correctly states the law, and should be given at the request of defendant. *Louisville & N. R. Co. v. Smith* (1901) 129 Ala. 553, 30 So. 571.

(b) *Negligence in regard to acts or omissions subsequent to the giving of the order.*—See § 1698, notes 6–10, ante.

person was "performing a duty of the corporation."² As this subsection declares in the most general terms that the master is to be liable for the "negligence" of any employee of the class designated, there would seem to be no room for the controversy which has arisen with respect to the construction of the subsection dealing with superintendence, *viz.*, whether the manual acts of a superior servant are among those for which the master is responsible. See § 1691, *ante*. The few authorities which bear upon the subject are of a negative complexion; but the implication in favor of the workman's right to recover for an injury caused by such an action is as strong as it can be without a direct ruling on the point. In *Wild v. Waygood* (see § 1698, *ante*), the point that the action could not be maintained because of the character of the negligent act was one so obviously suggested by evidence, that, if it had been considered an open one, it would almost certainly have been adverted to by one or other of the eminent judges and counsel who took part in the discussion of the facts. In one Indiana case the action was held not to be maintainable, where the evidence showed the infliction of an injury through the negligence of the plaintiff's superior in handling a heavy piece of machinery.³ The true rationale of this decision, however, is not the character of the act constituting the negligence, but the theory that there was no causal connection between the order and the injury. See § 1698, note 8, *ante*. In a still later case in the court of appeals of the same state the negligence was again in respect to a manual act, and it was held that this fact was immaterial.⁴

² In *Louisville, N. A. & C. R. Co. v. Wagner* (1899) 153 Ind. 420, 53 N. E. 927, the court said: "Both subdivisions are equally parts of the same section, and relate to the same subject-matter. Each subdivision specifies different employees, but in common they distinguish employees of a superior rank,—employees clothed with responsibility and authority of the employer,—and both must be governed by the same rules of interpretation. The section must be construed as a whole."

The fact that the injury was caused by the foreman's negligently approaching with a naked light a place where gas was escaping will not prevent a servant from recovering under section 1, subs. 2, although such an act is not in the performance of a duty of the corporation under subs. 4. *Indianapolis Gas*

Co. v. Shumack (1899) 23 Ind. App. 87, 54 N. E. 414.

³ *Hodges v. Standard Wheel Co.* (1899) 152 Ind. 680, 52 N. E. 391, 54 N. E. 383. One of the grounds of the decision, *viz.*, that the directing employee was a duly appointed delegate, has been already noticed. See § 1695, *ante*.

⁴ *Toledo, St. L. & W. R. Co. v. Pavey* (1906) 39 Ind. App. 284, 79 N. E. 529, citing *Meagher v. Crawford Laundry Mach Co.* (1905) 187 Mass. 586, 73 N. E. 853.

And see *Indianapolis Gas Co. v. Shumack* (1899) 23 Ind. App. 87, 54 N. E. 414, in which the negligence was in respect to a manual act, but which fact was not suggested as a reason for refusing to allow the action to be maintained.

F. LIABILITY FOR INJURIES CAUSED BY ACTS OR OMISSIONS DONE OR MADE IN OBEDIENCE TO RULES.

1700. [698] Introductory.—In section 1, subs. 4, of the English act it is provided that a servant shall have a right of action against his employer, whenever he is injured “by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf.” This clause has been inserted in the statutes of Alabama and Indiana, and those of the English colonies; but it is not found in those of Massachusetts, New York, or Colorado.

The effect of this provision, as a whole, is indicated by the following passage from the opinion of Fry, L. J., in an English case: “There are four questions which must be asked, every one of which must be answered in the affirmative before the plaintiff can substantiate his case. The first question is this: Was there personal injury caused by the plaintiff? The second is, Was there injury caused by reason of an act or omission of any employee of the defendant? The third question is, Was the act or omission done or made in obedience either to a rule or a by-law of the employer, or to particular instructions given by a delegate of the employer? Why Parliament so framed the section it may be a little difficult to understand; why the particular instructions of the employer should not be referred to, but only the rules or by-laws of the employer and the instructions of a delegate of the employer, is not, on the surface, very easy to see. No doubt the legislature had some good reason for so enacting. The fourth question is whether the injury resulted from some impropriety or defect in the rules, by-laws, or instructions. It must not only be the result of impropriety or defect in the rules, by-laws, or instructions, but it must be an act or omission done or made in obedience to them, or one of them.”¹

1701. [699] Necessity of proving negligence in respect to the rules, etc., or to particular instructions.—By section 2, subs. 2, of the English act, and the corresponding provisions of the colonial acts, it is expressly declared that the workman shall not be entitled to compensation “unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions.”¹ This proviso is not

¹ *Whatley v. Holloway* (1890) 62 L. T. N. S. (Q. B. D.) 639, 54 J. P. 645.

¹ A jury is justified in finding an impropriety, etc., where a man is placed

inserted in the American statutes; but it is clear, both on principle and authority, that this noninsertion cannot be construed as having the effect of overruling the general rule that proof of negligence in respect to the subject-matter is a condition precedent to recovery in actions against the employer. The intention of the legislatures is assumed to be that no liability can be predicated, unless the defendant is shown to have been culpable either in promulgating the rule in question, or in failing to promulgate a rule to meet the requirements of the case.²

[But it has been held in Alabama that the master is absolutely

in charge of an engine, and at the same time employed in other operations which may involve risk to life or limb. *Whitley v. Holloway* (1890) 62 L. T. N. S. (Q. B. D.) 639, 54 J. P. 645, per Fry, L. J.

² In *Dixon v. Western U. Teleg. Co.* (1895) 68 Fed. 630, it was insisted by plaintiff's counsel that this clause in the Indiana statute gives a right of action to an employee who has, without his fault, sustained an injury, arising from the performance of any service rendered in obedience to the rules, etc., without regard to the question of negligence or want of care of the corporation or its foreman. His argument was that the subsection was to be construed as if the employer had been declared liable where the injury "resulted from the act or omission of the person injured or any other person, done or made, etc." Discussing the contention, the court said: "The phrase 'where such injury resulted from the act or omission of any person' is broad enough to embrace the injured person. The expression 'any person,' in its usual and ordinary sense, is inclusive and embraces every employee. This clause of the statute is not free from ambiguity. While the language employed is capable of a construction as broad as is contended for, it will not be given such construction, if to do so would lead to absurd or unjust consequences. . . . The construction contended for would make every corporation, except municipal, an insurer of the safety of its employees from injury in all cases where they were injured without their fault, while acting in obedience to the rules or instructions of their employer. It would subject the industries of the state to hazards and burdens of new and dangerous proportions. Its

mischief would prove far-reaching, and its injustice would be great. No corporation could safely conduct its business, if it were required to become an absolute insurer of the safety of its employees. No principles of justice or sound policy can be invoked in support of a construction which would condemn the employer to compensate an employee for an injury for which the employer was in no wise in fault. The statute is susceptible of a construction which does no violence to the language employed, and which will protect the just rights of the employee, and at the same time hold the employer to respond in damages for injuries resulting from its fault or negligence, or from the fault or negligence of any person delegated with authority to represent it. The true construction of the clause requires the words 'any person' to be limited so as not to include the person injured. Thus construed, the clause would read: 'Where such injury resulted from the act or omission of any person (except the person injured) done or made: (1) In obedience to any rule, regulation, or by-law of such corporation; or (2) In obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.' This construction makes the statute harmonious, and gives effect to every word and member of it. Under this construction, the effect of this clause is to prevent the corporation from setting up the defense that the injury to the plaintiff was caused by the act or omission of a coemployee, when such coemployee was acting in obedience to the rules, regulations, or by-laws of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of

liable for any impropriety in the rule, even though he personally has not been negligent in respect thereto.³]

1702. [700] "In obedience to the rules."—The effect of these words is to relieve the master from liability wherever the rules, etc., were not in themselves improper or defective, and the actual cause of the injury was the imprudent manner in which a coservant of the plaintiff carried them out.¹

That an injury was "caused by reason of an act or omission" of a coemployee, "done or made in obedience to particular instructions, etc.," cannot be held where it appears that the plaintiff, while engaged in carrying out his directions, not improper in themselves, was injured by a subsequent breach of duty on the part of the directing employee.²

1703. [701] "Delegated with the authority of the employer."—The employees to whom these words are considered to be applicable

the corporation in that behalf. In my opinion this clause of the statute ought to receive no broader construction."

³ "The master is bound to answer for any impropriety in the rules or by-laws under which his business is carried on, whether there has been any negligence on his part or not, and he may be liable as for this, though he may have taken due care to employ competent persons to formulate his rules and by-laws." *Alabama G. S. R. Co. v. Cardwell* (1911) 171 Ala. 274, 55 So. 185.

¹ Where it is the duty of an employee to draw away the wood which has been cut by a saw and also to attend to the engine which operates the saw, a jury is not justified in finding that the employer's instructions not to neglect the engine required him to abandon his other duty without giving notice to a workman who fed the wood to the saw. *Whatley v. Holloway* (1890) 62 L. T. N. S. (Q. B. D.) 639, 6 Times L. R. 160, affirmed in 6 Times L. R. (C. A.) 353. Mathew, J., pointed out that what was done by the delinquent employee was not done in obedience to the instructions, but in consequence of disobedience to them.

An averment that the plaintiff was injured by a fellow servant's disobedience to a rule of the master will not enable him to recover under this clause, since its effect is to make the master liable in precisely the opposite case, *viz.*, where the act or omission of the fellow servant is done in obedience to the mas-

ter's rules. *Laughran v. Brewer* (1896) 113 Ala. 509, 21 So. 415.

In *Baltimore & O. S. W. R. Co. v. Little* (1897) 149 Ind. 167, 48 N. E. 862, also, the contention that the true construction of this provision is that if any duty is enjoined by rule, etc., upon a servant, and the duty is omitted, the corporation is liable for resulting injury, was rejected. The court said: "If this was the proper construction of the specification, there would be little requirement for other provisions of the act than those of the third subdivision, since it would strike down the fellow servant rule in its entirety wherever the act or omission is in the line of duty. It would make the corporation liable for the act or omission of a servant, whether negligent or not, and whether the duty negligently performed or negligently omitted may have been enjoined by the general rules, etc., of the corporation, or is in obedience to particular instructions from one 'delegated with authority in that behalf.' Such was not the intention of the legislature."

² *Postal Cable Teleg. Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854 (complaint held demurrable which showed that the plaintiff would not have been hurt if his foreman had notified him when it was no longer safe to remain in the neighborhood of a tree which he had been ordered to chop down). This case, under another of its aspects, is noticed in § 1698, note 7, *ante*.

are persons occupying the position of managers, whom the employer deposes in his stead to do or to abstain from doing what he would do or abstain from doing in the premises.¹

G. LIABILITY FOR NEGLIGENCE OF CERTAIN SPECIFIED RAILWAY EMPLOYEES.

1704. [702] Generally.—The English employers' liability act of 1880, and all the colonial and American statutes which are modeled upon similar lines, contain provisions for the especial benefit of railway servants. But on referring to the text of the statutes in subtitle A, *ante*, it will be seen that there is some diversity in the language employed by the various legislatures.

It will be observed that the virtual effect of these provisions is to abolish the master's immunity for railway accidents in all, or nearly all, instances in which the injury was caused by the negligence of subordinate agents engaged in directing the movements of the rolling stock. Taken in connection with the preceding subsections, they supplement a railway servant's right of action in such a manner that the act, as a whole, may be regarded as being, for practical purposes, the equivalent, so far as such servants are concerned, of the statutes of those American states in which the doctrine of coservice is declared to be no defense in cases where the injury was caused by the negligence in the operation of a railway.¹

The language used in these clauses of the acts which enable a servant to recover for an injury received while he was conforming to the orders of a superior (see subtitle E, *ante*) does not, in any degree limit the liability imposed upon the employer by the provisions discussed in the present subtitle.²

1705. [703] Persons having "the charge or control of signal points."—The only English case in which these words have been discussed discloses so much diversity of opinion as to their import that the decision, except as a determination that there is no right of action for the negligence of the particular employee who caused the injury, is not of much service as a precedent.¹

¹ *Clawton v. Mowlem* (1888) 4 Times L. R. (C. A.) 756.

² *Iowa, Kansas, Minnesota.* See chapter LXXVI., *post*.

² *Indianapolis Union R. Co. v. Houlihan* (1901) 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943.

¹ *Gibbs v. Great Western R. Co.*

(1884) L. R. 12 Q. B. Div. (C. A.) 208, affirming (1883) L. R. 11 Q. B. Div. 22, 48 L. T. N. S. 640, 31 Week. Rep. 722. There it was held that the defendant could not be held responsible where the evidence showed that it was the duty of one Fisher, the employee whose act was the immediate cause of

The Alabama and Massachusetts cases, so far as they go, seem to make the railway company liable for the negligence of all employees who for any space of time, however short, have the power to adjust a switch for the purpose of traffic.² Negatively, therefore, these cases are authority against the theory propounded in the English case by Brett, M. R., that the statute contemplates a "general charge." Fur-

the injury, to clean, oil, and adjust the points and wires of a locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the proper condition of the points and locking gear, which were moved and worked by men in the signal boxes; and that Fisher, having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, and so injured a fellow workman.

In the divisional court, Mathew, J., said: "I find a difficulty in ascertaining what was precisely meant by the general language used in subs. 5, but, upon the best interpretation I can give, I think the legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement. As Fisher did not answer that description, but was merely employed to oil, clean, and adjust that which was moved by some other thing in the charge and control of some other person, I am of opinion that there was no evidence to bring the case within the provisions of subs. 5." Field, J., doubted whether the words "charge or control" are intended to mean different things.

In the court of appeal, Brett, M. R., expressed his views as follows: "I cannot think that there is any color for saying he had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him

the judge of the law and not the witness of facts. The plaintiffs were bound to show by evidence what were the duties of this man, when it would be for the court to say whether, having such duties, he was a person who had the charge of the points as intended by the statute. Fisher himself, when cross-examined, said what his duties were. 'My duties are,' he said, 'to clean and oil the locking bars and apparatus. I had several places to go to; I worked under Inspector Saunders.' The meaning of working under Saunders is that Saunders might order him at any moment to go to such and such a place and oil the bars and apparatus there, or not to go to the place he had intended to go to for the purpose of oiling the bars. The evidence which was given, showed, I think, that Fisher was only a little above a laborer, that he had to do manual work on what he was told to look to, and that he was not a person who had the charge of those things upon which he had to do such work under such circumstances." Bowen, L. J., thought it was "sufficient to say that Fisher was only, at the most, employed to do certain work on and in respect of the points, under the order of somebody else."

² Engineers and conductors provided with keys to a switch, with the duty of opening and fastening which no one is especially charged, for the purpose of using the spur track attached to enable trains to pass each other, are in charge of the switch *ad hanc vicem*. *Birmingham R. & Electric Co. v. Baylor* (1893) 101 Ala. 488, 13 So. 793.

A railroad company is liable for negligence of a tower man, whose duty it was to move switches by levers in a tower on signals from the men on the tracks below, in throwing a different switch than that directed by a signal, an approaching train being thus caused to run on a wrong track, and collide with a switchman who gave the signal. *Welch v. New York, N. H. & H. R. Co.*

ther doubt is thrown upon the correctness of that theory, if we consider the context of the provision. The most natural construction of the words describing the other employees who are declared to be vice principals in respect to particular functions is that the legislature had in view the employees who actually operate the instrumentalities specified. If this conception be the true one, it is clear that the maxim, *Noscitur a sociis*, furnishes a strong reason against limiting the application of the phrase now under discussion to employees who have a general charge of points. Upon the whole, therefore, it is submitted that the nonliability of the employer in the *Gibbs Case* (see note 1, *supra*) may be more properly referred to the theory announced by Mathew, J., *viz.*, that the statutes are intended to cover only cases in which the control of the points is exercised in regulating the movements of cars.

In Indiana it has been held that an employee in charge of a switch is not a person "who has charge of any signal, telegraph office, switch yard," since the section is to be read as punctuated, and no comma is to be inserted between "switch" and "yard."³ These particular words occur only in the statute of that state, and their construction is therefore not at present a matter of practical interest in any other jurisdiction. But the writer ventures, in passing, to express his strong doubt whether this rule is correct. In the first place the expression is not in common use.⁴ Switch targets are not "signals."⁵

(1900) 176 Mass. 393, 57 N. E. 668. The court declined to hold that the fact that the negligent employee received directions from the other servants took him out of the category of vice principals.

See also *Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

As a railroad company is liable for the negligence both of an engineer and of a switchman while in the performance of their respective duties, it would be liable for an injury proximately resulting from the negligence of the switchman in letting the train into the wrong track, if the injury would not have resulted but for that negligence, even though the negligence of the engineer contributed to produce the result; and it would be liable for the negligence of the engineer, though the injury could not have happened but for the negligence of the switchman in letting the train into the wrong switch track. *Louisville & N.*

R. Co. v. Butler (1911) 1 Ala. App. 279, 55 So. 262.

³ *Baltimore & O. S. W. R. Co. v. Little* (1897) 149 Ind. 167, 48 N. E. 862; *Indianapolis & G. Rapid Transit Co. v. Andis* (1904) 33 Ind. App. 625, 72 N. E. 145; *Indianapolis & G. Rapid Transit Co. v. Foreman* (1904) 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669.

⁴ The only authority cited by the court is 5 Rapalje & Mack's Digest of Railway Law, p. 60, where one of the divisions of subjects is entitled "Switch Yards." The expression is also found, though not very frequently, in the reports. See, for example, *Hurst v. Kansas City, P. & G. R. Co.* (1901) 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695; *Illinois C. R. Co. v. Cozby* (1898) 174 Ill. 109, 50 N. E. 1011; *Fay v. Chicago, St. P. M. & O. R. Co.* (1898) 72 Minn. 192, 15 N. W. 15; *Williams v. Louisville & N. R. Co.* (1901) 111 Ky. 822, 64 S. W. 738; *Walker v. Atlanta & W. P. R. Co.* (1898) 103 Ga. 820, 30

1706. [704] Person in "charge or control of a locomotive engine."—*a. What is an engine under the statute.*—The word "engine" is construed as meaning a "machine used to move trains."¹ An electric car is not a "locomotive engine."^{1a} An engine of an essentially stationary type is not brought within the purview of the statute by the fact that, together with the machinery operated by it, it is mounted upon a truck, and its power can be applied so as to move that truck along a set of rails to some other part of the employer's premises.²

[In § 5 of the Ontario statute (55 Vict. chap. 30) there is a comma between "locomotive" and "engine," so that the words do not indicate one thing, but two things, a "locomotive" and an "engine."^{2a}]

b. What employees are deemed to be in "charge or control" of engines.—It is not disputed that this description is applicable to the employees who actually operate the locomotive engines which move trains. It is a question of fact who was in charge of an engine at

S. E. 503. But it is omitted in the Century, Standard, and the other dictionaries to which the writer has access. It seems very improbable that an expression which, as this omission indicates, is far from being a familiar one, should have been used in a statute of this character. But the most fatal objection to the theory of the court is that, in all the acts of a tenor similar to that of Indiana, "switches" are specifically mentioned, and that it is therefore more likely that the Indiana legislators intended to add "yards" to the list of the specified parts of the plant, than that they intended to omit one which is expressly mentioned in the other acts, and substitute another word which, as this very decision shows, is construed as absolving a railway company from liability for a class of accidents which are peculiarly destructive, and in which the victims are peculiarly helpless.

⁵ *Chicago, I. & L. R. Co. v. Barker* (1908) 169 Ind. 670, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 14 Ann. Cas. 375.

¹ *Murphy v. Wilson* (1883) 52 L. J. Q. B. N. S. 524, 48 L. T. N. S. 788, 47 J. P. 565, 48 J. P. 24.

A person in charge of a stationary engine operating a tramway on a mining slope is not in "charge of an engine" on a "track of a railway," and is therefore merely a fellow servant with the

engineer of a pump engine located in the mine. *Whatley v. Zenida Coal Co.* (1898) 122 Ala. 118, 26 So. 124 (demurrer sustained to count alleging negligence of such an engineer).

^{1a} *Indianapolis & G. Rapid Transit Co. v. Andis* (1904) 33 Ind. App. 625, 72 N. E. 145.

² *Murphy v. Wilson* (1883) 52 L. J. Q. B. N. S. 524, 48 L. T. N. S. 788, 47 J. P. 565, 48 J. P. 24 (truck supporting a steam-crane ran over plaintiff's hand while he was grasping a rail to steady himself in pulling at a stone).

A pile driver, consisting of a steam engine placed on one end of a flat car, with the driver used for raising the hammer on the other end of the car, all forming one machine, which was self-propelling by means of a chain connecting the engine with a sprocket wheel on the axle of the car under the engine, —is not a locomotive within the statute. *Jarvis v. Hitch* (1903) 161 Ind. 217, 67 N. E. 1057.

^{2a} *McLaughlin v. Ontario Iron & Steel Co.* (1910) 20 Ont. L. Rep. 355 (holding that an employee who controls the movements of an overhead traveling crane operated by electricity and made to raise and move from place to place heavy iron castings is a person in charge or control of an engine or machine upon a railway within the meaning of § 5.)

any particular time,³ and whether the act alleged as the cause of the injury amounted to a breach of a duty imposed on the person answering this description.⁴

³ *Louisville & N. R. Co. v. Richardson* (1893) 100 Ala. 232, 14 So. 209.

An engineer who is in the employment of a railway company, and in charge of an engine which is at the time running upon the company's tracks, is prima facie in the discharge of his duties as engineer, and in a complaint based on this subsection it is not necessary to aver that the engineer was in the discharge of the duties imposed by his employment, when the injury was inflicted. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 So. 430.

A complaint is good, where it states that the engineer, while in the service of the company in charge of a locomotive, negligently injured the plaintiff, at a time when both were acting in the line of duty as employees of the company. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582.

In the physical act of starting a car, an engineer is, as to a conductor, a vice-principal. *Simons v. Brooklyn Heights R. Co.* (1910) 142 App. Div. 36, 126 N. Y. Supp. 792, rehearing denied and appeal to court of appeals granted in (1911) 143 App. Div. 945, 127 N. Y. Supp. 1144.

A fireman who, in obedience to the direction of the engineer who is under the engine, attempts to move the reverse lever, but carelessly moves the engine to the injury of the engineer, does not have the "charge or control" of the engine within the meaning of the statute. *Louisville & N. R. Co. v. Goss* (1903) 137 Ala. 319, 34 So. 1007.

Although a fireman was authorized to indicate to the engineer where to stop the locomotive when coal was to be taken, yet the locomotive was in the immediate charge of the engineer, and in a proper case the company would be liable for a subsequent act of negligence on his part in permitting such locomotive to move. *Cleveland, C. C. & St. L. R. Co. v. Bergschicker* (1904) 162 Ind. 108, 69 N. E. 1000.

A railroad company is liable for the injuries to a section hand caused by failure of an engineer to warn him of the approach of the engine. *Sereno v. Dela-*

ware, L. & W. R. Co. (1911) 145 App. Div. 136, 129 N. Y. Supp. 159.

A railroad company is liable for the negligence of an engineer although he was not the fellow servant of the injured servant. *Boggs v. Alabama Consol. Coal & I. Co.* (1910) 167 Ala. 251, 140 Am. St. Rep. 28, 52 So. 878 (carpenter employed around defendant's mine).

⁴ Evidence that a trackman was run down by a train and that the engineer did not whistle, as the rules required him to do when passing trackman, is sufficient to require the submission of the question of the master's negligence to the jury. *Barker v. London & N. W. R. Co.* (1891) 8 Times L. R. 31.

The blowing of a whistle by the engineer of a railroad train 50 yards or more before reaching a place where the track is obscured by dense smoke for 250 or 300 yards is not, as matter of law, a sufficient exercise of care as to other employees who may be coming on the track in a hand car from the opposite direction. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 So. 430.

In order to impute negligence to the master because of the negligence of an employee in charge of an engine, that person must have known of the defect, or must have been negligent in the discovery of the existence thereof. *Southern R. Co. v. Cooper* (1911) 172 Ala. 505, 55 So. 211.

For an engineer to run a railway train at a rapid rate of speed at a place where the statute does not regulate and prescribe the rate is not negligence *per se*. whether or not such running is negligence, so as to render the company liable for the death of a brakeman who fell from the top of the train, depends upon the particular conditions and circumstances. *Perdue v. Louisville & N. R. Co.* (1893) 100 Ala. 535, 14 So. 366.

Evidence that the plaintiff, a switchman, was struck, while walking close to a track, by an engine which was moving at an excessive rate of speed and without sounding the bell, will justify a verdict against the company. *Canada Southern R. Co. v. Jackson* (1890) 17 Can. S. C. 316.

[The fact that the injured servant is himself of a class for whose acts the master is made liable by the statute will not relieve the master from liability.⁵]

It is not error to admit in evidence a rule from a railroad company's book of rules providing that "a lamp swung across the track is the signal to stop," where the issue involved is whether the engineer was negligent in failing to perceive upon the track an employee who had fallen down and became unconscious by reason of sickness. *Helton v. Alabama Midland R. Co.* (1893) 97 Ala. 275, 12 So. 276.

In an action brought in Kentucky for injuries received in Alabama, recovery may be had for the killing of a railroad employee by the negligence of those in charge of a locomotive, although the negligence was neither "gross" nor "wilful," as it must be to make the action sustainable in the former state. *Louisville & N. R. Co. v. Graham* (1896) 98 Ky. 688, 34 S. W. 229.

A railroad engineer is not negligent towards a switchman on a switch engine, so as to charge the company with liability for injuries to the latter, in running by an oil box, near the track, but far enough away to permit the engine to pass safely, unless he knows or has reason to believe that the switchman is in such a position that he may be injured in passing such box. *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325.

An engineer who propels a train with such force and violence against standing cars as to injure a brakeman attempting to make a coupling between such cars and another car on the other side thereof is guilty of negligence, although he may not have known that the brakeman was between the cars. *Alabama Midland R. Co. v. McDonald* (1895) 112 Ala. 216, 20 So. 472.

Whether a "running" or "flying" switch is or is not to be regarded as negligence *per se*, a railway company cannot successfully assail the propriety of a verdict which finds that it is not negligence to switch cars at a speed of 8 or 10 miles an hour onto a repair track. *Louisville & N. R. Co. v. Davis* (1890) 91 Ala. 487, 8 So. 552.

Compare *Devine v. Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539, where one of the alternative theories suggested by the evidence was that cars

had been "kicked" at too great a speed by the engineer, and the case was held to be one for the jury.

The conduct of an engineer in applying the air brake and bringing the train to a sudden stop without giving any signal or warning does not necessarily constitute actionable negligence on the part of the company as to an employee injured by being thrown off from a flat car by such stoppage. *Cooper v. Wabash R. Co.* (1894) 11 Ind. App. 211 38 N. E. 823.

No recovery can be had for the death of a fireman caused by an explosion due to the want of sufficient water in the boiler, where the evidence is that, although the company held the driver responsible as regards the engine, it was the fireman's duty to attend to the water supply. *Brunell v. Canadian P. R. Co.* (1888) 15 Ont. Rep. 375.

A railroad employee may recover for injuries caused by sudden unnecessary movements of cars, due to the negligence of the engineer in the handling of a train. *Highland Ave. & Belt R. Co. v. Miller* (1898) 120 Ala. 535, 24 So. 955.

The unexplained fall of coal from the tender of a passing engine, which strikes and injures a workman engaged on the track, is sufficient evidence from which the inference may be drawn that those in charge or control of the locomotive were negligent in their mode of using it. *O'Brien v. Michigan C. R. Co.* (1909) 19 Ont. L. Rep. 345.

A complaint in an action by a telegraph operator, which charges that in attempting to cross a railway track at a time when his duties required him to do so, he was struck by a train moving 20 miles per hour, which gave no warning of its approach; that he was unable to see its approach, on account of high weeds; and that the engineer of the train knew of his duty to cross the track at the time,—charges actionable negligence, though the statutory duty of the engineer, to whistle and ring his bell on approaching a crossing and to stop his engine might not be applicable. *Indianapolis Union R. Co. v. Houlihan* (1901) 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943.

⁵ In *Pittsburgh, C. C. & St. L. R. Co.*

1707. [705] Person having "charge or control of a train."—a.

What constitutes a train, generally.—The view of the supreme court of Massachusetts is that the word "train" was used by the legislature in the ordinary sense which it bore at the time when the employers' liability act was passed in that state, and that this subsection is therefore only applicable where the train is one which is moved by steam.¹ In the case cited it was held that an action could not be maintained for an injury caused by the management of a street railway car operated by electricity in the usual manner. This doctrine seems to the present writer to be of very dubious correctness, in so far as it is based on the theory that a train must be propelled by steam to be within the meaning of the statute. In some respects the peculiar dangers to which railway employees are exposed from moving cars are essentially the same, whether the motive power be steam or electricity, and an injury of the kind which was denied to be actionable is, therefore, within the spirit, if not the letter, of the statute. And once it is conceded that the statute covers trains operated by electricity, the further result would appear to follow, that it can make no difference, as regards the master's liability, whether the motive power is transmitted by wire from some central point or generated or stored in an engine traveling with the train. This view receives some support from an English case which embodies the principle, that, if the other elements of a "train" are present, the employer is liable for injuries caused by its being carelessly transferred from one point to an-

v. Collins (1904) 163 Ind. 569, 71 N. E. 661, it was held that the statute created a liability in favor of a person in charge of a train who was injured by the negligence of the person in charge of the locomotive engine drawing such train.

A railroad company is liable for injuries to an engineer due to the failure of another engineer to obey a rule requiring him to stop when the signal lights at a switch did not show, although another employee subordinate to the injured engineer had been negligent in failing to close the switch. *Pittsburgh, C. C. & L. R. Co. v. Sudhoff* (1910) 173 Ind. 314, 90 N. E. 467.

The statute imposes a liability on the railroad company for injuries to one locomotive engineer caused by the negligence of another. *Pittsburgh, C. C. & St. L. R. Co. v. Gipe* (1903) 160 Ind. 360, 65 N. E. 1034.

A liability may arise under this statute for an injury to a conductor through

the negligence of an engineer in charge of the engine upon the same train, notwithstanding a rule of the company making the conductor in some respects the superior servant. *Pittsburgh, C. C. & St. L. R. Co. v. Collins* (1907) 163 Ind. 467, 80 N. E. 415.

¹*Fallon v. West End Street R. Co.* (1898) 171 Mass. 249, 50 N. E. 536. The court qualified its opinion by suggesting that "possibly a railroad, where the motive power has been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the purview of the act."

In this connection it may be remarked that in Alabama it has been held that an electric railroad is within the purview of a statute applicable to steam railroads. *Louisville & N. R. Co. v.*

other, whether the motive power be fixed or movable.² In the course of his opinion Cave, J., emphasized the fact that the danger of putting cars in motion without proper warning is equally great, however the cars are moved, and upon whatever part of the line.

[An electric car has been held not to be a "train upon a railway," within the meaning of the Indiana statute. The grounds of this decision are that the legislature in other statutes did not include street railroads in the general term "railroad," and that, at the time of the passage of the statute, steam railroads were the only railroad in general operation.^{2a} But a contrary view prevails in Ontario.^{2b}

b. How many cars constitute a train.—In an English case Lord Halsbury doubted very much whether the applicability of the word "train" depends upon "the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway." He thought the legislature intended a "very wide scope" to be given to the language used, and that, "speaking in a general way the legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in course of being drawn along a railway by that locomotive engine," should be included in the word.³ The actual extent of the decision cited is that several temporarily detached cars constitute a "train," but as there is nothing in the opinions of the other law lords to indicate that they were inclined to put a less liberal construction upon the statute than the lord chancellor, his theory of its meaning may perhaps be regarded as the one judicially accepted in England.

In a Massachusetts case involving facts closely analogous to those under review by the House of Lords, a similar conclusion was arrived at, the statutory word being held applicable to a number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic under an impetus imparted to them by a locomotive which shortly before the accident had been detached.⁴ That this court is

Anchors (1896) 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279.

² *Cox v. Great Western R. Co.* (1882) L. R. 9 Q. B. Div. 106, 30 Week. Rep. 816, 47 J. P. 116, where the jury were held to be warranted in finding that an employee whose duty it is to apply the hydraulic power by which a capstan is made to haul freight cars coupled together is "a person in charge of a train upon a railway."

^{2a} *Indianapolis & G. Rapid Transit Co. v. Andis* (1904) 33 Ind. App. 625, 72 N. E. 145.

^{2b} *Toronto R. Co. v. Snell* (1901) 31 Can. S. C. 241.

³ *McCord v. Cammell* [1896] A. C. (H. L. [E.]) 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180.

⁴ *Caron v. Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

prepared to accept, if it has not already accepted, a construction of the statute not less favorable to the servant than that adopted by Lord Halsbury, is also inferable from two other decisions holding that a locomotive and a single car connected together and run upon a railroad constitute a "train."⁵

c. *What employees are deemed to have "charge or control" of a train; conductors.*—A conductor is the employee to whom the statutory description is most obviously applicable, and it is not disputed that a railway company is *prima facie* responsible for his negligence.⁶ This presumption may be rebutted by showing that, at the time the injury was received, he was not, as a matter of fact, in control of the train in question. It cannot be said, as a matter of law, that a conductor is not in charge of a train during a temporary absence therefrom.⁷ Nor can any cessation of his controlling functions be

⁵ *Dacey v. Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437. Followed in *Shea v. New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 396.

⁶ In *Chicago & E. I. R. Co. v. Richards* (1901) 28 Ind. App. 46, 61 N. E. 18, it was held that a complaint was not demurrable, which alleged in substance that a brakeman, while climbing up to the top of a car, was struck by another car which had been negligently left by the conductor of another train on an adjoining side track at a place where the two tracks were only 5 feet apart, and, owing to the transverse slope on which the side track was laid, the stationary car leaned over towards the other track.

A railroad company is liable for the failure of a conductor to give notice of the presence on the track of a brake-beam which had fallen from his train, to the employees of the train following. *Louisville & N. R. Co. v. Fitzgerald* (1909) 161 Ala. 397, 49 So. 860.

A conductor who, while the plaintiff and others were engaged in coupling cars and giving signals for the movement of the cars, which were repeated by the conductor, gave a signal of his own initiative, was acting as a vice principal. *Brown v. New York C. & H. R. R. Co.* (1908) 126 App. Div. 240, 110 N. Y. Supp. 514, affirmed without opinion in (1909) 196 N. Y. 542, 89 N. E. 1096.

⁷ *Donahoe v. Old Colony R. Co.* (1891) 153 Mass. 356, 26 N. E. 868. There the conductor left his train at a certain station and allowed it to proceed to the

next station without him. A brakeman had occasion to make a coupling while the conductor was still absent from his post, and was injured by a defective drawbar, of the condition of which the conductor had failed to notify him. It was held that the jury was justified in finding that the conductor was in charge of the train when the injury was received, since nothing was done that was contrary to his orders, or not reasonably to be expected. It was also contended, without success, that the omission of the conductor to warn the plaintiff with regard to the defective drawbar was not negligent, for the reason that the movements of the train and the coupling and uncoupling of cars were wholly under his direction, and that a brakeman was not expected to uncouple cars without his orders. The court said, that when the conductor left the train and permitted it to proceed without him, it might properly be inferred by a jury that he expected and permitted such things to be done as were necessary in the management of the train until he should rejoin it, without a specific order from himself for each particular act; and, if so, the omission in question might properly be found to have been negligence on his part.

The conductor may be found to be in charge of the train although temporarily absent, if the train is still operated in accordance with his orders. *Carroll v. New York, N. H. & H. R. Co.* (1902) 182 Mass. 237, 65 N. E. 69.

predicated from the mere fact that the portion of the train which caused the injury had been detached from the engine and the other cars at the time when plaintiff was hurt.⁸

The conductor of a switch engine which is drawing several cars under his direction may properly be found to be, for the time being, in charge of a train consisting of the engine and cars.⁹ But such a conductor is not deemed to be in charge of a train which he merely has to make up. His duties are ended as soon as the cars are connected so as to compose a train, and he never has charge of those cars as a train.¹⁰

d. Employees other than conductors.—It has been laid down by the supreme court of Massachusetts that by the words, “ ‘any person . . . who has the charge or control’ [of a train] is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it.”¹¹ A railway company, therefore, is respon-

⁸ *Devine v. Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539. There two cars which had been “kicked” ran against a post at the end of a stub switch. It was held that, on the evidence, the jury might properly find that the conductor was the person who gave the stop motion for the cars, and that, taking into account the speed at which they were moving, he was negligent in not giving the motion sooner than he did.

⁹ *Dacey v. Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437. There it was held that, in view of the use to which a freight yard is put in making up trains and receiving cars from incoming trains, and the dangers attendant on moving cars and making up trains in the nighttime, when a car is standing so near the point where tracks come together, that the space between it and the adjoining track is unusually narrow, a court cannot say, as a matter of law, that it was not a negligent act to leave the car in such a position.

¹⁰ In *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169, the court said: “The statute, in referring to a ‘signal, switch, locomotive engine, or train,’ seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part,

control its movements. The charge or control is of that whose characteristic is rapid and forceful motion. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine. The statute might have been made to include those who have charge of the construction of the engine or the cars or who inspect them. Neglect of their duties would be likely to cause an accident to the train while in motion. But the legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive engine or the train when complete.”

In another case it was doubted whether a switching foreman who merely designated the track on which is to be shunted a part of the cars of a train which is controlled by a conductor could be said to have had “charge or control” of the train. *Caron v. Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112. In view of the earlier decision, it is hard to see why the court should have felt any doubt on this point.

¹¹ *Caron v. Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112.

A yardmaster who is the only person who has the right to control all the moving of cars in the yard, and whose orders to move the cars are obeyed regardless of whether the inspection of the train

sible for the negligence either of an engineer or of a brakeman if, as a matter of fact, either of them was in charge of the train.¹² But the mere fact that a brakeman has been put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute a person who has charge of or control of the train.¹³

The English doctrine would seem to be virtually the same as that established by the Massachusetts decisions, the House of Lords having held that the case was for the jury where some detached cars were left by the engineer on a steep gradient, and, being inadequately

has been completed or not, is a superintendent and exercising superintendence, and is also a person in charge or control of a train for whose negligence in letting down cars against one on which the plaintiff, a car repairer, is at work, the master is liable, although the yardmaster has no right to order a car to be moved until the train of which it is a part has been inspected by the plaintiff. *Brady v. New York, N. H. & H. R. Co.* (1903) 184 Mass. 225, 68 N. E. 227.

¹² *Shea v. New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 396, holding it warrantable to find negligence, where the evidence was that the engine with a car attached was pushed, while the plaintiff was in the car, and a brakeman was standing on the front platform, against other cars with such force as to break the platforms of the cars and throw the employee from his seat.

The engineer of a railroad train must be regarded as the person in charge, for the purpose of giving signals or slackening speed at the approach of danger, although for most purposes the conductor has control of the train. *Davis v. New York, N. H. & H. R. Co.* (1893) 159 Mass. 532, 34 N. E. 1070, followed in *Fairman v. Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613.

See also *Baltimore & O. S. W. R. Co. v. Peterson* (1901) 156 Ind. 364, 59 N. E. 1044, where it was held proper to refuse an instruction that, if the persons in charge of a train were fellow servants of the injured person, or track repairer, he could not recover.

¹³ *Caron v. Boston & A. R. Co.* (1895) 164 Mass. 523, 42 N. E. 112, where it was denied that the statute was applica-

ble to a brakeman whose duty it was to take charge of a train of cars which was being shunted onto a siding under the supervision of the conductor. The court said: "If 'control' is one thing and 'charge' is another, then, inasmuch as to some extent every brakeman upon a train would have 'control' of it, every employee injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defense of common employment as to brakemen would be done away with, even though the brakeman might be acting under an immediate superior. The statute is to be fairly construed, and, while it removes the defense of common employment in some cases, it does not extinguish it altogether, and we do not think that the legislature intended that it should be abolished in all cases where injuries were sustained by the carelessness of a brakeman. If it had, it would have used language more truly descriptive of a brakeman's usual occupation than the words, 'any person in the service of the employer who has the charge or control of any . . . train upon a railroad.' It is the charge or control of which the statute speaks, and not a charge or control, and it is the charge or control of the train as a connected whole which is meant. . . . *Thyng v. Fitchburg R. Co.* (1892) 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169."

A brakeman standing on the top of a train giving signals to the engineer is not a person in charge of the train. *Breed v. Lehigh Valley R. Co.* (1909) 131 App. Div. 492, 115 N. Y. Supp. 1019.

blocked, ran away and struck the plaintiff.¹⁴ The members of the court were unanimous in declaring that the action could be maintained upon the theory that the engine driver was in charge of the train when it stopped at the point where the runaway cars were left, and that he did not cease to be in charge of it because some of the carriages were uncoupled from one another and from the engine, in order that they might be separately dealt with in operations all directed to one end, namely, the discharging of the freight.¹⁵ It was also considered that there was another and independent ground which rendered it proper to send the case to the jury, *viz.*, that the evidence adduced in behalf of the plaintiff went to show that the foreman was negligent in regard to the blocking of the cars after they had been detached. The words "any person having charge or control of the train" did not, it was said, necessarily point to one person who was

¹⁴ *McCord v. Cammell* [1896] A. C. 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180.

¹⁵ The following passage from Lord Herschell's opinion (p. 66) sufficiently indicates the reasoning upon which this conclusion was based: "When he removed, or before he removed, the engine from the train, unless he wanted the rest of the train to follow, or was content that it should follow, it was absolutely essential that something should be done to detach that part of the train, and to make it stationary, while the rest of the train went on. That was a dealing with the train under his charge; and it seems to me that it was his duty to take care that all that was necessary for the operation with which he was concerned, namely, conveying these carriages severally and successively to the place where their contents were to be discharged, was done. It was not necessarily his duty to do it himself. If that duty had been left to some other servant of the company, and if he had every reason to believe that the duty was being properly performed, then it might well be that there could not be said to be negligence on his part,—he would have discharged the obligation resting upon him by seeing that the work was being done by the person whose duty it was, in that sense, to do it. But in the present case there is evidence that he knew the method which was being employed to sprag the wheels; there is evidence that he knew that it was a method which on previous occasions had proved inef-

fectual; there was the evidence of witnesses who were called before the jury that the use of this slag at all was an improper method,—that the proper method was to use wood. Under these circumstances it seems to me impossible, when once the conclusion is arrived at that he was in charge of the train, to say there was no evidence of negligence upon his part."

Lord Watson took the ground that the disengaging of the cars from the engine and securing them in order that they might remain stationary until the engine returned to take them up, was an act done in the conduct of the train with which that engine started, and that, if that act was negligently done (which was a matter for the jury to determine), the plaintiff was entitled to recover if the person guilty of negligence had at the time "charge or control of the train."

Lord Davey agreed in thinking that the engine driver was "in charge of the train," and remained "in charge of the train" till the duties with which he was entrusted were fully completed; he considered it a strange thing to say that, when the engine driver who was thus in charge of the train left three fourths of it in an exposed and dangerous position, and it turned out that insufficient precautions had been taken to secure the safety of that portion which was so left behind, there was no evidence to go to the jury of negligence on the part of the "person in charge of the train."

in charge of the whole train. Different duties in connection with different parts of the train might be assigned to different persons, and, in that case, each and all of those persons were charged with the conduct of the train; and if any one of them was negligent in his own department, that would constitute negligence, bringing the case within the terms of the subsection.¹⁶ This case also lays down the doctrine that the question, who was in charge of a train, is to be determined, as between two or more employees, by considering what duty was violated by the act which caused the injury.

[The motorman on an electric street railway is the person having control of the movement of a train of which he is the motorman, within the meaning of the Ontario act.^{16a}]

The statutory words are applicable only to cases in which the control exercised over the train is direct. They do not render a railway company liable for the negligence of an employee who has control of a switch, or of a station agent who merely transmits orders to the man in charge of a train.¹⁷

1708. [706] Person having "charge or control of a car."—It is held that the word "car," which is found only in the Alabama act, is not confined to those cars which are intended to be hauled by locomotives, but is applicable to hand cars also.¹ The question whether an employee actually had charge or control of such a car can very rarely cause any doubt, and, as a matter of fact, the only

¹⁶ At p. 66 of the Law Reports the following passage is found in the opinion of Lord Watson:—"It is plain that Hopper was the person who insufficiently scotched the wagon which ran down the incline and killed the deceased; but it may be that, although he was the direct cause of the accident, the engine driver was also negligent in his duty, if he was charged with that duty. And I think, if that view were taken, he knew quite well the kind of sprag that was being used, and had reason to know that, although for some purposes sufficient, the use of it was attended with danger. On the other hand, if the duty of spragging was properly delegated to Hopper, he was, to that extent, in charge of the train, and was negligent. But on whichever of these alternatives negligence be found, whether it be fixed on the engine driver or upon the fireman, I think it follows that such person is also fixed in the position of the 'person having control of the train.' It has

been suggested by one of the learned judges in the court of appeal that, the duty having been committed to a great many persons, any one of whom might have performed it, therefore the person actually performing it was not 'in charge.' To my mind these considerations are very immaterial. I think the statute points directly to the person having 'the charge or control of the train' as being that person who, at the time when the negligent act is committed, has the duty laid upon him of performing that act with reasonable care."

^{16a} *Toronto R. Co. v. Snell* (1901) 31 Can. S. C. 241.

¹⁷ *Fairman v. Boston & A. R. Co.* (1897) 169 Mass. 170, 47 N. E. 613. See also *Devine v. Boston & A. R. Co.* (1893) 159 Mass. 348, 34 N. E. 539, where the company's nonliability for the negligence of a switchman seems to be assumed in the opinion.

¹ *Kansas City, M. & B. R. Co. v. Crocker* (1892) 95 Ala. 412, 11 So. 262.

points discussed, apart from those of mere pleading, have been whether an employee conceded to be in charge of a car was negligent in handling it.²

1709. [706a] Person having "charge of a signal."— These words, which occur in the Indiana statute and the New York railroad law, are applicable to a brakeman who is sent out to set torpedoes as a stop signal for an approaching train.¹ [So, an employee whose duty it is to give raps upon the rope connecting the cars in a mine with the hoisting engine, when the cars are to be raised,—the number of raps indicating the character of the load,—is a person "who has the charge or control of any . . . signal" within the meaning of the Nova Scotia statute.² But a brakeman giving signals to the engineer is not in "physical control or direction of the movement of a signal." ³]

² The inference of negligence has been held to be "sure and certain," where a foreman in charge of a hand car, with knowledge that the operators are at times in the habit of turning loose the lever on a down grade and standing without support, suddenly applies the brakes on such a grade without notice to the operators and without looking to see whether they are holding to the lever. *Kansas City, M. & B. R. Co. v. Crocker* (1891) 95 Ala. 412, 11 So. 262.

The foreman of a hand car is, as matter of law, guilty of negligence in entering at full speed a place on the track obscured by dense smoke, without sending a flagman ahead to ascertain if any train is on the track, in accordance with a custom regulating the running of hand cars through smoke. *Woodward Iron Co. v. Andrews* (1896) 114 Ala. 243, 21 So. 440.

A railway company is liable for an injury received by a laborer on a railroad in jumping from a hand car to avoid a collision occasioned by the failure of a foreman to give signals required by the rules of the road. *Richmond & D. R. Co. v. Hammond* (1890) 93 Ala. 181, 9 So. 577.

A jury is properly directed to find for the plaintiff if they find from the evidence that a foreman ran two cars close together at a high rate of speed on a trestle; that, without warning to the men on the rear car, he signaled to those on the front car to slacken speed; that

one of the employees on the rear car, seeing the signal, applied the brake on that car so suddenly that the lever was jerked out of the hands of the plaintiff's decedent, and that when the cars came into collision immediately afterwards, he was thrown to the ground. The facts thus set forth show negligence on the foreman's part and exclude the hypothesis of contributory negligence. *Jones v. Alabama Mineral R. Co.* (1894) 107 Ala. 400, 18 So. 30, second appeal (1896) 114 Ala. 519, 62 Am. St. Rep. 121, 21 So. 507.

A workman whose only duty was, from his position on the ground, to sprag the wheels of a car, is not in charge of it within the statute. *Woodward Iron Co. v. Curl* (1907) 153 Ala. 215, 44 So. 969.

¹ *Cowen v. Ray* (1901) 47 C. C. A. 352, 108 Fed. 320 (signals not set in the manner required by the rules).

² *Bell v. Iverness R. & Coal Co.* (1909) 42 N. S. 265.

³ *Hallock v. New York, O. & W. R. Co.* (1910) 197 N. Y. 450, — L.R.A. (N.S.) —, 90 N. E. 1124.

A switchman whose duty it was to give signals to the engineer for the moving of a train is not, as to the conductor engaged in making a coupling, a vice principal as having control of a signal. *Eagen v. Buffalo Union Terminal R. Co.* (1911) 200 N. Y. 478, 93 N. E. 1110, reversing (1909) 134 App. Div. 995, 119 N. Y. Supp. 1123.

1710. [707] On a "railway" or "railroad."—In England it has been held that the word "railway" is used in its popular sense, *viz.*, as meaning a way upon which trains pass by means of rails, and is not confined to railways belonging to those companies which are subject to the provisions of the railway regulation acts. Accordingly, this subsection applies to a temporary railway laid down by a contractor for the purpose of the construction of works.¹ A similar conclusion has been arrived at in Massachusetts, where a servant has been allowed to recover for an injury received on a short railway track intended for temporary use by a city in transporting gravel.² A dummy railroad has been held to be within the Alabama act.³

The location of the rails is not material, so long as the injury was caused by a moving engine or car. Thus, cars are on a "railway" while they are being moved on the lines in a freight shed with a view to their being loaded or unloaded.⁴ On the other hand, an engineer is not in charge of an engine "on a railroad" while it is stalled in a roundhouse for repairs.⁵ The complaint must allege that the engine or car which caused the injury was "upon a railway."^{5a} The gauge of road is immaterial.^{5b}

The railway need not be a public one, to be within the statute, as construed in some jurisdictions.^{5c} But a different rule prevails in others.^{5d}

¹ *Doughty v. Fairbank* (1883) L. R. 10 Q. B. Div. 358, 52 L. J. Q. B. N. S. 480, 48 L. T. N. S. 530, 48 J. P. 55 (driver injured by a collision).

² *Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

³ *Birmingham R. & Electric Co. v. Baylor* (1893) 101 Ala. 488, 13 So. 793.

It is immaterial whether the engine is a dummy, or is a mogul, passenger, or a freight engine, or a switch engine, if it is "upon a railway." *Woodward Iron Co. v. Lewis* (1911) 171 Ala. 233, 54 So. 566.

⁴ *Cox v. Great Western R. Co.* (1882) L. R. 9 Q. B. Div. 106, 30 Week. Rep. 816, 47 J. P. 116.

This section relates only to cars and engines on a railway. *Alabama Steel & Wire Co. v. Griffin* (1907) 149 Ala. 423, 42 So. 1034 (holding that a count in a complaint alleging that an employee was injured while unloading a car standing on a switch was sufficient).

⁵ *Perry v. Old Colony R. Co.* (1895) 164 Mass. 296, 41 N. E. 289 (machinist making repairs was injured by the en-

gineer's blowing down the engine into the ashpit in which the machinist was).

^{5a} *Tennessee Coal, Iron & R. Co. v. Bridges* (1905) 144 Ala. 229, 113 Am. St. Rep. 35, 39 So. 902; *Woodward Iron Co. v. Lewis* (1911) 171 Ala. 233, 54 So. 566.

A count in a complaint against a railroad company, which fails to allege that the employee was employed in or about the railway, or that he had any duty to discharge in connection therewith, is not sufficient under the statute. *Alabama Steel & Wire Co. v. Griffin* (1907) 149 Ala. 423, 42 So. 1034.

^{5b} *Woodward Iron Co. v. Lewis* (1911) 171 Ala. 233, 54 So. 566.

^{5c} A tramway in a mine, upon which cars operated by motors are run to carry ore out of the mine, is a railroad within the statute. *Ibid.*

A manufacturing corporation which operates a switching track and engines is within the statute. *Hines v. Stanley-G. I. Electric Mfg. Co.* (1908) 199 Mass. 522, 85 N. E. 851.

An employee engaged in removing a

It has never been directly decided that the English employers' liability act is inapplicable to street railways. But that such a doctrine will be applied would seem to be not improbable, in view of the fact that it has been expressly declared that a tramway does not come within the purview of a statute relating to the taxation of railways.⁶ It may be conceded that the distinction thus drawn between "railways" and "tramways" is not without plausibility in a country where the words are habitually differentiated, both in everyday conversation and in legislation.⁷

In the United States common usage, so far as it has any bearing upon the question, is an element which militates against, rather than supports, the theory that the terms "railway" and "railroad" do not comprehend those lines which are constructed along streets and highways. These words are constantly employed in a generic and very comprehensive sense, the word "tramway" being very rarely used. The decisions, however, are not harmonious. In Alabama it is apparently settled that the statute does include street railroads.⁸ A similar conclusion has been reached in New York.⁹ But it has been

large chunk of iron at a furnace by means of a locomotive and cable was engaged in and about a railroad so as to be within the protection of § 5 of the Alabama act. *Woodward Iron Co. v. Sheehan* (1910) 166 Ala. 429, 52 So. 24.

The haulage slope of a mine up which cars are drawn by a stationary engine is a railway within the British Columbia act. *Booker v. Wellington Co.* (1902) 9 B. C. 265.

^{5d} The statute does not apply to a corporation engaged in manufacturing cars. *American Car & Foundry Co. v. Inzer* (1908) 172 Ind. 56, 87 N. E. 722.

And a private railroad is not within the New York railroad law. *Matrucciello v. Milliken Bros.* (1910) 141 App. Div. 769, 126 N. Y. Supp. 739.

⁶ *Swansea Improvements & Tramway Co. v. Swansea Urban Sanitary Authority* [1892] 1 Q. B. 357. In the course of his opinion, Wills, J., remarked that "tramways are something essentially different from railways" and that "no ordinary person has any difficulty in distinguishing between the two."

⁷ See the tramways act 1870 (33 & 34 Vict. chap. 78), and the notice of accidents act 1894 (57 & 58 Vict. chap. 28). In the latter of these the schedule speci-

fies separately "railway, tramroad, and tramway."

⁸ *Birmingham R. Light & P. Co. v. Mosely* (1910) 164 Ala. 111, 51 So. 424.

In *Louisville & N. R. Co. v. Anchors* (1896) 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279, it has been held that an electric road is within the purview of a statute applicable to steam railroads.

The fact that the decision in the Alabama case cited in § 1706, note 1, *ante*, was put upon the consideration that the stationary engine in question was not "on a railway," and not upon the ground that the tramway was not a "railway," may possibly be regarded as indicating that neither court nor counsel deemed the latter theory to be sustainable.

⁹ In two cases in the inferior courts it has been held that the act does apply to street railways. *Forton v. Crosstown Street R. Co.* (1909) 63 Misc. 237, 116 N. Y. Supp. 746, reversed on ground of plaintiff's contributory negligence in (1910) 137 App. Div. 420, 121 N. Y. Supp. 749; *Riccio v. International R. Co.* (1909) 63 Misc. 588, 117 N. Y. Supp. 720.

The same view was taken in *Simons v. Brooklyn Heights R. Co.* (1910) 142 App. Div. 36, 126 N. Y. Supp. 792, rehearing denied and appeal to court of

held that street cars are not within the purview of the Massachusetts and New Jersey statutes.¹⁰

The strongest argument against the propriety of a construction of the act which would have the effect of excluding street railways from its purview is to be found in the consideration mentioned in the section just referred to, that some, at least, of the risks which servants encounter while working on such railways, are similar in kind to those which are incurred by the employees of steam railways of the ordinary type. In view of this fact, it is submitted that the former class of servants should not be deprived of the benefits of remedial legislation which may, without any unreasonable straining of its terms, be made to comprehend them.

Another case bearing on the subject discussed in the foregoing remarks will be found in § 1726, note 2, *post*.

It may be observed, however, that the Texas and Minnesota acts which define the liability of railway companies to their employees have been held not to be applicable to street-railway companies. See chapter LXXVI., *post*.

To bring a case within the provision of the Alabama statute making a railroad liable for the negligence of any person in its service who has charge or control "of any part of the track of a railway," it is not essential that the track occasioning the injury should be finished or in charge of the regular section foreman; but it is sufficient if it has reached such stage of construction as to become "the track of a railway," and has been adopted for use, though irregularly.¹¹

H. SERVICE OF NOTICE ON THE EMPLOYER.

1711. [708] Notice a condition precedent to the maintenance of an action under the statute.—Nearly all the acts with which we are now

appeals granted in (1911) 143 App. Div. 945, 127 N. Y. Supp. 1144.

But in *Murtagh v. Joline* (1911) 70 Misc. 251, 126 N. Y. Supp. 672, the court declined to express any opinion on the subject, but a judgment for the plaintiff was reversed upon the ground that the evidence did not support the complaint.

¹⁰ Prior to Stat. 1908, p. 370, chap. 420, the Massachusetts act did not apply to an elevated railroad. *McGilvery v. Boston Elev. R. Co.* (1909) 200 Mass. 551, 86 N. E. 893.

A surface car does not become an "elevated train" by being run up an incline to discharge and receive passen-

gers transferred to it from trains running on the defendant's elevated railway. *Dow v. Boston Elev. R. Co.* (1911) 207 Mass. 486, 93 N. E. 655 (the Massachusetts statute expressly includes elevated cars).

And see *Fallon v. West End Street R. Co.* (1898) 171 Mass. 249, 50 N. E. 536.

Paragraph 3, § 1, of the New Jersey act does not apply to employees of street railroads. *Conover v. Public Service R. Co.* (1910) 80 N. J. L. 681, 78 Atl. 187.

¹¹ *Southern R. Co. v. Howell* (1903) 135 Ala. 639, 34 So. 6.

concerned provide that the employer shall be served before the expiration of a specified period with notice that the employee in question has sustained an injury.¹ As to the effect of the provision in the Kansas statute, see § 1779, notes 1 *et seq.*, *post*. Compliance with the statutory requirement is a condition precedent to the plaintiff's right to avail himself of the remedial rights conferred by the legislature.^{1a} This rule the courts have construed strictly, for the reason that the manifest object of inserting the provisions as to notice was to insure that the master should have a sufficient opportunity to prepare his case. See § 1715 *a*, *post*. No action can be

¹ England, Newfoundland, and Australian Colonies, § 1; Ontario, §§ 9, 13; British Columbia, § 9; Manitoba, § 7; Alabama Code, § 2590; Massachusetts, § 3; Colorado, § 2; New York, § 2.

The Manitoba act of 1893, as at first passed, contained the same provision with regard to notice as that of Ontario from which it was copied. But by 58 and 59 Vict. chap. 48, § 2, the original act was amended by providing simply that the action could be brought at any time within two years after the occurrence of the accident. In this Province, therefore, the requirement as to notice has been abrogated altogether. Soon after the passage of this amendment it was held not to have any such retrospective operation as would extend the time for bringing in a case, where the injury had been received before the amending act had been passed. *Dixon v. Winnipeg Electric Street R. Co.* (1897) 11 Manitoba L. Rep. 528.

The acts of Alabama and Indiana contain no provision as to notice.

Nor does the New York railroad law (act of 1906, chap. 657).

^{1a} *Healey v. George F. Blake Mfg. Co.* (1902) 180 Mass. 270, 62 N. E. 270; *Cahill v. New England Teleph. & Teleg. Co.* (1907) 193 Mass. 415, 79 N. E. 821; *McRae v. New York, N. H. & H. R. Co.* (1908) 199 Mass. 418, 85 N. E. 425, 15 Ann. Cas. 489; *Herlihy v. Little* (1908) 200 Mass. 284, 86 N. E. 294; *Johnson v. Roach* (1903) 83 App. Div. 351, 82 N. Y. Supp. 203; *Grasso v. Holbrook, C. & D. Contracting Co.* (1905) 102 App. Div. 49, 92 N. Y. Supp. 101; *O'Neil v. Karr* (1906) 110 App. Div. 571, 97 N. Y. Supp. 148; *Severson v. Hill-Warner-Fitch Co.* (1906) 116 App. Div. 108, 101 N. Y. Supp. 808; *Hope v. Scranton & L. Coal Co.* (1907) 120 App. Div. 595,

105 N. Y. Supp. 372; *Mattson v. Phoenix Constr. Co.* (1909) 135 App. Div. 234, 120 N. Y. Supp. 566; *Stahl v. Schoonmaker* (1903) 84 N. Y. Supp. 239. See *McMullin v. Nova Scotia Steel & Coal Co.* (1908) 41 N. S. 514; *Carlin v. New York, N. H. & H. R. Co.* (1910) 137 App. Div. 71, 122 N. Y. Supp. 57 (holding that notice which merely stated that an employee had been injured on a float by a collision occurring in the vicinity of a certain place was insufficient).

The service of the notice required by the Colorado statute is a condition precedent to the maintenance of an action under it. *Lange v. Union P. R. Co.* (1903) 62 C. C. A. 48, 126 Fed. 338.

In *Pullman Co. v. Woodfolk* (1905) 121 Ill. App. 321, the cause of action arose in Colorado, but as the plaintiff failed to give the notice required by the statute, it was held that this statute was not available to him.

Proof merely that a notice of the accident was served, with no proof of the contents of the notice or the date of the service, is insufficient to establish liability under the employers' liability act. *Inglese v. New York, N. H. & H. R. Co.* (1909) 133 App. Div. 198, 117 N. Y. Supp. 392.

A letter from the attorney for the employee, to the employer, stating that the employee had been severely hurt while working at a specified place, and would probably lose his eyesight, and had placed his case in the writer's hands for adjustment, and informing the employer that if he wished to confer with the attorney the latter would be pleased to see or hear from him at once, is not sufficient as a notice. *Grebenstein v. Stone & W. Engineering Corp.* (1911) 209 Mass. 196, 95 N. E. 503.

maintained where the notice is not served until after the writ is made, although it was left at the defendant's house on the day the writ is dated.²

It has also been held that the provision in the English (§ 4) and colonial acts, by which it is declared that the want of notice shall be no bar to the maintenance of the action if the trial judge shall be of opinion that there was a reasonable excuse for such want of notice, applies only where due notice has not been given, and not where no notice at all has been given. It does not empower the trial judge to proceed with the case on the ground that the writ and declaration gave the defendant notice, and that he had also actual notice because his manager saw the accident or saw the plaintiff immediately after the accident.³

[The service of the complaint within the time required by the statute has been held not to be a sufficient notice.⁴ The giving of the notice being for the benefit of the employer, it may be waived by him.⁵ If the servant relies solely upon the statute, he will be restricted to the cause of the accident as set out in the notice.⁶ As § 42a of the New York railroad law contains no provision as to notice, the

² *Veginan v. Morse* (1893) 160 Mass. 143, 35 N. E. 451.

Although the notice may be made out and served on the same day that the writ is sued out, the plaintiff must prove that the former was done at an earlier hour than the latter; and he is not helped by any presumption of regularity in the proceedings of public officers, or of the natural and usual order of business having been followed. *Finneran v. Graham* (1908) 198 Mass. 385, 84 N. E. 473, 15 Ann. Cas. 291.

³ *Thompson v. Southern R. Co.* (1894) 15 New South Wales L. R. (L.) 162. On a subsequent hearing of the case (15 L. R. [L.] 166) it was further held that, where an application of the plaintiff to proceed notwithstanding that he gave no notice, has been refused, he cannot turn round fifteen months after the accident and make another application to proceed, on the ground that a letter sent by his attorney after the expiration of the statutory period constituted a valid notice under the circumstances.

⁴ The service of a complaint in a common-law action which was subsequently withdrawn is not a sufficient service of

notice. *Chisholm v. Manhattan R. Co.* (1906) 116 App. Div. 320, 101 N. Y. Supp. 622.

⁵ A letter from the employer to the injured servant while he was still in the hospital, to the effect that the employer did not deem it advisable for the employee to make any claim until the result of the injury was known, may be found to be a waiver of the required notice. *Wolven v. Gabler* (1909) 132 App. Div. 45, 116 N. Y. Supp. 359.

Where the defendant's business manager and representative saw the accident, arranged for plaintiff's admission to the hospital, and later discussed the cause of the accident with him, and it appeared that the plaintiff was without means, and for the first few weeks after the accident was unable to transact any business,—the want of notice should be dispensed with. *Lever v. McArthur* (1903) 9 B. C. 417.

⁶ The employee will not be allowed to prove acts of negligence not specified in the notice. *Carron v. Standard Refrigerator Co.* (1910) 138 App. Div. 723, 123 N. Y. Supp. 682.

giving of a notice is not a condition precedent of an action brought under that statute.⁷

1712. [709] Notice not essential to recovery if facts constitute a cause of action at common law.—As these statutes do not deprive an injured servant of his common-law rights of action, it follows that, if the circumstances alleged are such as will enable him to sue either at common law or under the statutes, he cannot be thrown out of court by proof that he has not complied with the statutory requirement as to notice, unless he insists on relying upon the statute alone.¹ But an action at common law cannot be converted into one under the statute simply because it has been discovered that the notice required by the statute had been given within the prescribed period by a former agent of the plaintiff, who had died before the common-law action was instituted.²

If the servant is relegated to his common-law rights alone, by reason of the fact that the proper statutory notice was not given, his ability to recover will depend upon the doctrines applied in the jurisdiction where the cause of action arose.³

As to the employer's right to rely in a common-law action upon defenses which are modified or abrogated by the statute, see § 1647, note 12, *ante*.

1713. [710] Notice must be given in writing.—That the notice is not valid unless it is given in writing was held, in a case decided the year after the English act came into force, to be a necessary inference from the provisions (§ 7) that notice of the injury shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post.¹ "In

⁷ *Schradin v. New York C. & H. R. R. Co.* (1907) 103 N. Y. Supp. 73, affirmed in (1908) 124 App. Div. 705, 109 N. Y. Supp. 428, which is affirmed in (1909) 194 N. Y. 534, 87 N. E. 1126.

¹ *Ryalls v. Mechanics' Mills* (1889) 150 Mass. 190, 5 L.R.A. 667, 22 N. E. 766; *Cahill v. New England Teleph. & Teleg. Co.* (1907) 193 Mass. 415, 79 N. E. 821; *Gmaehle v. Rosenberg* (1904) 178 N. Y. 147, 70 N. E. 411. And see *Rosin v. Lidgerwood Mfg. Co.* (1903) 89 App. Div. 245, 86 N. Y. Supp. 49; *Schermerhorn v. Glens Falls Portland Cement Co.* (1904) 94 App. Div. 600, 88 N. Y. Supp. 407.

² *Clark v. Adam* (1885) 12 Sc. Sess. Cas. 4th series, 1092.

³ In a Canadian case where the servant failed to satisfy the statutory requirements, it was held that the action could not be maintained, as the jury had found that there was no defect in the machinery, nor in the system used in operating it. *Dixon v. Winnipeg Electric Street R. Co.* (1897) 11 Manitoba L. Rep. 528.

¹ *Moyle v. Jenkins* (1881) L. R. 8 Q. B. Div. 116, 51 L. J. Q. B. N. S. 112, 30 Week. Rep. 324; *Keen v. Milwall Dock Co.* (1882) L. R. 8 Q. B. Div. (C. A.) 482, 51 L. J. Q. B. N. S. 277, 30 Week. Rep. 503, 46 J. P. 435, 46 L. T. N. S. 472, note 2, *infra*.

the second of the two cases cited, it was contended that an adequate notice might be made out from a reference to a document other than that which had been relied upon as satisfying the statutory requirements, but which had been found to be insufficient. Lord Coleridge thought that the question thus raised should be answered in a sense unfavorable to the servant. Brett, L. J., and Holker, L. J., declined to express a definite opinion, but they seem—especially the former—to have been strongly inclined to adopt the contrary view. All the members of the court were agreed in holding that, whether such a reference was or was not permissible, a notice otherwise defective could not be eked out by a reference to a verbal statement previously made by the injured servant to an agent of the master. It was accordingly held that there was no notice in compliance with the act where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector, who took down the details in writing and sent them to the employer's superintendent, and the workman's solicitor afterwards wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, and ending with the words, "particulars of which have already been communicated to your superintendent."²

The acts of Massachusetts and Colorado expressly provide that the

² *Keen v. Milwall Dock Co.* (1882) L. R. 8 Q. B. Div. (C. A.) 482. As regards the point left undetermined in this case, Lord Coleridge based his opinion on the words of the act which, as he considered, "described the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining the action." The following passage from the opinion of Brett, L. J., shows that arguments of no small weight may be adduced for the other doctrine. "It seems, therefore, to me that a notice might be available even if it should be defective in any of the matters required to be stated, as, for instance, if it did not in terms name the day when the injury was sustained, but showed it by reference; so, also, if it did not describe the cause of the injury with sufficient particularity, but still did not describe it so as to mislead. I agree that, as a general rule, the notice must be given in one notice, but I am not prepared to say that it would be

fatal if it were contained in more than one notice. Suppose, for example, a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that, 'in the letter I wrote yesterday I omitted to give you my address, and I now give it.' If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore, though not an accurate, but an informal, notice, it might be considered a notice within the meaning of the statute. If in the present case the letter of Mr. Bradley had referred to a written report, and to the date and particulars there given of the injury, I should not at this stage have said that there had not been a notice within the act, but should have desired a rule in order that the matter might be more fully discussed."

notice shall be in writing. The requirement in the former act, that the notice is to be "signed by the person injured, or someone in his behalf," is satisfied by a notice signed by a firm of attorneys, as attorneys for the injured employee. In the absence of direct evidence to the contrary it will be presumed that they were authorized to sign it.³

1714. [711] Service of the notice.—*a. Service on corporations.*—Where the defendant is a corporation, the notice may be served on its general superintendent at the place where suit is brought, or, during his absence, on any of the subordinate officials in his office. Anyone who appears to be such an official is a proper person to receive the notice.¹

A service upon the commissioner of corporations is not a sufficient service on a foreign corporation.^{1a}

b. Service through the postoffice.—A notice is not given as the statute requires, unless it is actually received, or, if sent through the postoffice, should have been received in the ordinary course of delivery, within the period limited.² Service under the English act is sufficient where the letter giving the notice actually reaches the master, though it is not registered. The provision as to registration merely means that, when that formality is gone through, the burden of proving that the letter never reached its destination is thrown upon the master.³

It would seem that, if an agent sends the notice, he must register the letter containing it, or run the risk of being called to account by his principal, if the latter suffers damage from its not being registered.⁴

[The failure of the employer to receive the notice is immaterial

³ *Dolan v. Alley* (1891) 153 Mass. 380, 26 N. E. 989 (construing amendment added by Mass. Stat. 1888, chap. 155).

¹ *Shea v. New York, N. H. & H. R. Co.* (1899) 173 Mass. 177, 53 N. E. 396. A notice of an injury to a brakeman, given to a freight agent or to the attorney of the company by which he was employed, which had made no objection to the receipt of like notices for five years, is a sufficient compliance with the statute. *De Forge v. New York, N. H. & H. R. Co.* (1901) 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669.

^{1a} *Healey v. George F. Blake Mfg. Co.* (1902) 180 Mass. 270, 62 N. E. 270 (holding that in mailing the notice to the defendant corporation the commissioner was not an agent of the plaintiff).

² *M'Donagh v. MacLellan* (1886) 13 Sc. Sess. Cas. 4th series, 1000 (action held not maintainable under the English act, where the notice was sent at such a time that it was impossible for it to reach the master until after the expiration of the six weeks specified in that act).

³ *M'Govan v. Tancred* (1886) 13 Sc. Sess. Cas. 4th series, 1033.

⁴ In *Ruegg on Employers' Liability Act*, p. 66, an unreported case is mentioned, in which a solicitor who had omitted to give notice by registered letter was sued by his client for negligence, and had to pay a considerable sum as damages and costs.

where the statute providing for service of notice of injury for which the master is to be held liable states that it may be served by post, by a letter addressed to the person on whom it is to be served.^{4a}]

c. Service in case of death.—Where suit is brought under section 2 of the Massachusetts act, the notice may be given by the widow.⁵ The amendment added to that act by Laws 1888, chap. 155, provides for the service of notice, in case of the death of the injured person, by his executor or administrator.⁶ The construction placed upon this provision is that, where the action is brought under section 2 of the act, the widow may give the notice, the position taken being that, as the action there specified is not maintainable by the executor or administrator, it cannot be implied that one or other should be appointed merely for the purpose of giving the notice.⁷

[A difference of opinion prevails as to the time within which an administrator must serve the notice.^{7a}

Notice of an accident, given by an administratrix before letters of administration had been granted, is not a nullity.^{7b}]

d. Excuses for failing to serve the notice.—Under the English and colonial statutes the want of notice is not fatal to the right of action if there was a "reasonable excuse" for the failure to serve it. Want of notice has been excused on the ground that the widow of the deceased man was in an advanced state of pregnancy, and so excited in mind that the doctor ordered that she should not be consulted on the subject⁸ on the ground that the plaintiff had been a long time in the hospital, and was not in a fit state to proceed with the action;⁹ and on the ground that negotiations for a settlement between the

^{4a} *Hurley v. Olcott* (1910) 198 N. Y. 132, 28 L.R.A. (N.S.) 238, 91 N. E. 270.

⁵ *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 155 Miss. 1, 29 N. E.

⁶ See *Daly v. New Jersey Steel & I. Co.* (1891) 155 Mass. 1, 29 N. E. 507; *Jones v. Boston & A. R. Co.* (1892) 157 Mass. 51, 31 N. E. 727.

⁷ *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

^{7a} In two cases arising under the New York act, it was held that it is not sufficient that a notice by an administrator be given within the 120 days after the accident, if it be not given within 60 days of the appointment of the administrator. *Randall v. Holbrook, C. & D. Contracting Co.* (1904) 95 App. 336, 88 N. Y. Supp. 681; *Holm v. Empire Hardware Co.* (1905) 102 App. Div. 505, 92 N. Y. Supp. 914.

But a different rule prevailed in *Hoehn v. Lautz* (1904) 94 App. Div. 14, 87 N. Y. Supp. 921.

^{7b} *Dennehy v. Poole* (1908; New South Wales) 25 W. N. 130 (leave to proceed with the action was granted).

⁸ *Bromley v. Oldham*, an unreported case cited in Rugg on Employers' Liability Act, 3d ed. p. 60.

⁹ *Miller v. Dalgety* (1884; New South Wales) 1 W. N. 164, 2 W. N. 17.

A notice given two weeks after the injured employee had left the hospital may be found to have been reasonably given, where the employer advised the employee not to bring in his claim until he knew the result of the injury. *Wolven v. Gabler* (1909) 132 App. Div. 45, 116 N. Y. Supp. 359.

widow of the injured employee and the employer were commenced within six weeks after the accident, and letters of administration were not granted to her till nearly eight months after the accident.¹⁰

On the other hand, it is clear that the plaintiff's ignorance of the fact that it was necessary to give the notice does not constitute a reasonable excuse within the meaning of the proviso.¹¹ A mistake by the laborer as to the proper party to sue is not a reasonable excuse for failure to give the prescribed notice.^{11a} It has been held in Scotland that no action can be maintained, although the party bringing the suit alleges that he was an old man and illiterate, and that it was not known whether the deceased would survive and bring suit himself.¹² This ruling is certainly a harsh one, even if the servant's injury was so severe that there was merely a chance of his recovery.

In another Scotch case where the action was brought by the widow of the employee, her forgetfulness, caused by the grief of mind which she had felt since the accident, was held not to be a reasonable excuse for omitting to send a notice.¹³ Considering the remedial character of the act, this decision also seems to be scarcely commendable. It is submitted that in construing this provision a court should not refuse to recognize the fact that violent grief sometimes produces a temporary incapacity to attend to the ordinary affairs of life.

The amendment to the Massachusetts act (Laws of 1888, chap. 155, § 1) declares that employees are excused from giving notice within the thirty days prescribed in the original statute, whenever

¹⁰ *Bulman v. Robertson* (1887; New South Wales) 4 W. N. 131.

That letters of administration on the estate of a fatally injured servant were not taken out until the expiration of the statutory period is a reasonable excuse for failure to give the prescribed notice. *Johnston v. Commonwealth Oil Corp.* (1909; New South Wales) 26 W. N. 120.

¹¹ *Ex parte Hannan* (1897) 18 New South Wales, L. R. (L.) 422.

"Ignorance of the law" is not a reasonable excuse for failure to serve the notice of accident. *Giovinazzo v. Canadian P. R. Co.* (1909) 19 Ont. L. Rep. 325.

The ignorance of the workman that the defendant was liable is not a reasonable excuse for failing to give notice of claim within statutory period. *Re Baxter* (1905; New South Wales) 22 W. N. 150.

^{11a} *Ex parte Harriott* (1906) 6 New South Wales St. Rep. 635 (wharf laborer employed by a stevedoring company, injured while unloading ship, sued the owners). The court said: "The reasons contemplated by the section are things which may have occurred since the accident, something personal to the man himself,—as, where he becomes insane, or where, long afterwards, symptoms of disease or injury resulting from the accident first appear, or where the man was in hospital and physically unable to give instructions to his solicitor."

¹² *M'Fadyen v. Dalmellington Iron Co.* (1897) 24 Sc. Sess. Cas. 4th series, 327 (son of plaintiff died a fortnight after accident, and notice was three days too late).

¹³ *Connolly v. Youngs Paraffin Light & Mineral Oil Co.* (1894) 22 Sc. Sess. Cas. 4th series, 80.

from "physical or mental incapacity" it is impossible for them to give the notice within that time. Whether an employee is entitled to claim the benefit of this provision is a question of fact to be determined according to the evidence introduced.¹⁴

[The fact that the foreman of a master was present immediately after the happening of the accident which caused injury to an employee, and therefore must have known of the trouble, does not dispense with the necessity of giving the notice required by the statute.¹⁵

A number of cases which discuss the question of a reasonable excuse under the New South Wales act will be found in the note below.¹⁶]

1715. [712] Sufficiency of the particulars contained in the notice.—

a. Generally.—A writing set up as a notice will not be construed with technical strictness, but its contents should at all events show that it is intended as the basis of a claim against the defendant, and that the information is given on behalf of the person who brings the suit.¹ Any notice is sufficient which contains such particulars as

¹⁴In a recent case, where the servant had died from the effects of the injury, the widow of the decedent testified that he was in bed almost two months after the accident; that during most of this time he knew her and talked to her, and that a good deal of the time he was conscious and knew what he was doing. The decedent's son also testified that he saw his father almost every day after the accident, and that he was conscious nearly all the time. It was held that there was no valid excuse for the failure to serve the notice. *Ledwidge v. Hathaway* (1898) 170 Mass. 348, 49 N. E. 656.

An instruction with reference to this provision, which stated that an employee was not excused unless he was both "mentally and physically disabled," has been held correct. *Cogan v. Burnham* (1900) 175 Mass. 391, 56 N. E. 585. But *quære*, considering that the disjunctive "or" is used in the statute.

¹⁵*Finnigan v. New York Contracting Co.* (1909) 194 N. Y. 244, 21 L.R.A. (N.S.) 233, 87 N. E. 424.

¹⁶Where the defendant had continued to employ the claimant for eleven weeks after the accident, and then discharged him, it was held that the payment of wages during that period constituted a reasonable excuse for not giving notice of the injury. *Ex parte Harriott* (1909;

New South Wales) 26 W. N. 117, following *Froy v. Balmain Steam Ferry*, 2 W. N. 4.

It is a sufficient excuse for not giving the notice, that after the accident the master continued to employ the servant for a period exceeding that limited by the statutes for the giving of the notice. *Ex parte Broughton* (1909; New South Wales) 26 W. N. 117.

A belief by a person injured, that some compensation will be given him by his employer without a resort to legal proceedings, may be a sufficient excuse for not giving notice, under § 6 of New South Wales employers' liability act. 1897. *Ex parte Shylan* (1908; New South Wales) 25 W. N. 3.

Where a claimant alleged that he had not given notice of his injury because his employers had told him they would compensate him without legal proceedings, it was held that he had not shown a reasonable excuse for not giving notice. *Ex parte Cavenlock* (1908; New South Wales) 25 W. N. 152.

No appeal can be taken from an order by which the application of a servant to be permitted to bring an action has been refused on the ground that there was no reasonable excuse for his failure to give notice. *Ex parte Yates* (1907) 7 New South Wales St. Rep. 217.

¹*Driscoll v. Fall River* (1895) 163

will give the employer substantial notice of what has occurred, and thus put him in a position to make such inquiries as will enable him to come to trial prepared to meet the plaintiff's case.²

Mass. 105, 39 N. E. 1003; *Carroll v. New York, N. H. & H. R. Co.* (1902) 182 Mass. 237, 65 N. E. 69; *English v. Miliken Bros.* (1909) 132 App. Div. 501, 118 N. Y. Supp. 31; *Palin v. Cary Brick Co.* (1909) 133 App. Div. 483, 117 N. Y. Supp. 1072; *Flanagan v. F. W. Carlin Constr. Co.* (1909) 134 App. Div. 236, 118 N. Y. Supp. 953; *Foster v. B. I. Crooker Co.* (1911) 142 App. Div. 268, 126 N. Y. Supp. 1020.

While the giving of the notice of an intent to sue for the death of a servant is a condition precedent to recovery, such a notice is not to be construed with technical refinement. *Herlihy v. Little* (1908) 200 Mass. 284, 86 N. E. 294.

² *Clarkson v. Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47; *Previsi v. Gatti* (1888) 58 L. T. N. S. (Q. B. Div.) 760, 4 Times L. R. 487.

See note to *Finnigan v. New York Contracting Co.-Pennsylvania Terminal*, 21 L.R.A.(N.S.) 233.

(a) *Notices held sufficient.* In *Martin v. Walker & W. Mfg. Co.* (1910) 198 N. Y. 324, 91 N. E. 798, it was held that a notice describing the act and circumstances under which the plaintiff's hand was caught in the rollers in a batting factory, and charging negligence on the part of the defendant, is not insufficient because it fails to allege that the master has been negligent in failing to guard the machinery as required by statute. The court said: "And under our decision in *Finnigan v. New York Contracting Co.* (1909) 194 N. Y. 244, 21 L.R.A.(N.S.) 233, 87 N. E. 424, a serious question would have been presented as to the competency of the evidence under the notice given. But under the more recent case of *Bertolami v. United Engineering & Contracting Co.* (1910) 198 N. Y. 71, 91 N. E. 267, we have to some extent modified and explained our former decision, and under the latter decision we think that the notice given was sufficient, and that it fully described the cause of injury."

A notice that states with all necessary completeness the time, place, and nature of the injuries received, and then states

that the injuries were caused solely by the negligence of a foreman in starting the machine at which the plaintiff was working is sufficient, although the particular machine in question was not definitely identified. *Smith v. Milliken Bros.* (1910) 200 N. Y. 21, 93 N. E. 184, affirming (1909) 133 App. Div. 903 117 N. Y. Supp. 285.

An objection to a notice on the ground that it did not sufficiently designate the place of the accident is untenable where it appears that the employer had actual knowledge of this detail, and was not misled. *Deon v. McClintic-Marshall Constr. Co.* (1909) 114 N. Y. Supp. 28

A notice that the injuries were caused by the employer's failure to furnish a safe and secure scaffold is sufficient since such failure is negligence under the statute. *O'Donnell v. John H. Parker Co.* (1908) 125 App. Div. 475, 108 N. Y. Supp. 875.

In *Valentino v. Garvin Mach. Co.* (1910) 139 App. Div. 139, 123 N. Y. Supp. 959, the court, in holding a notice which stated that a designated machine was unguarded to be sufficient, said: "The purpose and object of the statute is accomplished if the master is informed as to the particular thing or things out of which the injury resulted, so that he may make the necessary inquiries as to the fact and its attendant circumstances."

If the proof shows that the defendant was not misled, the defects in the notice will be obviated. *Young v. Bradley* (1908) 129 App. Div. 678, 114 N. Y. Supp. 264.

A notice that, at the time and place named, the servant was instantly killed by the falling of a derrick upon him, on account of its being improperly fastened, sufficiently states the cause of injury. *Brick v. Bosworth* (1894) 162 Mass. 334, 39 N. E. 36.

A notice that by the negligence of the employer in failing to furnish a safe place to work, and to keep it safe, and to furnish competent fellow servants, "large quantities of rock and earth were caused to fall," is sufficient. *Bertolami v. United Engineering & Contracting Co.* (1910) 198 N. Y. 71, 91 N. E. 267. The

A plaintiff is not bound to ascertain and inform the defendant of all the causes to which the defect which occasioned the injury is at-

court said: "We appreciate that the present notice has some features not entirely unlike those presented by the Finnigan notice, and, as emphasized by the interesting difference of opinion at the appellate division, we realize the difficulty of framing any general rule by which infallibly to test every notice. Each one which in near or across the border line of insufficiency will inevitably present some special features by which it must be judged. We think that the prominent feature which distinguished this notice from the Finnigan one are that it does state beyond substantial criticism what did actually and directly cause the injuries, whereas the Finnigan notice did not, and also that the specifications of defendant's legal agency in causing the accident, though perhaps in some degree general when considered simply by themselves, are apt and applicable, whereas no one of those in the Finnigan Case was."

A notice that the decedent was killed in one of the defendant's buildings by reason of the explosion of a hot-water tank maintained in the said building at that time, and that the explosion was due to the defendant's negligence, is sufficient. *Castner Electrolytic Alkali Co. v. Davies* (1907) 83 C. C. A. 510, 154 Fed. 938.

A notice that the plaintiff was injured on a certain day at the defendant's place of business "by having an armature fall on him while working in a pit" is sufficient. *Eddington v. Union R. Co.* (1908) 109 N. Y. Supp. 819.

A notice is not defective merely because it states plural causes of the injury, if the plaintiff in good faith believes that they all contributed to the injury. *United States Gypsum Co. v. Sliwienska* (1910) 106 C. C. A. 38, 183 Fed. 688.

The notice need not distinguish between the negligence of the master and that of his superintendent. *Tamaseric v. Beckwith* (1911) 145 App. Div. 78, 129 N. Y. Supp. 361, appeal to court of appeals denied in (1911) 145 App. Div. 909, 129 N. Y. Supp. 1148.

In *Foster v. B. I. Croker Co.* (1911) 142 App. Div. 268, 126 N. Y. Supp. 1020, the court said: "In view of the

beneficial purpose of this law and with the saving clause adverted to, the notice should be construed to some extent in the light of the existing facts in each case. If the accident occurred in an obscure part of the building, or if no one observed it, or if there were any other facts requiring a definite, explicit, and detailed statement of the cause of the accident in order to enlighten the employer, the notice should state pointedly the facts constituting the real cause of the injuries. If, however, the cause of the accident is obvious, and the employer knows precisely how, and when, and where it occurred, a notice of less particularity and precision may be deemed to be adequate."

A notice to a railroad company that a brakeman on a certain day was injured on the railroad, within "one hundred yards northerly" of a station named, by being caught between a car and a locomotive engine "by reason of a broken drawbar" upon the car, which permitted the tender of the engine to run up against the end of the car and crush his leg, is sufficient notice of the time, place, and cause of the injury. *Donahoe v. Old Colony R. Co.* (1891) 153 Mass. 356, 26 N. E. 868.

A notice which specifies the time and place of the injury, and that it was caused by the plaintiff's being run over by the defendant's train, is sufficient, although it contains allegations of negligence without specifying the particulars thereof. *Matrusciello v. Milliken Bros.* (1908) 129 App. Div. 661, 114 N. Y. Supp. 223.

A notice which gives the time and place, and states that the cause of the injury was being struck by a large piece of iron which fell upon deceased from above the place where he was working while performing his duties, pursuant to directions, the fall being occasioned by reason of the negligence of a superintendent, or a person acting as superintendent, in failing to exercise reasonable diligence, care, and prudence in the premises,—is sufficient, although it may also state that the superintendent was negligent in furnishing him with an unsafe tool. *Pennsylvania Steel Co. v. Lakkonen* (1910) 104 C. C. A. 513, 181 Fed. 325.

tributed. The notice satisfies the statute if it states a cause which actually existed under such circumstances as would render the de

A notice which contains a sufficiently accurate statement of the physical cause of the injury is sufficient, although it fails to specify the particular violation of the master's duty out of which the negligent cause of the injury arose. *Impellizzieri v. Cramford* (1910) 141 App. Div. 755, 126 N. Y. Supp. 644.

A notice is sufficient when it states the physical cause of the injury, so that the master is informed as to the particular thing or things out of which the injury resulted, and may make the necessary inquiries as to the fact and its attendant circumstances. *McGlynn v. Pennsylvania Steel Co.* (1911) 144 App. Div. 343, 129 N. Y. Supp. 45; *Juve v. Pennsylvania Steel Co.* (1911) 144 App. Div. 903, 129 N. Y. Supp. 53.

A letter written by the plaintiff's attorney, inclosing one from his physician, which fully informed the defendants of the time, place, and cause of the injury, is sufficient, there being other evidence showing absence of any intent to mislead. *Miller v. Camp Bird* (1909) 46 Colo. 569, 105 Pac. 1105.

A letter from plaintiff's solicitors stating that they had been instructed to commence an action without delay, and describing the injury, was held sufficient in *Cow v. Hamilton Sewer Pipe Co.* (1887) 14 Ont. Rep. 300.

A notice signed with the name of the attorney for the plaintiff "per" the initials of his stenographer, is sufficient. *Greenstein v. Chick* (1905) 187 Mass. 157, 72 N. E. 955.

A notice need not state that the decedent left a widow or next of kin. *Bartley v. Boston & N. Street R. Co.* (1908) 198 Mass. 163, 83 N. E. 1093.

(b) *Notices held insufficient.*—The notice must inform the employer that the claim is made under the statute. *Ortolano v. Degnon Contracting Co.* (1907) 120 App. Div. 59, 104 N. Y. Supp. 1064.

A notice which does not fairly and completely describe the cause of the accident is inadmissible. *Gorman v. Lowden* (1911) 130 N. Y. Supp. 239.

The defendant is entitled to be apprised by the notice of the specific location of the place where the injury took place. *Flanagan v. F. W. Carlin Constr.*

Co. (1909) 134 App. Div. 236; 118 N. Y. Supp. 953.

The defect should be described with such particularity as to inform the defendant of what he is called on to defend. *Tennessee Coal, Iron & R. Co. v. Smith* (1911) 171 Ala. 251, 55 So. 170.

A notice which fails to state that the injury was caused by some act for which the master was responsible is insufficient. *Heilig v. Burns* (1909) 133 App. Div. 764, 118 N. Y. Supp. 101.

A notice which merely states that the plaintiff was injured through the negligence of the foreman is insufficient. *Bovi v. Hess* (1908) 123 App. Div. 389, 107 N. Y. Supp. 1001.

In *Ortolano v. Degnon Contracting Co.* (1907) 120 App. Div. 59, 104 N. Y. Supp. 1064, it was held that a notice which stated merely that the plaintiff "sustained severe injuries to his person, including a severe cut on the left hand," was insufficient as giving no information with respect to the manner in which the plaintiff sustained the injuries.

A notice merely stating that the employee while in the employ of the defendant received certain injuries which he claimed resulted from the employer's negligence "in not providing a proper and suitable place for him to work" is insufficient in not apprising the employer that the claim is made under the statute, and pointing out the negligence from which the injury arose. *Ortolano v. Degnon Contracting Co.* (1907) 120 App. Div. 59, 104 N. Y. Supp. 1064.

A notice of a claim for injuries caused by the falling of an iron column, which does not show what caused it to fall, is insufficient. *Mattson v. Phoenix Constr. Co.* (1909) 135 App. Div. 234, 120 N. Y. Supp. 566.

A notice which states that the accident was caused by the failure of the employer to furnish the employee proper protection, so that he was struck by a bucket used for hoisting purposes, causing him to fall into a pit, does not sufficiently describe the cause of the injury. *Simpson v. Foundation Co.* (1911) 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912 B, 321, reversing judgment (1909) 134 App. Div. 930, 118 N. Y. Supp. 1142.

fendant responsible.³ The mere fact that a notice alleges different causes for the injury does not render it defective, if each of those causes is adequately stated.⁴ The provision that the plaintiff shall state the "cause of the injury" is not to be construed as a require-

A notice which, after enumerating various acts of negligence, states that "as a result of all of which certain earth, stone, and material was caused and permitted to fall upon and seriously injure me," does not sufficiently describe the injury. *Logerto v. Central Bldg. Co.* (1910) 198 N. Y. 390, 91 N. E. 782.

A notice stating that the servant was injured while unloading coal in the yard of the defendant is insufficient, where there are four or five different places in the yard where cars of coal are unloaded, and the plaintiff was one of a gang of twenty or thirty men engaged in unloading. *Miller v. Solvay Process Co.* (1905) 109 App. Div. 135, 95 N. Y. Supp. 1020.

Where the plant contained many buildings, a notice stating merely that the plaintiff fell through an opening in the plant, is insufficient as a notice, but the defect is not fatal where there is no controversy as to the place of injury. *Heffron v. Lackawanna Steel Co.* (1907) 121 App. Div. 35, 105 N. Y. Supp. 429, affirmed in (1909) 194 N. Y. 598, 88 N. E. 1121.

Notice to an employer of liability for injury to an employee, because of failure to furnish a suitable and safe place to work, and properly to inspect, guard, and protect the place where the employee was at work, does not fairly include the act of the master in allowing an unexploded charge of dynamite, used to remove rock, to remain in the rock near where the injured person was placed at work. *Finnigan v. New York Contracting Co.* (1909) 194 N. Y. 244, 21 L.R.A.(N.S.) 233, 87 N. E. 424.

A number of New York cases have held that a notice merely averring that the master was negligent in failing to furnish a safe place to work, proper appliances, and competent fellow servants, is insufficient. *Finnigan v. New York Contracting Co.* (1909) 194 N. Y. 244, 21 L.R.A.(N.S.) 233, 87 N. E. 424; *Logerto v. Central Bldg. Co.* (1910) 198 N. Y. 390, 91 N. E. 782; *Barry v. Derby*

Desk Co. (1907) 121 App. Div. 810, 106 N. Y. Supp. 575; *O'Donnell v. John H. Parker Co.* (1908) 125 App. Div. 475, 109 N. Y. Supp. 875; *Kennedy v. New York Teleph. Co.* (1908) 125 App. Div. 846, 110 N. Y. Supp. 887; *Glynn v. New York C. & H. R. R. Co.* (1908) 125 App. Div. 186, 109 N. Y. Supp. 103; *Palmieri v. S. Pearson & Son* (1908) 128 App. Div. 231, 112 N. Y. Supp. 684; *Galino v. Fleischmann Realty & Constr. Co.* (1909) 130 App. Div. 605, 115 N. Y. Supp. 334; *Carlin v. New York, N. H. & H. R. Co.* (1910) 137 App. Div. 71, 122 N. Y. Supp. 57.

A notice is insufficient which states that the cause of the injury was the defective condition of the stamping press, "in that the whole machine was out of plumb," where there was no evidence tending in the slightest degree to show that the accident was due to such a cause, and the record contained no testimony to show that there was no evidence of intent to mislead, and that the party entitled to the notice was not in fact misled. *Hughes v. Russell* (1905) 104 App. Div. 144, 93 N. Y. Supp. 307.

A judgment for the plaintiff will be reversed where the notice stated the name of the plaintiff as John, when his correct name was Michael, J., and stated that the injury was caused by the machine being "out of plumb," where there was no evidence that such was the cause,—especially when there was no proof that the defendant was not misled. *Hughes v. Russell* (1905) 104 App. Div. 144, 93 N. Y. Supp. 307.

A notice signed by a third person in his individual name is insufficient, although the third person was the attorney for the present plaintiff, who afterwards became the administrator of the deceased servant. *Lukkonen v. Fore River Ship Bldg. Co.* (1908) 197 Mass. 586, 84 N. E. 299.

³*Dolan v. Alley* (1891) 153 Mass. 380, 26 N. E. 989.

⁴*Coughlan v. Cambridge* (1896) 166 Mass. 268, 44 N. E. 218.

ment that he shall state the "cause of action."⁵ Nor will a notice be declared insufficient merely for the reason that, as the evidence adduced at the trial shows, the proximate cause of the injury was not stated with legal precision.⁶ Still less will it be necessary to set forth what is called in one of the cases the "cause of the cause of the injury."⁷

In the English and colonial acts, the intention of the legislature that the sufficiency of the notice shall be ascertained in accordance with extreme liberal canons of construction is unmistakably indicated by the provision that the statement shall be made in "ordinary language." This phrase is assumed to have reference to the fact that these acts were passed for the special benefit of persons in a humble sphere of life, and not possessed of much knowledge. The claimant "is to use his own untutored language."⁸

The words just mentioned are not inserted in the American acts but there is nothing in the reports to indicate that its absence has been regarded as a reason for applying a stricter rule of construction than that adopted by the English courts.

b. Inaccuracies which do not invalidate a notice.—The language of the provisions by which it is secured that a plaintiff shall not be put out of court simply because his notice was inaccurate in some particulars is, it will be observed, not quite the same in all the statutes. By those of England and of the colonies the validity of the notice is made to depend upon the question whether the defendant

⁵ *Clarkson v. Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, per Field, J. (p. 390).

⁶ *Clarkson v. Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, where a notice was held sufficient which stated that the plaintiff, a child, was injured in consequence of the defendant's negligence in leaving a certain hoist in their warehouse unprotected, whereby the plaintiff had her foot caught in the casement of the said hoist, although the evidence showed that the accident was proximately caused by the negligence of the plaintiff's mistress in allowing her to go into the hoist by herself.

⁷ In an action for an injury to an employee by the falling of a bank of earth owing to the negligence of the employer's superintendent, a notice to the employer, setting forth the cause of the in-

jury to be "the falling of a bank of earth," is sufficient, although not referring to the superintendent or his conduct. *Lynch v. Allyn* (1893) 160 Mass. 248, 35 N. E. 550.

⁸ Cave, J., in *Stone v. Hyde* (1882) L. R. 9 Q. B. Div. 76. In the same case Mathew, J., remarked, "When we consider that the object of the legislature in passing this act was to confer a benefit on the working classes, I think it would be unreasonable and unjust, and contrary to the spirit and intention of the act, to require these notices to be framed with all the particularity of a statement of claim."

Compare the statement of Field, J. in *Clarkson v. Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47, that "the statute was intended for the use of unlearned persons, for whom it was meant to provide a cheap and speedy remedy."

was prejudiced by the inaccuracies complained of, and it is expressly declared that this question is to be determined by the trial judge. In those of Massachusetts and Colorado there is merely a categorical statement that certain specified inaccuracies shall not invalidate the notice, unless they were intended and actually did mislead the defendant; and in the absence of any designation of the tribunal which is to determine this question, the inference has necessarily been drawn that, like other questions of fact, it is primarily for the jury. But the practical results of each of these provisions appear to be virtually identical, when measured by the circumstances disclosed in cases where the actions have been allowed to proceed.

If the validity of the notice has been declared, either expressly by a specific finding, or impliedly by a verdict for the plaintiff, a judgment in his favor will not be set aside, unless the conclusion thus reached was manifestly unwarrantable.⁹

⁹ A letter from the plaintiff's solicitor which merely gave the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg," has been held to be a valid notice. *Stone v. Hyde* (1882) L. R. 9 Q. B. Div. 76, 51 L. J. Q. B. N. S. 452, 46 L. T. N. S. 421, 30 Week. Rep. 816, 46 J. P. 788.

In *Carter v. Drysdale* (1883) L. R. 12 Q. B. Div. 91, 53 L. J. Q. B. N. S. 557, 32 Week. Rep. 171. a finding that the defendant was not prejudiced was declared to be warrantable, where the notice itself omitted the date of the injury, but the plaintiff's solicitor had sent a letter in which that particular was stated. Lord Coleridge remarked that he did not see how, under these circumstances, any other conclusion was possible than that no prejudice was shown.

In *Hearn v. Phillips* (1885) 1 Times L. R. (Q. B. Div.) 475, the plaintiff, having been injured while in the employ of one "G. F. Van Camp," had served notice on "E. Van Camp," who carried on business at the same place. The county court judge found that the notice had been duly served, and having amended the inaccuracy in the initials, allowed the trial to proceed, holding that the employer was not thereby prejudiced in his defense. Held, that a judgment in the plaintiff's favor ought not to be set aside.

The omission of the plaintiff's name and address, and a wrong date, are defects which are not fatal to the validity of the notice, if the trial judge can still say that, as a matter of fact, the defendant was not prejudiced in his defense by these inaccuracies, and that they were not for the purpose of misleading. *Previsi v. Gatti* (1888) 58 L. T. N. S. (Q. B. Div.) 762, 4 Times L. R. 487, distinguishing *Keen v. Millwall Dock Co.* (1882) L. R. 8 Q. B. Div. 482, 51 L. J. Q. B. N. S. 277, 30 Week. Rep. 503, 46 J. P. 435, 46 L. T. N. S. 472, on the ground that the absence of prejudice to the defendant was not a factor in that case, nor made the subject of any argument, the plaintiff being held to have been rightly nonsuited simply for the reason that the notice was insufficient.

The following letter from the wife of the injured servant is sufficiently specific: "I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you." *Thompson v. Robertson* (1884) 12 Sc. Sess. Cas. 4th series, 121.

A jury is justified in finding that there was no intention to mislead, and that in fact the defendant was not misled, by a notice of the death of an employee, stating that deceased was killed by a stone being precipitated upon him

There seems to be only one reported decision bearing upon the question how far a court of review will go in overriding the action of a trial judge who has denied recovery for the reason that the notice was insufficient to satisfy the statute, and the rationale of that decision is somewhat obscure.¹⁰

A notice making a claim for compensation under the workmen's compensation act 1897, which stated the name and address of the injured man and the nature of the accident, could not be regarded and receive effect as a notice under the employers' liability act, 1880.¹¹

The Federal court will follow the decision of the state court as to the sufficiency of notice under the statute.¹²

I. DEATH OF EMPLOYER OR INJURED EMPLOYEE; HOW THE RIGHT OF ACTION IS AFFECTED BY.

1716. [713] Scope of this subtitle.—It is not proposed in this subtitle to do more than state the result of the cases which have been decided with express relation to one or other of the acts now under discussion. For a more complete collection of cases dealing with the effect of death upon the right of action for personal injuries, the reader must consult the general treatises on the subject.¹

from defendant's derrick as a result of the negligence of defendant or of some person for whose negligence he was liable, and that the notice was therefore sufficient although the negligence was in failing to warn him of the raising of the stone. *Beauregard v. Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N. E. 555.

In Scotland, where the issues are adjusted by a different court from that which tries the case, the question whether the excuse for not sending the notice was reasonable may be decided by the former court, or in its discretion postponed for the decision of the trial court. *Trail v. Kelman* (1887) 15 Sc. Sess. Cas. 4th series 4.

¹⁰ In *Beckett v. Manchester* (1888) 52 J. P. (Q. B. Div.) 346, a nonsuit was set aside on the ground that the want of a name and address is not fatal to the notice, if the defendants are not taken by surprise in consequence of the defect. So far as the position of the court can be understood from the very meager report of the case, absence of prejudice

seems to have been viewed as a legal inference from the mere fact that the defendant came into court. But, in view of the decisions cited above, this seems not to be maintainable as an unqualified proposition. The report probably omits to mention the factor which was really regarded as decisive.

¹¹ *Thomson v. Baird & Co.* (1903) 6 Sc. Sess. Cas. 5th series, 142.

¹² The Federal courts will follow the state courts in their construction of the statute as to the sufficiency of the notice. *United States Gypsum Co. v. Sliwienska* (1910) 106 C. C. A. 38, 183 Fed. 688; *Pennsylvania Steel Co. v. Lakkonen* (1910) 104 C. C. A. 513, 181 Fed. 325.

¹ In *Roberts & Wallace, Liability of Employers*, pp. 380 *et seq.*, will be found an excellent summary of the English cases. A full review of the English decisions under Lord Campbell's act is given in *Beven's Employers' Liability*, 2d ed. pp. 84 *et seq.*, and chap. vi. of the same author's work on *Negligence*. (Vol. 1, p. 208.) See also *Ruegg on*

1717. [714] Death of employer; effect of.—In England it has been held that the maxim, *Actio personalis cum persona moritur*, which operates as a bar to an action at common law against the executors of the culpable party also precludes recovery in an action brought by a servant under the statute.¹ The same doctrine would doubtless be applied in any American or colonial jurisdiction, unless it is otherwise provided by the act itself, as is the case in Ontario (§ 11), and in British Columbia (§ 15).

1718. [715] Death of plaintiff; pending action abated by.—If a plaintiff dies after an action under the statute is commenced, but before judgment, the action already commenced abates. The death may give a right of action under the damage act, but this is a different action and must be prosecuted separately.¹

1719. [716] Suits by executors or administrators.—Nearly all the statutes now under consideration expressly provide that the right of action given by them may be enforced by the "personal representatives" of a servant who dies as a result of the injury in suit.¹

By Mass. Pub. Stat. chap. 112, § 212, as amended by Stat. 1883, chap. 243, a right of action is given to an administrator in any case where the intestate could have sued, but recovery is not allowed for the negligence of a fellow servant. In a later case than the one cited in note 4, *infra*, it was argued that the combined effect of this provision and of § 2 of the employers' liability act (see *infra*) was to give an action to the administrator free from the defense arising out of the relation of fellow servants, in a case where death had resulted without conscious suffering, and where there is no widow nor dependent next of kin. But this contention did not prevail.²

Under the Alabama Code, it has been held not to be necessary to aver in the complaint that the injured servant left any heirs at law

Employers' Liability Act, p. 128. In Shearn. & Redf. Neg. §§ 124 *et seq.*, the American decisions are collected.

¹ *Gillett v. Fairbank* (1887) 3 Times L. R. (Q. B. Div.) 618.

¹ *McCarthy v. Jacobb*, an unreported decision of the English court of appeal, mentioned in Rugg on Employers' Liability Act, p. 121, note (n).

¹ England, Newfoundland and Australian Colonies, § 1; Ontario, § 3, subs. 5; British Columbia, § 15; Alabama Code, § 2591; Massachusetts, § 1, subs. 3, §§ 2, 3; Colorado, § 1, subs. 3; New York, § 1.

This statute places a workman who has been killed by the negligence of his employer in the same position as a stranger, but does not operate so as to give his personal representatives any other or better right than they would have if he was actually a stranger. *Murray v. Miramichi Pulp & Paper Co.* (1909) 39 N. B. 44.

² *Clark v. New York, P. & B. R. Co.* (1893) 160 Mass. 39, 35 N. E. 104. Some remarks on the inaptness of the phraseology used in § 3 will be found at the end of the opinion of the court.

surviving him, though the damages recovered are to be distributed according to the statute of distribution.³

In most of the statutes no special provision is made for a suit by a widow as distinguished from other personal representatives; but in Massachusetts, section 2 of the act gives a widow or dependent next of kin the right to sue in the special case where the employee is instantly killed or dies without conscious suffering. Under this provision the right of recovery exists only under such circumstance as would have created a liability in favor of the employee if he had survived.⁴ The effect of sections 1 and 2 of the act is, therefore simply this—that, if death is not instantaneous, and there is conscious suffering, the action must be brought by the person injured or his executor or administrator, while, if there is instantaneous death, or death not preceded by conscious suffering, the action must be brought by the widow or next of kin.⁵

³ *Columbus & W. R. Co. v. Bradford* (1888) 86 Ala. 574, 6 So. 90.

⁴ In *Dacey v. Old Colony R. Co.* (1891) 153 Mass. 112, 26 N. E. 437, the court said: "The provisions of this section would be inconsistent with those of the statute of 1883, chap. 243 (see note, 2, *supra*), if that were held to include cases where the deceased might have maintained an action under the employers' liability act if death had not resulted. It could not have been intended that, where an employee is instantly killed or dies without conscious suffering, the widow or next of kin shall have a right of action for the death under the employers' liability act, and that the administrator also, by virtue of the same statute, shall be enabled to maintain an action for the death which could not otherwise be maintained under the statute of 1883. We are of opinion that the statute of 1887, chap. 270, cannot be invoked to relieve a case brought under the statute of 1883, chap. 243, from the defense that the injury was caused by the negligence of a fellow servant. Section 2 of the first-mentioned statute, which gives a remedy to the widow or next of kin, instead of to the administrator, where death results without conscious suffering, must be held to be exclusive as to the cases of death where the aid of the statute is invoked."

See also *Vecchioni v. New York C. & H. R. R. Co.* (1906) 191 Mass. 9, 71 N. E. 306, citing the *Dacey Case*.

⁵ *Gustafsen v. Washburn & M. Mfg. Co.* (1891) 153 Mass. 468, 27 N. E. 179.

If the deceased left a brother and sister, and the latter alone was dependent on him, the action should be brought in her name alone. *Daly v. New Jersey Steel & I. Co.* (1891) 155 Mass. 1, 2 N. E. 507.

To be "dependent" within the meaning of the statute, the next of kin need not be one of the class of persons whom the deceased was legally bound to support. Dependence, if proved as a fact is sufficient. *Hodnett v. Boston & A. R. Co.* (1892) 156 Mass. 86, 30 N. E. 224. Compare the decisions with regard to the English workmen's compensation act of 1897, § 1826, *post*.

Whether the deceased died without "conscious suffering" is a question primarily for the jury. See *Maher v. Boston & A. R. Co.* (1893) 158 Mass. 36, 32 N. E. 956; and *Mears v. Boston & M. R. Co.* (1895) 163 Mass. 150, 31 N. E. 997, for cases involving evidence deemed to be sufficient to justify the inference of death without such suffering.

A widow not suing as administrator has no cause of action for the death of her husband, unless the death is instantaneous. *Smith v. Thomson-Houston Electric Co.* (1905) 188 Mass. 371, 7 N. E. 664.

The employers' liability act cannot be availed of by the father to recover for loss of service or for expenses, inasmuch as this statute gives a right of action only to the employee or his legal repre-

The Colorado statute has no application where an action is brought by a mother for the death of her son.^{5a}

The phraseology of the various acts as to suits by personal representatives differs considerably; but presumably the doctrine laid down in Massachusetts is universally applicable, *viz.*, that there is only one cause of action under them. Hence they do not give the administrator of an employee a right of action against an employer for causing the employee's death, in addition to the right as legal representative to recover damages accruing to the intestate in his lifetime.⁶

The phraseology of the damage act which happens to be in force in the particular jurisdiction where the injury occurs determines what parties shall be deemed "personal representatives" for the purposes of the employers' liability act in that jurisdiction. If the damage act provides that the action must be brought by the executors or administrators of the deceased person, the wife of a servant who has been killed in the course of his employment cannot bring a suit in her own name under an employers' liability act.⁷

It has been decided with reference to the employers' liability act of Colorado that the provision which relates to suits by personal representatives cannot be construed as having abrogated by implication

sentatives, or, if he is instantly killed or dies without conscious suffering, to his widow or next of kin. *Jordan v. New England Structural Co.* (1908) 197 Mass. 43, 83 N. E. 332.

The father and mother of a deceased employee cannot recover unless they are dependent upon him. *Mehan v. Lowell Electric Light Corp.* (1906) 192 Mass. 53, 78 N. E. 385.

^{5a} *Mitchell v. Colorado Mill. & Elevator Co.* (1898) 12 Colo. App. 277, 55 Pac. 736, affirmed in (1909) 26 Colo. 284, 58 Pac. 28.

⁶ *Ramsdell v. New York & N. E. R. Co.* (1890) 151 Mass. 245, 7 L.R.A. 154, 23 N. E. 1103. After quoting the provision in question, the court said: "This plainly authorizes an executor or administrator to proceed in the right of his testator or intestate, and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantive cause of action. It gives only 'the right of compensation and remedies' and it gives them to the employee, or to his legal representative in case of his

death. It implies that his representatives are merely to succeed to his rights and remedies. But the law recognizes no 'right of compensation' for the death of a person, and gives to a deceased person no remedies founded on his death." These considerations are of general applicability and therefore independent of the following additional argument by which the court went on to fortify its position: "If this clause (§ 1, subs. 3) gave a right of action for the death of an employee as an extension to his representatives of a right which under one or two statutes belongs to the representatives of others who are not employees, it would necessarily include the right where death is instantaneous. But manifestly that was not intended. The next section of the statute (2) deals expressly with such cases in a different way. It is quite apparent that clause 3 of § 1 gives the legal representatives of a deceased employee merely a right to recover the damages to which he was entitled at the time of his death."

⁷ *Pearson v. Canadian P. R. Co.* (1898) 12 Manitoba L. Rep. 112.

the right of action which is given to those representatives by the damage act of that state.⁸

The general statute of limitation of one year applies to bar a recovery for injury resulting in death, where the action is brought by the personal representative of the servant against the master under the employers' liability statute.⁹

J. PERSONS ENTITLED TO SUE UNDER THE ACTS.

1720. [717] General remarks.—The cases which turn upon the question whether the injured person is entitled to maintain an action under these statutes against the party whom he seeks to hold responsible fall into three categories:

(1) Those in which the right of action is made to depend upon principles applicable to statutory and common-law actions alike.

(2) Those in which the right depends entirely upon the specific terms of the acts themselves.

(3) Those in which the right depends upon the answer to the question, how far common-law principles are affected by these or other acts which modify the relations between masters and servants.

1721. [718] Servants temporarily under the control of the defendant.—Whether the plaintiff, although regularly working for another person, was, at the time of the accident, under the control of the defendant in such a sense as to be an employee *ad hanc vicem*, and therefore entitled to hold the defendant accountable under the statute, is determined by tests similar to those which are applied in actions at common law.¹ The predicament thus indicated is discussed at length in vol. i.

⁸ *Colorado Mill. & Elevator Co. v. Mitchell* (1899) 26 Colo. 284, 58 Pac. 28, affirming (1898) 12 Colo. App. 277, 55 Pac. 736.

⁹ *Louisville & N. R. Co. v. Chamblee* (1911) 171 Ala. 188, 54 So. 681; *O'Kief v. Memphis & C. R. Co.* (1893) 99 Ala. 524, 12 So. 454.

¹ One sent by a firm of contractors to assist their workman in constructing an elevator which they have contracted to erect in a building, whose wages the owners have promised to pay, may properly be found to be a servant of such owners. *Wild v. Waygood* [1892] 1 Q. B. 783. Lord Herschell, commenting on the contention that the plaintiff was not working under any contract with the

defendants, and therefore was not a workman within the meaning of the act, and capable of suing under it, said: "The only effect of that objection, if it prevailed, would be this,—that there would be no question as to the defendant's liability; but the action should have been one brought at common law, and not brought under the employers' liability act. But I think that in this case there is evidence that the plaintiff was a workman employed by the defendants. Duplea had requested Horton's foreman that he should have furnished to him a man for the purpose of doing the work in connection with the lift. It was not work which Horton had to do, but work which the defend-

1722. [719] Course of employment. Volunteers.—(Compare §§ 1561-1567, *ante.*) A mere volunteer as regards the service under performance is not entitled to the benefits of those acts.¹

1723. [720] Persons who have permanently or temporarily ceased to be in the employment of the defendant.—(Compare §§ 1555, 1556, *ante.*) If the plaintiff, though he may at some previous time have worked for the defendant, was not actually in his service at the time when the injury was received, it is clear that he cannot sue under these statutes.¹

1724. [721] Independent contractors.—(See also chapter LXXXIV., *post.*) These acts have no application to a man who is conducting

ants had to do. There is evidence that Duplex needed and obtained assistance for the work he had to do, and his employers recognized it as being rendered on their behalf and asked to have an account sent in for the work the man had done, so that they might pay his wages during the time he was so engaged. It is enough to say that there was evidence which it was impossible to withdraw from the jury that the plaintiff was in the service of the defendants within the meaning of this act."

¹ *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117, where, however, the court refused to say that this doctrine barred recovery in the case of a female employee whose hair was caught in an uncovered revolving shaft, while she was on a bench endeavoring to open a window for ventilation purposes.

A brakeman who is traveling as a passenger on a train, and is not under the control of the conductor for the purpose of the performance of the duties characteristic of his position, cannot recover for injuries received in coupling a car in compliance with the directions of the conductor. Such a direction is entirely unauthorized, and fastens no liability on the company. *Georgia P. R. Co v. Propst* (1887) 83 Ala. 518, 3 So. 764. There the court held demurrable a count which began thus: "When on a trip down defendant's said road, . . . plaintiff, being aboard defendant's train, . . . was then and there ordered by the conductor or foreman of said railway company, employed to manage or superintend the business affairs of said company on the aforesaid train, and whilst in the exercise of his

superintendence, to couple a freight car to others attached." It was declared that there was nothing in this court which showed that the plaintiff was acting as brakeman, or had been requested to do so.

A servant who is injured while attempting to repair defective machinery cannot recover under these statutes, if the work thus undertaken was outside the scope of his regular duties. *Mellor v. Merchants' Mfg. Co.* (1890) 150 Mass. 362, 5 L.R.A. 792, 23 N. E. 100. To the same effect, *Gooch v. Citizens' Electric Street R. Co.* (1909) 202 Mass. 254, 23 L.R.A. (N.S.) 960, 88 N. E. 591.

¹ By the rules of a mine, workmen upon their discharge, were not entitled to receive their wages until they had returned their tools. A miner who was discharged on a Saturday, but had no opportunity to go down for his tools on that day, went down on Monday and was injured by an explosion of gas due to inadequate ventilation. Held, that at the time of the injury he was acting in the employment of the mine owner. *Cowler v. Moresby Coal Co.* (1885) 1 Times L. R. (Q. B. Div.) 575.

In *Lovell v. Charrington*, reported in the Law Times Newspaper, March, 1882 (see also *Roberts & Wallace on Liability of Employers*, 3d ed. p. 230), the plaintiff had been occasionally employed by the defendant as a trolleyman, but on the day in question, he arrived too late, and was told that he was out of employment for that day. While leaving the premises he was injured owing to a defect therein. Held, that he was not a "workman" within the statutory definition.

his own business. Under such circumstances the fault, if any, is imputable to himself.¹

1725. [721a] Servants of independent contractors.—Under the English, colonial, and Alabama statutes, which contain no special provision modifying the general rule of law on the subject, it is clear that the servants hired by a contractor or sub-contractor cannot sue the principal employer unless there is evidence to show that the control which he exercised over them was the same in kind and degree as that exercised by a master.¹ Similarly, the servant of a subcontractor cannot recover in a suit against the principal contractor.²

Under the acts of Massachusetts, Ontario, and British Columbia the principal employer is made liable to servants of contractors or subcontractors for defects in the condition of the ways furnished by him for the purpose of executing the work contracted for. Whether the instrumentality which caused the injury was one of those to which this provision applies is a question of fact in each instance.³

¹ *Bruce v. Barclay* (1890) 17 Sc. Sess. Cas. 4th series, 811.

² The miners who take service under the middlemen known in England as "butty" men are liable to dismissal by the principal employer, and are therefore regarded as his servants in such a sense as to be entitled to the benefits of the employers' liability act of 1880. *Brown v. Butterley Coal Co.* (1885) 53 L. T. N. S. 964, 50 J. P. 230.

The act is not applicable to assistants of workmen, who are hired and controlled by the workmen, and not by the employers. *Littlejohn v. Brown & Co.* [1909] S. C. 169.

See also *Milligan v. Muir* (1891) 19 Sc. Sess. Cas. 4th series, 870, where the general rule in the text was applied.

Whether the immediate employer of the plaintiff was an independent contractor or in the service of the defendant is a question for the jury, where the evidence is that such employer took work from the defendant; that he hired the plaintiff as well as other boys, and paid them their wages; that the plaintiff went to work when the company wanted him; and that the company repaired the machinery used, whenever it was out of order. *Masters v. Jones* (1894) 10 Times L. R. (Q. B. Div.) 403.

³ *Nicolson v. MacAndrew* (1888) 15 Sc. Sess. Cas. 4th series, 854.

³ A workman employed by a subcon-

tractor to do work outside the mill cannot recover from the owner of the mill, where he passes through the mill to get a drink of water, and in returning goes out of his way to assist a mill hand and falls through an unguarded hole in the floor. *Finlay v. Miscampbel* (1890) 20 Ont. Rep. 29.

In *Toomey v. Donovan* (1893) 15 Mass. 232, 33 N. E. 396, the case was held to be for the jury, where the evidence was that the defendant had given to another person charge of a certain room in his factory under an agreement by which the defendant was to furnish the machinery and materials, and the contractor was to hire and pay the men that the defendant was to pay for the repairs; that the contractor had the right to order the repairs to be made that the defendant had the right to inspect the machines, and was often in the room; and that the injury was received owing to a defect in one of the machines by one of the men in the employ of the contractor. In this case the contractor was also the person intrusted by the defendant with the duty of seeing that the machine was in proper condition, under § 1, subs. 1, of the statute. It was held that the relation which he occupied as contractor would not relieve the defendant from liability for his negligence in the discharge of this duty.

1726. [722] Railway servant.—It has been suggested that this term, which is employed in the English act for the purpose of designating one of the specific classes of persons to which the provisions are applicable, should be understood as referring only to servants engaged in the conduct and management of railways, and not as embracing servants hired to do work in connection with a collateral undertaking carried on by a railway company as an adjunct to its proper business of carriage by land,—*e. g.*, the keeping of a hotel, or the operation of a line of steamboats.¹ Such a doctrine would limit the benefit of the acts in a manner analogous to the decisions under the acts of Iowa, Kansas, and Minnesota, which, it is held, abolish the defense of coservice only in cases where the injuries were received in the actual operation of a railway. But, so far as the writer knows, there has not been any judicial expression of opinion as to the point just raised.

In an English case it has been held that a driver of a tram car could not sue under the act, as being a workman engaged in "manual labor."² The possibility of his recovering as a "railway servant" was not discussed, and it seems to have been assumed both by the court and counsel that this description was not applicable to an employee of a street railway company. The reasons for adopting such a construction of the act are undoubtedly stronger in England than in the United States. See § 1710, *ante*. But it remains to be seen whether, even in the former country, the courts will, when the point is directly raised, go to the length of holding that the benefits of a remedial statute must be denied to a class of employees who can only be excluded from its purview by dint of attaching a somewhat narrow and technical meaning to the word "railway."

In the Ontario, Manitoba, and British Columbia acts it is expressly declared that the term "railway servant" includes "tramway and street railway servant."

It has been held that an employee working on a railway controlled by the Canadian Dominion government may recover under the provisions of an employer's liability act passed by the legislature of the Province in which the injury was received.³

All persons in the employment of railway companies, whatever may be their rank, are within the purview of the act.⁴

¹ Roberts & Wallace on Liability of Employers, 3d ed. p. 231. N. S. 448, 57 L. T. N. S. 476, 35 Week. Rep. 577, 51 J. P. 630.

² Cook v. North Metropolitan Tramways Co. (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. ³ Canada Southern R. Co. v. Jackson (1890) 17 Can. S. C. 316. ⁴ A superintendent drowned while en-

1727. [723] Workmen.—By sec. 10 of the English act it is declared that the expression “workman” means “any person to whom the employers and workmen act of 1875 applies.” All the cases in which the expression has been construed with reference to either of these statutes are reviewed in the subsequent section (1968) which deals with the scope of the act of 1875, *quoad personas*. It should, however, be mentioned here that the employers and workmen act is, by its express terms, inapplicable to “servants in husbandry.” Servants of this class are also excepted from the purview of the Ontario, Manitoba, and British Columbia acts.

1728. [724] Seamen.—Seamen were expressly excepted from the scope of the employers and workmen act of 1875. This provision, though repealed for other purposes by the merchant seamen act of 1880, was, for the purposes of definition, kept alive by section 11 of that act. Seamen are therefore still excluded in England from the advantages of the employers’ liability act.¹

If a plaintiff relies upon the theory that his functions were partly those of a seaman and partly what may be called nonmaritime, he cannot recover unless he proves expressly and distinctly that he actually had an employment separate from that of a seaman.²

The word “seaman” applies only to the crews of sea-going ships. An action will therefore lie for the death of the fireman of a canal boat who was drowned by its capsizing;³ and for injury to a dock laborer helping to warp a steamboat from one berth to another.⁴ This rule has been altered to some extent by express enactment in some of the British colonies.

gaged in investigating the condition of a well was held entitled to recover in *Pearson v. Canadian P. R. Co.* (1898) 12 Manitoba L. Rep. 112.

¹ A bill introduced in 1893 to repeal the act of 1880, and, *inter alia*, to give seamen the benefit of the substituted enactment, failed to pass into law. See Kay, *Shipmasters & Seamen*, 2d ed. § 466.

In New South Wales it has been held that the phrase “otherwise engaged in manual labor” must be construed as being applicable only to persons *ejusdem generis* with those specifically mentioned, and that it only embraces persons working on land. *Hanson v. Australasian Steam Nav. Co.* (1884) 5 New South Wales L. R. (L) 447. But by the act of 56 Vict. No. 6, seamen are now entitled to sue under the statute.

In *Corbett v. Pearce* (1904) 2 K. B. 422, it was held that one of a crew of two hands employed to navigate a barge in the estuary and tidal waters of the Thames was a “seaman,” and consequently was excluded from the provisions of the act.

² *Hanrahan v. Limerick S. S. Co.* (1886) Ir. L. R. 18 C. L. 135 (holding, on the ground that there was no such proof furnished, that a mate of a steamer could not recover for injuries received while he was superintending the loading of a cargo).

³ *Oakes v. Monkland Iron Co.* (1884) 11 Sc. Sess. Cas. 4th series, 579.

⁴ *Macbeth & Co. v. Chislett* [1910] A. C. 220, 79 L. J. K. B. N. S. 376, 102 L. T. N. S. 82, 26 Times L. R. 268, 54 Sol. Jo. 268, 47 Scot. L. R. 623.

1729. [725] Servants working in government departments.—According to Mr. Beven (1 Neg. 873), the definition of “workman” in the employers and workmen act does not include Crown servants for these two reasons:

First, the rights of the Crown are not affected by any act in which the Crown is not specially named.¹

Secondly, the Crown is not liable for torts committed by its servants.² This rule, as it would seem, still prevails in most of the British colonies; but it has been abrogated wholly or partially in some of them.³

K. DAMAGES RECOVERABLE.

1730. [726] Damages recoverable where the injured servant is himself the plaintiff.—The provisions specifying the amount recoverable by an injured servant do not give a measure of damages, but merely fix a limit beyond which the jury cannot award compensation.¹ Within that limit the measure of damages is left to be determined upon the ordinary principles which regulate the assessment of the indemnity in actions for personal injuries.

Under the English and some of the colonial acts the maximum amount which can be awarded is a variable quantity, dependent upon the earning capacity of the supposed injured person.² The

¹ Bacon's Abr. title, Prerogative (E) 5. Hardcastle, Statutory Law, Craies' ed. pp. 401-421.

² *Sutton v. Johnstone* (1787) 1 T. R. 493, 1 Revised Rep. 257, 1 Bro. P. C. 76, 1 Eng. Rul. Cas. 765; *Buron v. Denman* (1848) 2 Exch. 167; *Raleigh v. Goshen* [1898] 1 Ch. 73, 67 L. J. Ch. N. S. 59, 77 L. T. N. S. 429, 46 Week. Rep. 90.

³ The New Zealand employers' liability act is expressly made applicable to Crown servants.

In Canada by virtue of the Dominion act (50 & 51 Vict. ch. 16) employees engaged on any “public work” can recover for the negligence of any officer or servant of the Crown if the circumstances were such that he could have recovered in an action against a private employer. *Queen v. Filion* (1895) 24 Can. S. C. 482, following *Quebec v. Queen* (1894) 24 Can. S. C. 420, where it was laid down that the effect of the Dominion statute (50 & 51 Vict. chap. 16, § 16, par. (c.) was to confer upon the

exchequer court, in all cases of claim against the government, arising out of the death of or injury to any person through the negligence of its servants on any railway or other public work of the Dominion, the same jurisdiction as is exercised in like cases by the ordinary courts over public companies. Apparently, this statute operates so as to give a government servant a right to take advantage of any employers' liability act which may be in force in the Province where the injury was received, if he was engaged on a railway or other public work.

¹ *Borlick v. Head* (1885) 34 Week Rep. 102, 53 L. T. N. S. 909, 50 J. P. 327.

² The plaintiff is entitled to prove as damages loss of wages in respect both of his employment with the defendants, and also in respect of certain overtime labor under another employer, where the total amount which he can thus recover is less than the amount he might have been awarded in respect of his estimated

American acts simply declare that the damages shall not exceed a certain sum.

A mixture of these two methods is adopted in the Ontario and British Columbia acts, the servant having the privilege of recovering either a fixed sum or one computed on the basis of earnings, whichever may be the larger. The precise amount recoverable within the limit thus fixed is determined (except in so far as it may be affected by the special provisions in some of the acts respecting deductions) with reference to the principles which regulate the measure of damages in all actions for personal injuries. An extended discussion of the subject would therefore be out of place in this article.

Where the plaintiff is entitled to damages at common law, as well as under the statute, the amount of the indemnity recoverable is not restricted to the sum fixed by that act.³

Under the Alabama statute, exemplary or punitive damages are recoverable.⁴

1731. [727] Damages recoverable by the personal representatives of an injured servant.—The various clauses in these statutes by which a right of action is given to the representatives of a deceased servant have been treated as an expression of the intention of the legislatures that the provisions of the damage acts and the decisions in which they have been construed are to be regarded as controlling upon the questions of the assessment of damages in cases where death results from the accident in suit.

In England the right of action given to relatives of a deceased person by the earlier act is not a right given to them *quâ* relatives to recover damages as a *solatium* for the distress which may be occasioned to them by the death; nor is it a right transmitted to them by the deceased, to recover damages for the loss or for the personal pain and suffering which he endured. It is a right given to the parties named in the statute, to recover damages for the death of

earnings for three years in the defendant's service. *Borlick v. Head* (1885) 34 Week. Rep. 102, 53 L. T. N. S. 909, 50 J. P. 327, 2 Times L. R. 103.

An apprentice cannot, under this section, be awarded more than the sum to which his wages at the time of the accident would amount in three years. The damages cannot be augmented by construing the word "earnings" as including the computed value of the tuition he

was receiving. That word means money or things capable of being turned into money by accurate estimation. *Noel v. Redruth Foundry Co.* [1896] 1 Q. B. 453, 65 L. J. Q. B. N. S. 330, 74 L. T. N. S. 196, 44 Week. Rep. 407, 12 Times L. R. 248.

³ *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12.

⁴ *Southern R. Co. v. Bunt* (1902) 131 Ala. 591, 32 So. 507.

their relative, when, and only when, the death has caused such parties a pecuniary loss, and to the extent only of such pecuniary loss.¹

The colonial acts are expressed in the same terms and therefore construed in the same manner as that of England.²

In Alabama, Colorado, and Indiana, the measure of damages is limited to the pecuniary injury sustained by the persons to whose benefit the recovery enures. Exemplary or vindictive damages cannot be recovered, nor can anything be allowed on account of the pain and suffering of the deceased, the grief and distress of his family, or the loss of his society.³

In Massachusetts the representatives of the deceased servant may recover damages for all the damage accruing to him before death, including his mental and physical sufferings.⁴

L. TRIAL PRACTICE.

1732. [728] Scope of subtitle.—In this subtitle it is proposed merely to collect, under appropriate headings, the cases in which various points of pleading and procedure have been determined in actions brought under the statutes. It would be out of place to attempt, in the present connection, to develop fully the general rules which these cases illustrate. For a more complete discussion of the subjects touched upon, the reader is referred to the various treatises on trial practice.¹ Other illustrative cases are collected in chapter LXX., *ante*.

1733. [729] Within what period the action must be brought.—In all the acts reviewed in this chapter, except those of Alabama and Indiana, there are express provisions of which the effect is that the injured servant's right to maintain the statutory suit is conditional upon its being instituted within a specified period.

It has been held with regard to the English act that the time limit

¹ Ruegg, *Employers' Liability Act*, pp. 131 *et seq.*, citing *Gillard v. Lancashire & Y. R. Co.* (1848) 12 L. T. 356; *Pym v. Great Northern R. Co.* (1863) 4 Best & S. 396, 31 L. J. Q. B. N. S. 377, 10 Jur. N. S. 190, 11 Week. Rep. 922, and other cases.

² *Rombough v. Balch* (1900) 27 Ont. App. Rep. 32.

³ *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360; *James v. Richmond & D. R. Co.* (1890) 92 Ala. 231, 9 So. 335 (both cases under the employers' liability act); *Denver, S. P. & P.*

R. Co. v. Wilson (1888) 12 Colo. 20, 20 Pac. 340; *Ohio & M. R. Co. v. Tindall* (1859) 13 Ind. 366, 74 Am. Dec. 259. See, generally, Sutherland, *Damages*, §§ 1263 *et seq.*; Shearm. & Redf. Neg. §§ 137, 466.

⁴ See Shearm. & Redf. Neg. § 767a.

¹ So far as the English procedure is concerned, the works of Mr. Beven, Mr. Ruegg, and Messrs. Roberts & Wallace on employers' liability, will supply lawyers in other jurisdictions with all the information that they are likely to require.

is absolute, and that a servant's action is barred even where his excuse for not taking proceedings is that, between the time of giving notice of the injury and the expiration of the period within which the statute prescribes that the action must be brought, he was in a lunatic asylum, in consequence of the impairment of his faculties by the accident.¹ If this decision is good law it discloses a very shameful defect in the statute.

1734. [730] Service of summons; waiver of irregularity in.—

An employee waives an irregularity in the service of the summons (in the case cited it was served several days too late) by appearing and cross-examining the plaintiff.¹

1735. [731] Joinder of employer and negligent coemployee as parties defendant.—In an action brought under these statutes for an injury caused by the culpable act of any of the employees for whose negligence the employer is declared liable, that act obviously constitutes a breach both of a duty owed by the employer and of a duty owed by the employee himself. The injured person, therefore, may maintain an action against the employer and the delinquent employee jointly.¹

1736. [732] Institution of distinct suits at common law and under these acts.—By the express terms of the English act (§ 6), a statutory action must, in the first instance, be commenced in a county court. But, as the common-law rights of a servant are not affected by the act, the institution of such an action will not debar him from bringing another action at common law, either in the county court or the high court. If actions are brought in different courts one will be stayed. If both are brought in a county court, they will be consolidated and tried together.¹

1737. [733] Joinder of causes of action under the different provisions of these acts.—If the plaintiff intends to rely upon several distinct causes of action,—as, a breach of common-law duty, and the negligence of one or more of the persons for whom the employer is by these acts rendered responsible,—the facts must be alleged in separate counts.¹ A complaint is demurrable, if in one of the counts

¹ *Johnston v. Shaw* (1883) 21 Scot. L. R. 246.

¹ *Dunn v. Butler* (1885) 1 Times L. R. (Q. B. Div.) 476.

¹ *Charman v. Lake Erie & W. R. Co.* (1900) 105 Fed. 449 (removal of cause from the state to the Federal court was denied on this ground).

¹ See Beven, *Employers' Liability*, 2d ed. p. 198.

¹ *Highland Ave. & Belt R. Co. v. Dusenberry* (1891) 94 Ala. 413, 10 So. 274; *Highland Ave. & Belt R. Co. v. Miller* (1898) 120 Ala. 535, 24 So. 955; *Louisville & N. R. Co. v. Mothershead* (1893) 97 Ala. 261, 12 So. 714.

it sets forth two separate causes of action, one under each of two distinct provisions of one of these acts.² This rule, however, is subject to the qualification that several distinct "defects" may be alleged in the same count,³ and that, if the injury resulted from the concurrent operation of two or more of the particular kinds of negligence covered by separate subdivisions of the acts, there may be an averment to that effect in one count; the plaintiff then has the burden of establishing the several allegations of negligence.⁴

A plaintiff may allege in the alternative, in the language of the statute, every negligence which the statute makes actionable; or he may select one if he is willing to stand upon that one.⁵

1738. [734] Joinder of causes of action under these acts and at common law.—In England it has been customary to join common-law and statutory causes of action in the same suit, and in spite of one judicial intimation adverse to this rule of procedure, its propriety may, perhaps, be regarded as being now no longer open to controversy.¹

² *Clements v. Alabama G. S. R. Co.* (1899) 127 Ala. 166, 28 So. 643; *Highland Ave. & Belt R. Co. v. Dusenberry* (1891) 94 Ala. 413, 10 So. 274; *Richmond & D. R. Co. v. Weems* (1893) 97 Ala. 270, 12 So. 186; *Louisville & N. R. Co. v. Mothershed* (1893) 97 Ala. 261, 12 So. 714.

A cause of action under subd. 1 of the Alabama Code, § 1749, authorizing a recovery for personal injuries caused by defects in the machinery, and another cause of action under subd. 3, based on the negligence of a person in the service of the master to whose orders the servant was bound to conform and did conform, are improperly joined in one count in a complaint. *Clements v. Alabama G. S. R. Co.* (1900) 127 Ala. 166, 28 So. 643.

³ *Alabama G. S. R. Co. v. Bailey* (1895) 112 Ala. 167, 20 So. 313.

⁴ *Bridges v. Tennessee Coal, Iron & R. Co.* (1895) 109 Ala. 287, 19 So. 495.

A single count may ascribe the injury to concurrent breaches of duty under two or more subdivision of the act, which will constitute a single cause of action. *Louisville & N. R. Co. v. Fitzgerald* (1909) 161 Ala. 397, 49 So. 860. And see *Alabama Consol. Coal & I. Co. v. Heald* (1911) 171 Ala. 263, 55 So. 181.

⁵ *St. Louis & S. F. R. Co. v. Phillips* (1910) 165 Ala. 504, 51 So. 638.

¹ In *Munday v. Thames Ironworks & Shipbuilding Co.* (1882) L. R. 10 Q. B. Div. 59, 52 L. J. Q. B. N. S. 119, 47 L. T. N. S. 351, Manisty, J., expressed a doubt whether a statutory action instituted in a county court and removed to a superior court could be consolidated with one instituted, prior to the removal, in the superior court. But this dictum is inconsistent with the case of *Larbey v. Greenwood* (reported only in the Times newspaper, July 23, 1885), where the action in the county court was removed in order that a common-law claim might be added to it. Mr. Ruegg, who refers to this decision (*Employers' Liability Act*, p. 141, note), states that the same course has been followed in other cases. See also *Marrow v. Flimby & B. M. Coal & Fire Brick Co.* (1898) 2 Q. B. 588, 67 L. J. Q. B. N. S. 976, 79 L. T. N. S. 397, where there was both a common-law and a statutory claim, and no objection to this joinder was raised.

For the general rule as to the joinder of alternative causes of action under the judicature act, see *Bagot v. Easton* (1877) L. R. 7 Ch. Div. 1, 47 L. J. Ch. N. S. 225, 37 L. T. N. S. 369, 26 Week. Rep. 66.

In Scotland, also, this joinder is permitted.²

In Massachusetts the propriety of such a joinder has never, so far as the writer knows, been questioned, and a large number of cases might be cited in which the complainant has included counts setting forth claims both under the statute and at common law.³ A similar remark is applicable to the Alabama course of practice.⁴

See also §§ 1618, 1620, *ante*.

1739. [734a] Joinder of causes of action under these acts and other statutes.—It has been held by the English court of appeal that the cause of action for the death of several employees in favor of their respective relatives, under Lord Campbell's act and the employers liability act, are several, and cannot be joined in one action.¹ But such a joinder is now permitted under order 3, rule 1a of the county court rules, which was added in consequence of this decision.

1740. [735] Election between different counts.—[It has not yet been definitely determined in Massachusetts, whether, in a case where the liability of the defendant is stated in several counts, some under the statute and some at common law, the plaintiff can be compelled to elect upon which counts he will go to the jury.¹ But probably an election cannot be compelled when the counts are all under the statute.²

1741. [736] Former recovery in action under another statute or at common law.—A plaintiff to whom compensation has been awarded under the English act of 1897, reviewed in chapter LXXVII., *post*, cannot recover damages for the same injury under the employers' liability act of 1880.¹

² *Morrison v. Baird* (1882) 10 Sc. Sess. Cas. 4th series, 271; *Goudie v. Paul* (1894) 22 Sc. Sess. Cas. 4th series, 1; *Duthie v. Caledonia R. Co.* (1898) 35 Scot. L. R. 726; *Murray v. Cunningham* (1890) 17 Sc. Sess. Cas. 4th series, 815; *McColl v. Badie* (1891) 18 Sc. Sess. Cas. 4th series, 507.

³ It will be sufficient to mention, as examples, the following: *Demers v. Marshall* (1899) 172 Mass. 548, 52 N. E. 1066; *Ford v. Mt. Tom Sulphite Pulp Co.* (1899) 172 Mass. 544, 48 L.R.A. 96, 52 N. E. 1065; *Hall v. Wakefield & S. Street R. Co.* (1901) 178 Mass. 98, 59 N. E. 668; *Hughes v. Malden & M. Gaslight Co.* (1897) 168 Mass. 395, 47 N. E. 125.

⁴ For examples of the joinder of common-law and statutory counts, see *Clements v. Alabama G. S. R. Co.* (1899)

127 Ala. 166, 28 So. 643; *Louisville & N. R. Co. v. York* (1901) 128 Ala. 305, 30 So. 676.

¹ *Carter v. Rigby* [1896; C. A.] 2 Q. B. 113, 65 L. J. Q. B. N. S. 537, 74 L. T. N. S. 744, a decision under the English county court rules, order 44, rule 18, in which the court followed *Smurthwaite v. Hannay* [1894] A. C. 494, 6 Reports, 299, 63 L. J. Q. B. N. S. 737, 71 L. T. N. S. 157, 43 Week. Rep. 113, a decision with regard to order 16, rule 1, of the supreme court rules.

¹ *Clare v. New York & N. E. R. Co.* (1898) 172 Mass. 211, 51 N. E. 1083, citing several cases.

² *Beauregard v. Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N. E. 555.

¹ *Campbell v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 887.

A judgment in favor of a defendant railway company in an action under the employers' liability act is a bar to a subsequent action against it at common law for the same injury, but not to an action under a statute which declares such companies to be liable under certain specified circumstances.²

1742. [737] Complaint.—In this section it is proposed to consider merely the formal requisites of the complaint. Its sufficiency, in so far as that depends upon the correctness of the rule of substantive law which it embodies, has necessarily been determined as an incident of the discussion of the various doctrinal points investigated in preceding subtitles of this chapter.

Some of the decisions to be cited possibly apply a stricter standard of technical correctness than would be deemed necessary in a portion of the jurisdictions in which the more liberal of the modern systems of pleading have been adopted. But even to practitioners who have to draw complaints with reference to those systems such decisions will afford some instruction and guidance.

a. Relation of employer and employed—The relation of employer must exist, and must be set forth in the complaint, to enable the injured person to sue under these statutes.¹

aa. Scope of employment.—The complaint must show that the servant when injured was acting within the scope of his employment.^{1a}

² *Clare v. New York & N. E. R. Co.* (1898) 172 Mass. 211, 51 N. E. 1083.

¹ *Logan v. Central Iron & Coal Co.* (1904) 139 Ala. 548, 36 So. 729; *Virginia Bridge & Iron Co. v. Jordan* (1905) 143 Ala. 603, 42 So. 73, 5 Ann. Cas. 709; *Walton v. Lindsey Lumber Co.* (1905) 145 Ala. 661, 39 So. 670; *Woodward Iron Co. v. Curl* (1907) 153 Ala. 215, 44 So. 969; *Whitmore v. Alabama Consol. Coal & I. Co.* (1909) 164 Ala. 125, 51 So. 397; *Republic Iron & Steel Co. v. Williams* (1910) 168 Ala. 612, 53 So. 76; *Wabash R. Co. v. Beedle* (1910) 173 Ind. 437, 90 N. E. 760; *Wabash R. Co. v. Erb* (1905) 36 Ind. App. 650, 114 Am. St. Rep. 392, 73 N. E. 939; *Nicholson v. MacAndrew* (1888) 15 Sc. Sess. Cas. 4th series, 854; *Sweeney v. Duncan* (1892) 19 Sc. Sess. Cas. 4th series, 870; *Coughlin v. Boston Tow-Boat Co.* (1890) 151 Mass. 92, 23 N. E. 721. In the last-cited case the court held that, upon a general demurrer not pointing out any specific defect, a complaint was good which alleged that the

defendant was the owner of and had the management and control of a certain vessel on a certain day, that the plaintiff was then and there at work on said vessel as a laborer, shoveling coal and discharging the cargo, and that he was then and there in the employ of one W., a stevedore then doing the work of discharging the said cargo of said vessel.

A complaint framed under the employers' liability act for injuries to a servant must show a contractual relation between the employer and the servant. *St. Louis & S. F. R. Co. v. Brantley* (1910) 1768 Ala. 579, 53 So. 305 (holding that no contractual relationship existed where a minor had misrepresented his age in order to procure the position).

^{1a} A complaint must allege that the servant was engaged in or about the master's business when injured. *Adams v. Southern R. Co.* (1910) 166 Ala. 449, 51 So. 987.

A complaint must show that the employee was injured while in the perform-

b. Necessity of alleging that negligence was committed by a statutory vice principal.—A complaint is demurrable unless the allegations show that the misconduct which is the basis of the claim was that of one of the particular employees for whose fault the employer is made responsible by the statutes.² A complaint is insufficient unless it shows that the injured servant was subject to the orders of the

ance of his duty. *St. Louis & S. F. R. Co. v. Sutton* (1910) 169 Ala. 389, 55 So. 989, Ann. Cas. 1912 B, 366.

An employee must show that he was in the discharge of duties when injured. *Southern R. Co. v. Bentley* (1911) 1 Ala. App. 359, 56 So. 249 (holding that a servant of a railroad company who had finished unloading a car, and was on the ground when an engine attached to the car started to draw the car away, and jumped onto the car merely for a ride, was not, while so riding, within the statute).

² *Bear Creek Mill Co. v. Parker* (1902) 134 Ala. 293, 32 So. 700; *Southern Car & Foundry Co. v. Bartlett* (1903) 137 Ala. 234, 34 So. 20; *Alabama G. S. R. Co. v. Williams* (1904) 140 Ala. 230, 37 So. 255; *United States Cast Iron Pipe & Foundry Co. v. Driver* (1909) 162 Ala. 580, 50 So. 118; *Ft. Wayne Gas. Co. v. Nieman* (1903) 33 Ind. App. 178, 71 N. E. 59; *Indiana Mfg. Co. v. Buskirk* (1903) 32 Ind. App. 414, 68 N. E. 925.

A charge which imposes liability upon a railroad merely because the plaintiff was injured "by the negligence of somebody else in its employ" is erroneous. *Birmingham Southern R. Co. v. Craig* (1911) 1 Ala. App. 329, 55 So. 950.

A count in an action for injuries caused by "defects" is bad, unless it contains an allegation of negligence either in the employer or someone intrusted, etc. *Davies v. Dyer* (1890) 11 New South Wales L. R. (L.) 431.

Averments that a person named was in the employment of the defendant, that he had superintendence intrusted to him, that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent,—clearly show that the superintendence which he had was intrusted to him by the defendant. *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

A complaint does not state a cause of action under the statute if it fails to allege that the injury was caused by an employee who had "any superintendence intrusted to him, whilst in the exercise of such superintendence." *United States Cast Iron Pipe & Foundry Co. v. Driver* (1909) 162 Ala. 580, 50 So. 118.

A complaint is good under subd. 2 of § 1749 of the Code, where it claims for the negligence of a person intrusted with superintendence of selecting cars to be loaded by the plaintiff, a foreman, and the members of his yard crew, in selecting a defective and dangerous car without apprising the plaintiff of its condition. *Illinois Car & Equipment Co. v. Walch* (1902) 132 Ala. 490, 31 So. 47C.

In one Scotch case it was laid down that the complaint in an action for injuries caused by the negligence of an employee exercising superintendence must contain a distinct averment showing the duties discharged by the superior servant, and that he was not ordinarily engaged in manual labor. *Moor v. Ross* (1890) 17 Sc. Sess. Cas. 4th series, 796.

But in a later one it was held that a complaint is not demurrable which shows that the negligent servant managed the defendant's estates while he was absent, although it does not aver in terms that he was not ordinarily engaged in manual labor. *M'Leod v. Pirie* (1893) 20 Sc. Sess. Cas. 4th series 381.

Allegations that the injury occurred on the defendant's road on which it was at the time operating hand cars, and on one of defendant's hand cars, on which intestate, as an employee of defendant was at the time engaged in the duties of his employment, and that one H. was the foreman in charge of said car, are sufficient to show that H. was at the time the foreman of the defendant. *Highland Ave. & Belt R. Co. v. Dusenberry* (1893) 98 Ala. 240, 13 So. 308.

A complaint alleging facts which show

servant alleged to have been negligent.^{2a} A count which charges negligence, in the alternative, either to the master or his vice principal, must aver facts importing the master's liability both for his own and his vice principal's negligence.³

c. —and by such a vice principal while acting in the line of his duty.—A specific allegation that a statutory vice principal was in the discharge of the duties imposed upon him by his employment, when the injury was inflicted, is not necessary.⁴

d. *Sufficiency of the allegation of negligence.*—As regards the sufficiency of the complaint in respect to its statement of the breach of duty relied upon as a cause of action, the general rule is that it is

that the cause of the injury was the negligence of a fellow servant in respect to the details of the work is demurrable. *Ashley v. Hart* (1888) 147 Mass. 573, 1 L.R.A. 355, 18 N. E. 416.

For this reason a complaint by a section hand for injuries caused by being struck by a hand car, "being operated recklessly, wantonly, and with gross negligence by defendant or its agent at that time," is bad. *Central of Georgia R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969. See also note 5, *infra*.

^{2a} *Creola Lumber Co. v. Mills* (1906) 149 Ala. 474, 42 So. 1019; *Southern Indiana R. Co. v. Martin* (1903) 160 Ind. 280, 66 N. E. 886; *Ft. Wayne Iron & Steel Co. v. Parsell* (1906) 168 Ind. 223, 79 N. E. 439; *Norton-Reed Stone Co. v. Steele* (1903) 32 Ind. App. 48, 69 N. E. 198.

The concurring elements necessary to be found in a complaint based upon the employers' liability act are as follows: First, was the offending servant clothed by the employer with authority to give orders to the injured person that the latter was bound to obey; second, did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was at the time bound to obey; third, was the injured person at the time of the injury in the exercise of due care and diligence. *Louisville, N. A. & C. R. Co. v. Wagner* (1899) 153 Ind. 420, 53 N. E. 927.

For a complaint to be good under the employers' liability act it must show that the injured employee was conforming to an order and direction of some person in the service of the railroad whose order and direction he was bound

to obey and did obey. *Cleveland, C. C. & St. L. R. Co. v. Bossert* (1909) 44 Ind. App. 245, 87 N. E. 158.

³ *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325.

⁴ This rule was laid down in a case where the court relied upon the consideration that an engineer who is in the employment of a railway company, and in charge of an engine which is at the time running upon the company's tracks, is *prima facie* in the discharge of his duties as engineer. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 So. 430.

A complaint is good, where it states that the engineer, while in the service of the company, in charge of a locomotive, negligently injured the plaintiff, at a time when both were acting in the line of duty as employees of the company. *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582.

A complaint in alleging that an employee was injured by the negligence of a person in charge of a locomotive must allege that such person was in the employment of the defendant. *Alabama G. S. R. Co. v. Williams* (1904) 140 Ala. 230, 37 So. 255.

A complaint alleging negligence on the part of a servant entrusted with superintendence must show that the negligent act was committed by him while in the exercise of superintendence. *Alabama G. S. R. Co. v. Cardwell* (1911) 171 Ala. 274, 55 So. 185.

The complaint must show that the servant alleged to be negligent owed the injured employee some duty. *Muncie Pulp Co. v. Davis* (1904) 162 Ind. 558, 70 N. E. 875.

good against a demurrer, when, and only when, it follows, either literally or substantially, the words of the particular provision with reference to which the allegations were framed.⁵

⁵ (a) *Injury caused by "defects in the ways," etc.*—"A complainant who seeks to base an action on any of the provisions of the employers' liability act must by positive and direct averment of facts show that the action falls within the particular provision upon which he relies." *Chicago, I. & L. R. Co. v. Barnes* (1905) 164 Ind. 143, 73 N. E. 91.

"It is not necessary that the precise words of the statute should be used, but no form of allegation that amounts to less than the equivalent of the words of the statute will be sufficient." *Southern Indiana R. Co. v. Martin* (1903) 160 Ind. 280, 66 N. E. 886.

A complaint which states generally the facts, and alleges that they constitute a defect in the ways, etc., is not demurrable. *Louisville & N. R. Co. v. Pearson* (1893) 97 Ala. 211, 12 So. 176; *Willey v. Boston Electric Light Co.* (1897) 168 Mass. 40, 37 L.R.A. 723, 46 N. E. 395; *Birmingham Rolling Mill Co. v. Rockhold* (1904) 143 Ala. 115, 42 So. 96; *Tutwiler Coal, Coke & I. Co. v. Farrington* (1906) 144 Ala. 157, 39 So. 898; *St. Louis & S. F. R. Co. v. Phillips* (1910) 165 Ala. 504, 51 So. 638; *Tennessee Coal, Iron & R. Co. v. Williamson* (1909) 164 Ala. 54, 51 So. 144; *Sloss-Sheffield Steel & I. Co. v. Bibb* (1910) 164 Ala. 62, 51 So. 345.

A complaint alleging that a stationary engine was defective is sufficient without specifying the parts thereof which were defective. *Sloss-Sheffield Steel & I. Co. v. Hutchinson* (1906) 144 Ala. 221, 40 So. 114.

A declaration alleging a defect "in the condition" of the ways, works, etc., is not subject to demurrer for not alleging a defect "in" the ways, works, etc. *Jones v. Tennessee Coal, Iron & R. Co.* (1909) 163 Ala. 266, 5 So. 1017.

A complaint based on a defect in the ways, works, or machinery of the employer should describe the defect with such particularity as to inform the defendant of what he is called on to defend. *Republic Iron & Steel Co. v. Williams* (1910) 168 Ala. 612, 53 So. 76.

A complaint which alleges that the injury was caused by "defects, etc." and concludes with "viz., the said hand car

was out of plumb," and "was so improperly adjusted that it was likely to jump or be thrown from the track," has been held sufficiently specific, against a demurrer, in its description of the defects. *Southern R. Co. v. Gupton* (1898) 122 Ala. 231, 25 So. 34.

It is not necessary to state the nature of the duties discharged by the person entrusted with the duty of seeing that the ways, etc., were in good condition. *Louisville & N. R. Co. v. Orr* (1891) 9 Ala. 602, 10 So. 167.

A complaint in an action to recover for an injury caused by defects in the ways, works, machinery, or plant of the defendant is demurrable, where it does not indicate by name or identify in some other way the appliance or appliances on the defective quality of which the plaintiff relies. *Louisville & N. R. Co. v. Jones* (1900) 130 Ala. 456, 30 So. 586.

Or where the defect to which the alleged injury was due is not specified. *Whatley v. Zenida Coal Co.* (1898) 12 Ala. 118, 26 So. 124.

In *Mobile & O. R. Co. v. Georg* (1891) 94 Ala. 199, 10 So. 145, it was held that an averment that "defendant negligently used in its business a steam engine or locomotive which was out of order, so that it could not be stopped promptly," could not be regarded as the equivalent of the statutory language. The court said: "The engine may have been negligently used in the business and yet the defect complained of not have arisen from, or been discovered and remedied owing to, the negligence of defendant, or of some person intrusted with the duty of seeing that the works and machinery were in proper condition. The adverb 'negligently,' as employed in the count, qualifies the manner in which the engine was used, and, fairly construed, does not relate to the origin of the defect, or to the failure to discover and remedy it; and even when taken in connection with the subsequent averment that plaintiff was injured on account of 'the negligently defective condition of the engine' is not the equivalent of an averment that the defect arose from, or was not discovered and reme-

It is error to sustain a demurrer to a complaint the averments of which substantially follow the language of the statute, but it is error

died owing to, the negligence of defendant, or of any person in its employment."

To the same effect, see *Central of Georgia R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969, where a complaint for injuries caused by being struck by a hand car which was not "properly fixed so as to control it," was held demurrable for the omission of the same allegation.

A declaration which first sets forth the manner in which the accident occurred, and then alleges that the "defendant corporation by its servants and agents was negligent, and was guilty of a breach of duty towards the plaintiff," does not allege any defect. *Marnin v. Kitson Mach. Co.* (1893) 159 Mass. 156, 34 N. E. 89.

It has been held that a count of the complaint which alleges that there was a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the defendant, in that the "appliances used by defendant in or about attempting to get said car upon said rails were not proper and sufficient for that purpose," is subject to demurrer. *Louisville & N. R. Co. v. Jones* (1900) 130 Ala. 456, 30 So. 586. The court took the position that, in order to escape condemnation by such an averment, the defendant would have to show that the things used were not only proper, but sufficient, to effect the purpose. But if they are proper to use as an auxiliary, the mere fact that they are insufficient to accomplish the whole undertaking does not show that they ought not to be used. Supposing there was such insufficiency,—it might imply negligence in the superintendent of the work,—but it did not charge the employer with negligence in furnishing the appliances.

The complaint should state that the "defect arose from, or had not been remedied owing to, the negligence of the employer, etc." *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145; *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, 10 So. 87; *Birmingham R. & Electric Co. v. Baylor* (1893) 101 Ala. 488, 13 So. 793; *Southern R. Co. v. Grace* (1909) 95 Miss. 611, 49 So. 835 (accident occurred in Alabama).

In one Alabama case it was held to

be unnecessary to allege that a reasonable time within which to remedy the defect had elapsed when the accident occurred. *Conrad v. Gray* (1895) 109 Ala. 130, 19 So. 398. This ruling seems to be essentially inconsistent with an earlier decision, in which a complaint was held to be demurrable which merely alleges that the defect "was known to the superior officers of plaintiff and known to defendant." It is consistent with such an allegation that the defect may have become known so short a time before the accident that there was no opportunity to remedy it. *Seaboard Mfg. Co. v. Woodson* (1891) 94 Ala. 143, 10 So. 87.

In an action under the Alabama act the complaint alleged that the defendant company failed to provide safe appliances, and also that it omitted to keep them in repair, and the latter clause was followed by the words "and knowingly allowed the same to remain out of repair." The court held that the word "knowingly" should be construed as applying only to the failure of the defendant to keep the appliances in repair, and that, as the allegation of a failure to provide appliances rendered the complaint sufficient, and this did not raise the question of the defendant's knowledge, it could be objected, after a verdict for the plaintiff, that, having unnecessarily alleged knowledge, he was bound to prove it. *Louisville & N. R. Co. v. Coulton* (1888) 86 Ala. 129, 5 So. 458. The argument here seems to embody a theory of the onus of proof which is contrary to the weight of authority, as indicated in § 1677, *a*, *ante*, as well as to the manifest sense of the phrase now under discussion.

A complaint alleging defects in ways, works, or machinery is demurrable if the defects are not specified. *Louisville & N. R. Co. v. Jones* (1901) 130 Ala. 456, 30 So. 586.

A complaint is not subject to demurrer upon the ground that it did not point out the defect in the railway at or near the point of derailment, merely because it alleges that the "railway" was defective. *Jackson Lumber Co. v. Cunningham* (1904) 141 Ala. 206, 37 So. 445.

(b) *Negligence of person intrusted*

without prejudice, if an amendment which specifies the particular facts relied upon as being indicative of negligence, but imposes no ac

with superintendence.—A complaint averring the relationship of master and servant at the time when the injury was inflicted, that injury did result to the plaintiff, and that the proximate cause thereof was the negligence of a superintendent of the defendant whilst in the exercise of such superintendence, is good. *Collier v. Tennessee Coal, Iron & R. Co.* (1908) 155 Ala. 375, 46 So. 487.

A complaint is good on demurrer which alleges that the plaintiff was injured by the fall of a tree lodged against the one which he was chopping, because the foreman had failed to give him due warning as he had agreed. *Postal Teleg. Cable Co. v. Hulsey* (1901) 132 Ala. 444, 31 So. 527.

Where the gravamen of the count is the negligence of a servant who had superintendence intrusted to him, and his failure to keep a hand car in order, and his permitting the plaintiff to use it, the count does not attempt to set up two separate and distinct causations. *Southern R. Co. v. McGowan* (1907) 149 Ala. 440, 43 So. 378.

A charge in a complaint, that the master mechanic had full charge of the work at which appellee was engaged at the time of his injury, and that he had been "intrusted by said defendant with the duty of keeping the ways, works, plant, tools, and machinery connected with and in use in the business of said defendant corporation in proper condition," shows that the master mechanic was a vice principal. *American Rolling Mill Co. v. Hullinger* (1903) 161 Ind. 673, 67 N. E. 986, 69 N. E. 460.

A complaint based on the negligence of one intrusted with superintendence must point out the negligence complained of. *Maddox v. Chilton Warehouse & Mfg. Co.* (1911) 171 Ala. 216, 55 So. 93.

A general averment of the negligence of the person intrusted with superintendence is enough. An averment of specific negligence is not requisite. Thus, a complaint in an action for negligently causing the death of an employee in a mine, alleging that defendant's superintendent negligently failed to take due and proper precautions to prevent a fire which had started in the mine from causing the suffocation or asphyxiation

and death of plaintiff's intestate,—sufficiently alleges the negligence of the superintendent. *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 7 Am. St. Rep. 17, 25 So. 793.

A count in the complaint of a mine employee which avers that his employment was of a dangerous nature; that he was young and inexperienced, an mentally and physically immature; that these facts were well known to defendant's foreman who had control of the work in which plaintiff was employed and of the car upon which plaintiff was riding in the discharge of his duties at the time of the injury complained of and that defendant negligently failed by itself, its said foreman, or anyone else, to give plaintiff any warning of the danger of his employment, or to instruct him as to the safest method of discharging his duties,—states a good cause of action, when it is further averred that such negligence resulted in the injury of the plaintiff. *Alabama Mineral & Co. v. Marcus* (1900) 128 Ala. 355, 3 So. 679.

A count in a complaint alleging that the defendant's superintendent, knowing that to give slack to the rope to which a certain bar of iron was attached would probably cause said bar to strike upon or against a scaffold on which the plaintiff's intestate was standing and cause the same to swing or oscillate, negligently ordered the persons in charge of the pulley by which said bar of iron was being hoisted to give slack to the rope, which they did, and because there of said bar was thrown or struck against said scaffold, causing the same to swing and by reason thereof caused plaintiff's intestate to fall off the scaffold to the ground, inflicting the injuries complained of, is sufficient and demurrable since it is not averred therein that the order given was unnecessary, or that a reasonable and probable result of the swinging of the scaffold was to throw the deceased off, or that the superintendent had any knowledge that such would be the probable or reasonable result of the giving of said order. *Decatur Cattle Wheel & Mfg. Co. v. Mehaffey* (1900) 128 Ala. 242, 29 So. 646. In this case it was also held that where, in addition to the averments just set forth, it is also

averred that the superintendent, well knowing at the time that the slacking of the rope would cause the iron to hit against the scaffold, and cause it to move and swing, and "thereby have a tendency to throw the plaintiff's intestate off of said scaffold," and thus endanger him, as there was no other person on the scaffold to assist in receiving the iron, etc., gave an order, and by reason thereof the iron struck the scaffold, causing it to swing, and the plaintiff to fall off, said count sufficiently states a cause of action.

In *Kansas City, M. & B. R. Co. v. Burton* (1893) 97 Ala. 240, 12 So. 88, the principle that the "superintendence" contemplated by these acts is that which is exercised over men, not over inanimate appliances (see § 1686, *ante*), was held not to involve the consequence that a complaint was bad in which the allegation was, substantially, that some inorganic appliance was left, by the orders of a superior employee, in such a position as to endanger unduly servants engaged in the work assigned to the injured person. There an action was brought for an injury caused by a railway car which was left too close to the track adjacent to that on which it stood. The court said: "The superintendence averred has relation to more than the track of the defendant, and the car left dangerously close thereto. The averment is that the yard master, by whom we understand to be intended a person charged with the control of the tracks and cars in the yard of a railroad, was intrusted with superintendence in the placing and position of cars in the yard, and hence, necessarily and obviously the performance of his duties involved the movement of cars and, in consequence, the control and direction of men and appliances necessary to such movement as was requisite to place the cars in safe and proper positions. The essence of the averment, therefore, is that the yard master had intrusted to him superintendence of the men and appliances used in the placing of this particular car, and that whilst in the exercise of that superintendence, he negligently permitted and suffered the car to be placed so near to an adjacent track, with a passing train on which plaintiff was discharging his duties as switchman, as that it collided with the person of the plaintiff, and produced the injuries complained of."

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For other examples of complaints in which negligence was affirmed or denied to be predicable as to the acts of superintendent, see also *Moore v. Gimson* (1890) 17 Sc. Sess. Cas. 4th series, 796; *Highland Arc. & Belt R. Co. v. Dusenberry* (1893) 98 Ala. 239, 13 So. 308 (§ 1690, note 2, *ante*).

(c) *Injury caused by negligence of person to whose orders the servant was bound to conform.*—A complaint is sufficient to take the case to the jury, when it alleges in substance that the injury was caused by the negligence of the defendants, or of their foreman, specially averred to be a person to whose orders the injured servant was bound to conform, in causing such servant to work in a drain from 7 to 10 feet in depth, without sufficiently propping the sides, the result being that the sides collapsed and fell upon him. *M'Coll v. Eadie* (1891) 18 Sc. Sess. Cas. 4th series, 507.

A count in a complaint, which avers that plaintiff received the injury, while in the discharge of his duties as an employee of defendant, by reason of the negligence of the defendant's section boss, who ordered or permitted the car from which the plaintiff fell or was thrown, and by which plaintiff was run over, to be run at a dangerous and reckless rate of speed, thereby producing the injuries complained of, states a good cause of action. *Alabama Mineral R. Co. v. Marcus* (1900) 128 Ala. 355, 30 So. 679.

It is not necessary to specify the nature of the duties discharged by the person to whose orders the plaintiff was bound to conform. *Louisville & N. R. Co. v. Orr* (1891) 94 Ala. 602, 10 So. 167.

Nor is it necessary to state in what particular respects the order given was negligent. *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145.

A complaint which does not show that the plaintiff was bound to conform to the order in question, that the injury resulted from his having so conformed, and that the order was negligent, is demurrable. *Postal Teleg. Cable Co. v. Hulsey* (1896) 115 Ala. 193, 22 So. 854.

A complaint which charges that an order was negligently given is sufficient. *Chicago, I. & L. R. Co. v. Tackett* (1904) 33 Ind. App. 379, 71 N. E. 524.

The complaint must allege that the order was negligently given. *Creola*

Lumber Co. v. Mills (1906) 149 Ala. 474, 42 So. 1019.

A count in a complaint is under the statute where the gravamen of the charge is not the negligence of an employee tipping the mixer in a steel plant, but that it was done in obedience to instructions negligently given by a person who was delegated by the master to give said instructions. *Tennessee Coal, Iron & R. Co. v. Cottrell* (1911) 172 Ala. 538, 55 So. 791.

It is not necessary to allege that the negligent servant had actual knowledge of the dangerous conditions, since constructive knowledge is sufficient. *Clear Creek Stone Co. v. Carmichael* (1905) 37 Ind. App. 413, 73 N. E. 935, 76 N. E. 320.

A complaint alleging that the superintendent of wreckage on defendant's road, whose orders the plaintiff as section hand was bound to obey, failed to use a derrick to remove certain heavy wreckage, but ordered it to be removed by hand when it was too heavy to be so handled, and failed to warn the plaintiff of the dangers likely to be incurred, states a cause of action. *Baltimore & O. S. W. R. Co. v. Hunsucker* (1904) 33 Ind. App. 27, 70 N. E. 556.

(d) *Injury caused by obedience to rules, etc.*—A count framed under the provision as to injuries caused by obedience to rules is bad unless it contains an allegation that the injury resulted from some impropriety or defect in the rules, etc. *Davies v. Dyer* (1890) 11 New South Wales L. R. (L.) 431.

(e) *Injuries caused by negligence of various railway employees.*—An averment in a count of a complaint in an action by a brakeman against a railroad company, that he was shaken or jolted from the car and his injuries were caused by the negligence of the engineer in allowing his car and engine to be suddenly and violently shocked, is a sufficient allegation of negligence. *Highland Ave. & Belt R. Co. v. Miller* (1898) 120 Ala. 535, 24 So. 955. In the same case it was held that the complaint in such an action need not aver that the shock or jerk which caused him to fall from the car was of more than usual violence or greater than was ordinarily incident to the starting and movement of cars, where in the first count it is charged to have been caused by reason of a defect in the engine, and in the

third count by the negligence of the engineer.

In an action to recover for the negligence of a person "in charge of an engine," it has been held sufficient to aver that the injuries were inflicted "by reason of defendants' negligence," the position being taken that for the purpose of pleading, there is no distinction between the "negligence of a railway company" and the negligence of an "engineer." *Indianapolis Union R. Co. v. Houlihar* (1901) 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943.

A count in a complaint, which avers that the injury was received while the plaintiff's intestate was rightfully in discharge of the duties of his employment by the negligence of a fellow servant in charge of an engine, which was so carelessly handled as to produce the injury, is sufficiently certain and definite, and states a good cause of action. *Louisville & N. R. Co. v. York* (1900) 128 Ala. 305, 30 So. 676.

A complaint in an action to recover for an injury alleged to be due to the negligence of an employee in "charge of a car . . . upon a railway" is bad if it fails to aver that such employee was in charge of the car in question and that it was on a railway. *Centra of Georgia R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969.

It is necessary, in making out a case against a railroad company under the employers' liability act (Burns's Ann St. 1908, § 8017), for the negligence of a person in charge of a locomotive engine or train of cars, that it shall appear from the averments of the complaint that the case is within the statute, and that the negligence complained of as having produced the injury was the negligence of a servant of the company who, in the line of his employment, had charge of a locomotive or train of cars. *Pittsburgh, C. C. & St. L. R. Co. v. Rogers* (1909) 45 Ind. App. 230, 87 N. E. 28.

A complaint counting upon the negligence of a fellow servant in charge of an engine must aver that such engineer knew, or had reason to believe, that the act in question would be likely to injure plaintiff, or that plaintiff was then within the line of danger from such act. *Southern R. Co. v. Goins* (1911) 1 Ala App. 370, 56 So. 253.

A complaint which alleges that the injury was caused by the negligence of

ditional burden on the plaintiff, is filed, and a demurrer to it overruled.⁶

A complaint alleging injuries from a defective system is sufficiently specific without a distinct averment to show how and in what manner this system was directly authorized by the defendant.⁷

In a treatise of high authority it is said to be necessary, under the English rules of practice, that, in every case, except where the negligence relied on is the employer's personal negligence alone, the particulars of the claim should give both the name and the description of the persons in the employer's service who are alleged to have been negligent.⁸ The decisions as to this point in Alabama are curiously inconsistent,⁹ as is shown by the cases set out in the note.

an engineer employed to operate the train, "while so engaged in the operation thereof," is sufficient. *Creola Lumber Co. v. Mills* (1906) 149 Ala. 474, 42 So. 1019.

A complaint which merely charges negligence of one "who had charge or control of a point on said railroad" is demurrable, since the allegation might merely designate some locality wholly unconnected with any signals or "points" or "the track of the railroad." *Cogbill v. Louisville & N. R. Co.* (1907) 152 Ala. 683, 44 So. 683.

⁶ *Laughran v. Brewer* (1896) 113 Ala. 509, 21 So. 415.

⁷ *Henderson v. Watson* (1892) 19 Sc. Sess. Cas. 4th series, 954.

⁸ Ruegg, Employers' Liability Act, p. 122. In the appendix of this work, the learned author gives a number of forms of particulars of demand which have been actually used in statutory suits.

⁹ In one case it was held that a complaint is not demurrable for the reason that it does not designate the name or position of the person intrusted with the duty of seeing that the ways, etc., are in proper condition. *McNamara v. Logan* (1893) 100 Ala. 187, 14 So. 175. Defendant's counsel cited *Mobile & O. R. Co. v. George* (1891) 94 Ala. 199, 10 So. 145, where it was suggested, *arguendo*, but not expressly determined, that good pleading required the name of the person to whose orders the employee was bound to conform, to be stated, so as to give the defendant notice thereof, and present an issuable fact whether such person was in the service or employment of defendant, or whether

plaintiff was bound to conform to his orders. But this case was distinguished by the court on the ground that, even supposing that the suggestion embodied the proper rule as to pleading under the subsection dealt with, *viz.*, that relating to conformity to orders, it did not follow that the same strictness should be required in a declaration alleging an injury from defects.

The McNamara Case was followed by *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 S. E. 430, overruling on this point *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325; *Northern Alabama R. Co. v. Shea* (1904) 142 Ala. 119, 37 So. 796; *Houston Biscuit Co. v. Dial* (1903) 135 Ala. 168, 33 So. 268; *Louisville & N. R. Co. v. Lile* (1908) 154 Ala. 556, 45 So. 699.

On the other hand, it has been held that a count based upon the negligence of a person charged with superintendence must allege the name of such person, or the plaintiff's ignorance thereof. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191, 21 S. E. 430; *Louisville & N. R. Co. v. Bouldin* (1895) 110 Ala. 185, 20 So. 325; *Central Foundry Co. v. Bailey* (1909) 162 Ala. 623, 50 So. 346.

A like rule prevails where negligence is charged on the part of a servant authorized to issue orders. *Alabama Steel & Wire Co. v. Clements* (1906) 146 Ala. 259, 40 So. 971.

In other cases, moreover, it is laid down that the name of a negligent employee having "charge or control" of a train, etc., must be alleged, or it must be stated that such name was unknown to the plaintiff. *Southern R. Co. v. Cunningham* (1895) 112 Ala. 496, 20

In Massachusetts the name of a negligent superintendent is immaterial.¹⁰

e. Notice of injury.—In any jurisdiction where the giving of notice of the injury is made a condition precedent to the plaintiff's right to sue under one of these statutes (see § 1711, *ante*) a complaint is demurrable, unless it alleges that notice of the injury was given.¹ It is sufficient to allege that the plaintiff "duly" gave notice.¹²

f. Necessity of alleging absence of contributory negligence.—See § 1630, *ante*.

1743. [738] Sufficiency of the plea.—A plea stating that, if there was any fault, it was that of a fellow servant, has been held sufficient ly specific to go to trial upon.¹

A plea which avers that the plaintiff "knew, or by the use of ordinary care could have known, of said defect" has been held demurrable for the reason that these statutes provide that the employer shall not be liable when the servant knows—not when he might or should have known—of the defect, and fails to give information thereof.²

It has been held that, under the Ontario act, pleading want of notice avails not, unless the special notice of § 14 is also given in due course.³

The plea of the servant's failure to notify the master of the defects need not negative the master's knowledge thereof.⁴

1743a. Replication.—A few cases involving the sufficiency of replications are noted below.¹

So. 639; *Central of Georgia R. Co. v. Lamb* (1899) 124 Ala. 172, 26 So. 969.

The upshot of these rulings, therefore, is simply the establishment of the extremely technical and arbitrary distinction, that if the negligent employee belongs to one particular class of statutory vice principals, his name must be averred, while, if he belongs to another of those classes, such an averment is unnecessary.

A railroad employee cannot recover from the company, under a count of the complaint alleging that the name of the person guilty of the alleged negligence was unknown to him, where such allegation is disproved by the undisputed evidence. *Alabama G. S. R. Co. v. Davis* (1898) 119 Ala. 572, 24 So. 862.

¹⁰ *Woodbury v. Post* (1893) 158 Mass. 140, 33 N. E. 86.

¹¹ *Dickie v. Boston & A. R. Co.* (1881) 131 Mass. 516; *Johnson v. Roach* (1903) 83 App. Div. 351, 82 N. Y. Supp. 203;

Crosby v. Lehigh Valley R. Co. (1903) 128 Fed. 193.

¹² *Steffe v. Old Colony R. Co.* (1892) 156 Mass. 262, 30 N. E. 1137.

¹ *McNeil v. Kinneil Coal Co.* (1898) 25 Sc. Sess. Cas. 4th series, 962.

² *Louisville & N. R. Co. v. Hawkins* (1890) 92 Ala. 241, 9 So. 271.

³ *Potter v. McCann* (1908) 16 Ont. L. Rep. 535; *Wilson v. Owen Sound Portland Cement Co.* (1900) 27 Ont. App. Rep. 328.

⁴ *Louisville & N. R. Co. v. Wilson* (1909) 162 Ala. 588, 50 So. 188.

¹ A replication that the master already knew of the defects, and that the servant knew it, is sufficient on a demurrer, where the plea alleged that the servant failed to notify the master of a defect. *Alabama Steel & Wire Co. v. Thompson* (1910) 166 Ala. 460, 52 So. 75.

If a servant relies upon the master's knowledge of the defect as an excuse for

1743b. Evidence.—Some cases involving the question of the burden of proof are cited in the note below.¹

1744. [739] Instructions to jury.—To ask a jury in general words whether there was any defect by reason of which the accident happened, or any negligence on the part of an employee having superintendence, is not a proper way of submitting the case to them.¹

If one charge is first given at the request of the plaintiff, and then another is given at the request of the defendant, eliminating from the case the count of the complaint on which the first charge is based, the most that can be said of the first charge is that it was abstract—an infirmity not demanding a reversal.²

A requested instruction that an engineer and his fireman are fellow servants is properly refused.³

Where the plaintiff testified that when the suit was brought he did not know the name of the negligent employee, the defendant was not entitled to the general charge, upon the theory that the averment that the person was unknown was not proven.⁴

his failure to report it as charged in the plea, such knowledge should be brought forward by replication. *Louisville & N. R. Co. v. Wilson* (1909) 162 Ala. 588, 50 So. 188.

A replication to a plea charging contributory negligence in violating a rule is subject to demurrer where it alleges that the rule was violated in obedience to the orders of a superior employee, but fails to show that the order was given by one who had authority to abrogate a rule. *Huggins v. Southern R. Co.* (1906) 148 Ala. 153, 41 So. 856.

¹ The burden of proof is upon plaintiff to show the defect, and to show that it "arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or some person in the service of the master or employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." *Birmingham Rolling Mill Co. v. Rockhold* (1904) 143 Ala. 115, 42 So. 96.

The failure of a servant to give a notice of the defect to the master as required by the statute is a matter of defense, and the burden of proof rests upon the defendant. *Urquhart v. Smith & A. Co.* (1906) 192 Mass. 257, 78 N. E. 410.

The statute puts the burden of showing that the defendant was not misled by the notice upon the plaintiff. *Tobin*

v. Brimfield (1902) 182 Mass. 117, 65 N. E. 28.

The burden of proving that the employee did not notify the master of the defect is upon the master. *Seipel v. Kranich & Bach* (1911) 129 N. Y. Supp. 373.

Where the complaint alleges several defects conjunctively, it is necessary to prove or to introduce evidence tending to prove all of the defects. *Tobler v. Pioneer Min. & Mfg. Co.* (1910) 166 Ala. 482, 52 So. 86.

The plaintiff must prove that the prescribed notice was given. *Heilig v. Burns* (1909) 133 App. Div. 764, 118 N. Y. Supp. 101.

A notice alleging the negligence of the master is broad enough to sustain a count in the complaint alleging negligence on the part of a superintendent. *Berube v. Horton* (1908) 199 Mass. 421, 85 N. E. 474.

¹ *Pritchard v. Lang* (1809) 5 Times L. R. 639.

² *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

³ *Southern Indiana R. Co. v. Osborn* (1906) 39 Ind. App. 333, 78 N. E. 248, rehearing denied in (1907) 39 Ind. App. 341, 79 N. E. 1067.

⁴ *Tennessee Coal, Iron & R. Co. v. Cottrell* (1911) 172 Ala. 538, 55 So. 791.

1745. [740] Provinces of court and jury.—(See generally § 1637, *ante*). Whether the acts of omission or commission covered by the various sections of these statutes show an absence of due care is a question for the jury, whenever the evidence is such that reasonable men may differ as to the proper inference to be drawn from it.¹ A verdict for the plaintiff, therefore, should not be set aside where there was any evidence to support the cause of action alleged.² But an examination of the facts in the cases decided under the statutes shows that they have exercised with considerable freedom their power of controlling the action of juries.

The question whether the material substances constituting the instrumentality which was the immediate cause of the injury were among those covered by the statutes is also one for the jury, wherever the proper inference from the facts is a matter of doubt, or the facts themselves are a subject of controversy.³ But a court is almost always warranted in reviewing a verdict for the plaintiff which involves the determination of this question, for the elements of uncertainty which render the finding of a jury conclusive are seldom present. See cases cited *ante* in §§ 1671–1673, 1679.

It is also for the jury in the first instance to say whether the negligent employee was a superintendent (see §§ 1683–1685, *ante*), or a person to whose orders the plaintiff was bound to conform (see § 1694, *ante*), or a person delegated with the authority of the employer to make rules or to give particular instructions (see § 1703, *ante*), or a person in charge of one of the various appliances specified in the provision relating to negligence in the operation of railways (see §§ 1705–1710, *ante*). But in this connection again the control of the jury over the results is often merely nominal.

As to the functions of court and jury in determining whether inaccuracies in the notice were prejudicial to the defendant, see § 1715, *ante*.

1746. [741] Removal of actions to higher courts.—To induce a judge of the English supreme court to grant a writ of certiorari to remove an action from the county court, something more is necessary than an affidavit which merely alleges in substance that the sufficiency of the notice, and other questions upon which the liability of

¹ *McCord v. Cammell* [1896] A. C. [H. L. E.] 57, 65 L. J. Q. B. N. S. 202, 73 L. T. N. S. 634, 60 J. P. 180, per Lord Watson (p 65).

² *Reynolds v. Holloway* (1898) 14 Times L. R. (C. A.) 551.

As to the grounds upon which a new trial will be granted under the English judicature act, see, generally, Ruegg, *Employers' Liability Act*, pp. 142 *et seq.*

³ *Prendible v. Connecticut River Mfg. Co.* (1893) 160 Mass. 131, 35 N. E. 675.

the defendant depends, are of considerable complexity and legal difficulty. Special circumstances such as are not likely to arise in cases of this type, but which may arise in exceptional instances, must be averred in order to justify a removal. Under any other doctrine the intention of the legislature that the county court should be the regular tribunal for the trial of these actions might be frustrated in the great majority of cases.¹

As to the power of removal generally under the judicature acts and its amendments, and the county court acts, see Ruegg, *Employers' Liability Act*, pp. 138 *et seq.*

1747. [741a] Appointment of assessors.—Notwithstanding that the English act merely provides that assessors may be appointed “for the purpose of ascertaining the amount of compensation,” Mr. Ruegg (*Employers' Liability Act*, p. 127) thinks that it was really intended that the assessors should serve the same purpose as assessors in county court actions generally; that is to say, they are to give such advice and assistance as persons of skill and experience in the matter to which the action or matter relates are qualified to give. If this conjecture is well-founded the same construction would be placed on the similar language of the Canadian and Australian acts. But so far as judicial authority goes, the point is apparently still an open one.

1748. [742] Questions which may be reviewed on appeal.—In England an appeal from a county court to the high court is only allowed on questions of law.¹ It is a condition precedent to the right of appeal that the question on which it is desired to appeal should have been raised before the county court judge;² and that it should have been raised at or immediately after the appeal.³

¹ *Munday v. Thames Iron-works & Shipping Co.* (1882) 47 L. T. N. S. 351, L. R. 10 Q. B. Div. 59, 52 L. J. Q. B. N. S. 119. See also *M'Evoy v. Waterford S. S. Co.* (1885) Ir. L. R. 16 C. L. 291.

In *Reg. v. London Court Judge* (1885) L. R. 14 Q. B. Div. (C. A.) 905, 54 L. J. Q. B. N. S. 330, 52 L. T. N. S. 537, 33 Week. Rep. 700, affirming (1885) L. R. 12 Q. B. Div. 818, 54 L. J. Q. B. N. S. 301, 33 Week. Rep. 521, 49 J. P. 407, it was held that § 39 of the county courts act 1856, providing for a stay of the proceedings on certain conditions, was intended to apply to actions which could be brought either in one of the superior courts or a county court, and

was therefore not applicable to an action brought under the employers' liability act, since by § 6 of that act the action must be brought in the county court.

² See Ruegg, *Employers' Liability Act*, p. 147.

³ *Rhodes v. Liverpool Commercial Invest. Co.* (1879) L. R. 4 C. P. Div. 425; *Clarkson v. Musgrave* (1882) L. R. 9 Q. B. Div. 386, 51 L. J. Q. B. N. S. 525, 31 Week. Rep. 47; *Cook v. Gordon* (C. T.) 61 L. J. Q. B. N. S. 445; *Allmarch v. Walker* (1885) 78 L. T. Journ. (Q. B. Div.) 391.

³ *Bessemer Land & Improv. Co. v. Campbell* (1898) 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793.

As the American statutes contain no specific provisions affecting the procedure on appeal, the actions under them are in this respect governed by the same rules as actions at common law.

CHAPTER LXXV.

STATUTES ABROGATING THE DEFENSE OF COMMON EMPLOYMENT
IN ACTIONS FOR INJURIES CAUSED BY THE NEGLIGENCE OF
SUPERIOR SERVANTS OR OF COSERVANTS IN OTHER DEPART-
MENTS: ARKANSAS, CALIFORNIA, MISSISSIPPI, MONTANA, OHIO,
OREGON, SOUTH CAROLINA, UTAH, VIRGINIA.

1749. Scope of chapter.

A. ARKANSAS.

1750. Text of statute.

1751. Effect of this statute.

a. Superior servants.

b. Servants of the same grade.

c. Servants in the same department.

B. CALIFORNIA.

1752. Text of statute.

1752a. Effect of this statute.

C. MISSISSIPPI.

1753. Text of Constitution and statutes.

1754. Provisions construed.

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D. MONTANA.

1755. Text of statute.

1756. Effect of Montana statute [Code of 1907].

E. OHIO.

1757. Text of statute.

1758. Effect of this section.

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c. Servants in different departments.

F. OREGON.

1759. Text of statute.

1759a. Effect of statute (act of 1903).

G. SOUTH CAROLINA.

1760. Text of Constitution.

1761. Effect of this provision.

a. Generally.

b. Superior servants.

c. Servants in different departments.

H. UTAH.

1762. Text of statute.

1763. Construction of this provision.

a. Generally.

b. Superior servants.

c. Servants in different departments.

I. VIRGINIA.

1764. Text of Constitution and statute.

1764a. Effect of these provisions.

1749. [743] Scope of chapter.—Another group of statutes which embody provisions of a similar character, and which may, therefore be appropriately reviewed together, comprises the enactments by which the doctrine of common employment, as it is applied in the majority of jurisdictions, has been modified in the states specified above. These enactments render applicable to corporations generally or to railway companies, either one or the other of two theories which as already explained, have been adopted, independently of statute, in several jurisdictions (see §§ 1425–1432, and 1447–1452, *ante*),—the theories, namely, that all superior employees are vice principal as regards their subordinates, and that coservice is not a bar to an action for injuries caused by the negligence of an employee in a different department.¹

A. ARKANSAS.

For a more recent statute in this state, see § 1768, *post*.

1750. [743a, 744a] Text of statute.—The contents of the Arkansas act (Laws of 1893, chap. 46, p. 68; Sandels' & H. Dig. chap. 130 §§ 6248, 6249) are as follows:

Sec. 1. That all persons engaged in the service of any railway corporations foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, or vice principals of such corporation, and are not fellow servants with such employee.

Sec. 2. That all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to :

¹ Upon the question, Are street and suburban railroads within the meaning of statutes of this character? see note to *Norfolk & P. Traction Co. v. Ellington*, 17 L.R.A. (N.S.) 117.

Upon the question, Are private railroads within the meaning of statutes of this character? see note to *Ed. H. Cunningham & Co. v. Neal*, 15 L.R.A. (N.S.) 479.

common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees are fellow servants with each other: Provided, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants.

Sec. 3. No contract between the employer and employee, based upon the contingency of the injury or death of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding.

1751. [744, 745] Effect of this statute.—*a. Superior servants.*—Railway companies have been held liable for injuries received by a subordinate owing to the negligence of a foreman of a section gang;¹ and of an engine foreman who controlled a crew engaged in switching and moving cars in a yard, and who had no power to employ the men, but only reported them for negligence or refusal to do their work.² The train dispatcher and the conductor of the train are not fellow servants of the fireman on the train.³

A white man associated with colored laborers in the employment of a railroad company in setting a post is not made a vice principal because such laborers regard him as a boss, or because he assumes some sort of control without authority from the company.⁴

¹ *St. Louis, I. M. & S. R. Co. v. Rickman* (1898) 65 Ark. 138, 45 S. W. 56, holding the foreman to be guilty of negligence in failing to order the removal of a hand car from the track until it was too late to prevent its being struck by an approaching train, and in failing to warn the section men who were attempting to remove it, of the approach of the train.

A section foreman is not a fellow servant of one of the men in his gang. *St. Louis, I. M. & S. R. Co. v. Harmon* (1908) 85 Ark. 503, 109 S. W. 295.

In *Haworth v. Kansas City Southern R. Co.* (1902) 94 Mo. App. 215, 68 S. W. 111, it was held that under the Arkansas statute the superintendent of a repair gang on a railroad is not a mere fellow servant while riding on a hand car from one place of work to another. The court said: "A superior or vice principal in charge of workmen does not become a coworkman whenever he actively assists in the manual performance of a task, instead of superintending

it. If he chooses to take on himself the role of laborer he may do so, but he does not thereby divest himself of his responsibility as foreman or superintendent and his duty to see that work is done in a careful way. The judgment and care which he must use as superintendent, to see that precautions are taken to avoid harm to his gang, continue to be exacted of him by the law, although he may have stepped down from his pedestal for an interval."

² *St. Louis, I. M. & S. R. Co. v. Touhey* (1899) 67 Ark. 209, 77 Am. St. Rep. 109, 54 S. W. 577.

³ *Choctaw, O. & G. R. Co. v. Doughty* (1905) 77 Ark. 1, 91 S. W. 768. See *St. Louis & S. F. R. Co. v. Furry*, note 12, *infra*.

⁴ *Hunter v. Kansas City & M. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379. The court said: "We have, under this evidence, the case of three men working together in the common purpose of setting a post in a hole prepared to receive it. That

b. Servants of the same grade.—An instruction is erroneous which makes the test of the relationship of fellow servant depend solely upon whether they had “control over each other in the way of discharging or employing each other.”⁵ A fireman and engineer on the same engine are fellow servants of the “same grade,” where neither is exercising superintendence or control over the other.⁶

c. Servants in the same department.—The foreman of a switching crew and a switchman of another crew are in different departments

Snowden received larger pay than Hunter, or that in some respects his work was not the same as that done by his associates, does not determine that he was a vice principal. The determining question under this statute is whether he was intrusted by the corporation with the authority of superintendence, control, or command of those with whom he was associated in the service of the company, or with authority to direct these other employees in the performance of their duty to the common master. When, as in this case, it is shown that several persons are associated together and working together to a common purpose in the same department, they are presumed, under the 2d section of the Arkansas statute, to be fellow servants, and the burden is upon him who claims that a different relation existed, to establish that one was a vice principal. . . . That Hunter should regard Snowden as a ‘boss,’ or that he assumed to have some sort of control over those associated with him, will not make him the representative of the corporation. The authority [of a vice principal] to control and direct others must be an authority ‘intrusted by such corporation’ to him. His authority may, of course, be implied from the very nature of the duties imposed upon him, but he is not a vice principal merely because his higher character, greater intelligence, superior race, or natural habit of command caused him to assume an authority not intrusted to him by the common master, or to be regarded and treated with a respect due to his personal qualities rather than to his delegated power of control by those associated with him. . . . The mere fact that this common carpenter using the gauge and level should in their use have occasion to ‘direct’ that his fellow laborers should elevate or lower a post or

should move it a few inches, more or less, nearer or further from the line of the track, did not vest him with such ‘authority to direct’ as was contemplated by the 1st section of this act, any more than would be the case if one of the other three were to throw a few spadefuls more or less of earth into the hole, or to use more or less strokes of the rammer in tamping the earth around the post, or any other common direction like that. If Snowden should, in adjusting his gauge or using his level have committed some error of judgment which was detected by one of the other three laborers, and he should say to Snowden, ‘Put your level here,’ or ‘your gauge here,’ he would be in as much authority to give directions about the common work as Snowden would; and it is not such natural, incidental, and necessary ‘direction’ and ‘control’ as must occur whenever two or more work together to which this statute refers but that kind of master-like command which involved the element of superior will and authority far more than Snowden had in this case.”

The fact that the employee alleged to be a vice principal slipped, the result being that the post which was being set up fell on and injured a laborer, was also held not to be negligence, where the slipping was due to the character of the ground on which he was obliged to stand, and all the precautions necessary to the seeming exigencies of the situation were observed. *Hunter v. Kansas City & M. R. & Bridge Co.* (1898) 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379.

⁵ *Fordyce v. Key* (1905) 74 Ark. 19, 84 S. W. 797.

⁶ *Kansas City, Ft. S. & M. R. Co. v. Becker* (1897) 63 Ark. 477, 39 S. W. 358.

and are not fellow servants.⁷ The members of two different switching crews are not fellow servants.⁸ A hostler in a railroad yard who has several men under him is not the fellow servant of a "fire-knocker" engaged in taking the cinders and ashes out of the ash pan of a standing engine, although they are both under the supervision of one man.⁹ The inspector in a roundhouse, who is subject to the authority of the mechanical department of the railroad company, is not a fellow servant of a fireman while on the road, who is subject to the authority of the transportation department.¹⁰ Car or train inspectors are not in the same department as employees engaged in operating the cars or trains.¹¹

A train dispatcher and a fireman are not fellow servants.¹²

B. CALIFORNIA.

1752. Text of statute.— Section 1970 of the Civil Code of California (see chapter LXXIII., *ante*) was amended (Laws 1907, p. 119, chap. 97) so as to read as follows:

Sec. 1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, or in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect, or

⁷ *St. Louis, I. M. & S. R. Co. v. McCain* (1900) 67 Ark. 377, 55 S. W. 165.

⁸ *St. Louis, I. M. & S. R. Co. v. McCain* (1900) 67 Ark. 377, 55 S. W. 165 (negligence inferable where cars are kicked at night down a transfer track at a high rate of speed, without any attempt to ascertain whether the track is clear).

⁹ *St. Louis, I. M. & S. R. Co. v. Thurmond* (1902) 70 Ark. 411, 68 S. W. 488.

¹⁰ *Kansas City, Ft. S. & M. R. Co. v. Becker* (1899) 67 Ark. 1, 46 L.R.A. 814, 77 Am. St. Rep. 78, 53 S. W. 406.

¹¹ *St. Louis, I. M. & S. R. Co. v. Dupree* (1907) 84 Ark. 377, 120 Am. St. Rep. 74, 105 S. W. 878 (foreman of

switch engine); *St. Louis, I. M. & S. R. Co. v. Holmes* (1908) 88 Ark. 181, 114 S. W. 221 (brakeman).

A conductor in charge of a gravel train and under the general superintendence of the train master is not in the same department as a train inspector through whose negligence he is injured, and who is employed by the foreman of the repair shop. *St. Louis Southwestern R. Co. v. Lewis* (1909) 91 Ark. 343, 121 S. W. 268.

¹² *St. Louis & S. F. R. Co. v. Furry* (1902) 52 C. C. A. 518, 114 Fed. 898. See *Choctaw, O. & G. R. Co. v. Doughty*, note 3, *supra*.

default of a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signa point, locomotive engine, or other appliance than that upon which the employee [who] is injured is employed, or who is charged with despatching trains or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

Knowledge by an employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such employer shall not be a bar to recovery for any such injury or death caused thereby unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances, or structures, and thereafter consented to use the same, or continued in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated; but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void; and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed.

1752a. Effect of this statute.—A yard foreman is not the fellow servant of a switchman.¹

There can be no recovery for injuries to the engineer on a work train, caused by the negligence of a brakeman of the same train in failing to give proper notice of the approach of another train, although he was riding at the time on another train by the order of his conductor.²

The operator of an elevator in a mercantile building is not in the same department as the other employees of the building.³

The engineer in charge of the engine which operates a pile driver, the connection between the engine and the hammer being made only

¹ *Masner v. Atchison, T. & S. F. R. Co.* (1910) 157 Cal. 348, 107 Pac. 695 (carpenter at work on addition to building); *Judd v. Letts* (1910) 158 Cal. 618.

² *Forrest v. Southern P. Co.* (1909) 12 Cal. App. 247, 107 Pac. 155.

³ *Morgan v. J. W. Robinson Co.*

(1910) 156, 111 Pac. 12 (saleswoman in department store).

by a rope, is employed on "another" machine than an employee engaged in steadying the piles in front of the pile driver.⁴

C. MISSISSIPPI.

1753. [745a] Text of Constitution and statutes.—Const. 1890, art. 7, § 193. This constitutional provision, which, with the exception of the last sentence, was re-enacted very nearly in the same words in the Code of 1892, § 3559, and in Laws of 1896, chap. 87, runs as follows:

Every employee of any railroad corporation (by chapter 87 of the Laws of 1896, this provision was amended so as to make it applicable to employees of all corporations) ¹ shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured; and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death ensues from any injury to an employee the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons.² Any contract or agreement, ex-

⁴ *Korander v. Penn Bridge Co.* (1911) 16 Cal. App. 249, 116 Pac. 384.

¹ See *Brooks v. Mississippi Cotton Oil Co.* (1899) 76 Miss. 874, 25 So. 479, where an instruction ignoring this change was held erroneous.

This act has no application where the defective conditions were due to the extreme cold. *Yazoo City Transp. Co. v. Smith* (1900) 78 Miss. 140, 28 So. 807.

But the statute extending the application of the Constitution to all corporations has been pronounced unconstitutional. *Ballard v. Mississippi Cotton Oil Co.* (1903) 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Yazoo & M. Valley R. Co. v. Schraag* (1904) 84 Miss. 125, 36 So. 193.

² As the effect of this sentence was that the statute did not enure to the benefit of parent, child, husband, or wife (see *Illinois C. R. Co. v. Hunter*

[1892] 70 Miss. 471, 12 So. 482), it was amended thus by the Laws of 1896, chap. 87: Where death ensues from an injury to an employee an action may be brought in the name of the widow of such employee for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of the child for the death of an only parent, for such damages as may be suffered by them respectively, by reason of such death, the damages to be for the use of such widow, husband, or child, except that in case the widow should have children the damages shall be distributed as personal property of the husband. The legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair

press or implied, made by any employee to waive the benefit of this action shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees.³

By the Laws of 1898, chap. 66, the act of 1896 was amended by adding a section to the effect that pending suits should not be affected by any of its provisions. But this act was subsequently pronounced unconstitutional.⁴

The Constitution does not have a bearing on the case where the injured servant was guilty of contributory negligence.⁵

A construction company having authority to own, but not to operate, a railroad, which, while engaged in constructing a line of road for a railroad company, uses cars and engines in the work, is not operating a railroad within the meaning of the Constitution.⁶

A member of a bridge crew who is riding home from his work on a push car propelled by a lever car placed behind it is a fellow servant of the members of the crew and underboss in charge of the latter car, so that he cannot hold the railroad company liable for injury due to their negligence.⁷

Code 1906, § 1985, provides as follows:

In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies.⁸

and just with reference to the injury resulting from such death to the persons suing. cause of action based on the common law.

The *Hunter Case*, however, was overruled by implication in *Bussey v. Gulf & S. I. R. Co.* (1901) 79 Miss. 597, 31 So. 212, and was expressly overruled in *Yazoo & M. Valley R. Co. v. Washington* (1908) 92 Miss. 129, 49 So. 614. In the latter case it was held that under the Mississippi Constitution the phrase "legal or personal representatives" embraces not only the executor or administrator, but also the heirs or next of kin, as the case may be.

³ In *Illinois C. R. Co. v. Abrams* (1904) 84 Miss. 456, 36 So. 542, it was held that a cause of action based upon this section of the Constitution cannot be joined in the same count with a

⁴ See note 1 *supra*.

⁵ *Illinois C. R. Co. v. Emmerson* (1906) 88 Miss. 598, 40 So. 818.

⁶ *Bradford Constr. Co. v. Heflin* (1906) 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077.

⁷ *Givens v. Southern R. Co.* (1909) 94 Miss. 830, 22 L.R.A.(N.S.) 971, 49 So. 180.

⁸ Where the physical facts and circumstances showed that the employee was beyond the path and sweep of the train when the engine and several cars passed, the presumption of negligence on the part of the railroad is met. *Alabama G. S. R. Co. v. Hunnicutt* (1910) 98 Miss. 272, 53 So. 617.

As to the constitutionality of these provisions, see the concluding chapter of this treatise.

1754. [745b] Provisions construed.—a. Superior servants.—The constitutional provision is not applicable, unless the delinquent servant is superior to the other in such a sense that the former can exercise a discretion and judgment in controlling the actions of the latter.¹ Under state decisions a railroad engineer is not a superior agent, officer, or person having the right to control or direct the services of a brakeman on the train.² A contrary view has been taken in the Federal court.³

In one case it was held that in an action for injuries to a railroad brakeman caused by the negligence of an engineer, all that is necessary to be shown is that the engineer had the authority to direct or control the services of the injured employee on the train.⁴

A railroad engineer is the superior servant of his fireman.⁵ The engineer of a switch engine is not a superior agent or officer of the railway company as to a yard master.⁶

¹ *Fenwick v. Illinois C. R. Co.* (1900) 40 C. C. A. 369, 100 Fed. 247, denying recovery where one member of a switching crew, whose business it was to distribute cars on the various tracks in the yard, to make up the trains, was injured by the negligence of another member of the crew whom the yard master had appointed foreman for the night of the accident, and to whom he gave the switch list, the evidence being that such foreman merely called out the track on which a car was to be switched, as fixed by usage or by the switch list, and had no authority to command the switchman to pursue any particular line of action, and that he was of the same rank in the service as the others of the crew, and neither employed nor had power to discharge them.

² *Evans v. Louisville, N. O. & T. R. Co.* (1893) 70 Miss. 527, 12 So. 581.

The engineer of a construction train, and a laborer employed thereon to clear the tracks of gravel after the unloading of the cars, are fellow servants. *Bradford Constr. Co. v. Heftin* (1906) 88 Miss. 314; 12 L.R.A. (N.S.) 1040, 42 So. 174, 8 Ann. Cas. 1077.

³ *Moore v. Illinois C. R. Co.* (1905) 67 C. C. A. 541, 135 Fed. 67 (holding that a complaint which alleged that the plaintiff, a brakeman, who was injured by the negligence of the engineer in backing the engine upon him while he

was between the rails adjusting the valves of the air brakes, stated a cause of action under this clause of the Constitution).

⁴ *Yazoo & M. Valley R. Co. v. Washington* (1908) 92 Miss. 129, 45 So. 614.

⁵ *Cheaves v. Southern R. Co.* (1903) 82 Miss. 48, 33 So. 649, 34 So. 385.

Upon a second appeal ([1904] 84 Miss. 565, 36 So. 691) it was contended that § 193 of the Constitution should be so construed as to mean that such an employee can recover only when he is injured while executing, at the very time of his injury, some special command or order given by his superior officer, where such officer is at the time in the exercise of the right to superintend him or to direct his services, but the court said: "Our Constitution plainly means that wherever an employee is injured by the negligence of a superior officer, or of a person having the right to direct or control his services, such employee is entitled to recover, whether he is at the time obeying any special command born of the exigencies of the occasion, or is engaged merely and simply in the discharge of his ordinary routine duties; such superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master."

⁶ *Farquhar v. Alabama & V. R. Co.* (1900) 78 Miss. 193, 28 So. 850.

The "tender" of a railway drawbridge is a fellow servant of a section hand, as he is not a superior officer in charge of work.⁷

b. Servants in different departments.—A fireman on a locomotive engine and a telegraph operator are engaged in different departments and about a different piece of work.⁸ A section foreman walking along the track is not in the same department as the engineer of a passing train.⁹

Mere contributory negligence is no defense to a reckless and criminal disregard of his duty by a servant in another department.¹⁰

D. MONTANA.

1755. [746b, 747] Text of statute.—By a territorial act originally passed in 1873, it was provided as follows:

In every case the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in cases of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger. See also Rev. Stat. 1879, § 31, p. 471; Comp. Stat. 1887, chap. 35, § 697; Mont. Code 1895, § 905.

Under this provision a railway company was held liable for the negligence of an engine hostler, resulting in injury to his helper;¹ and damages were recovered against a mining company for the negligence of one who employed and discharged employees in a mine, supplied materials and implements for its development, and had full control of the property, employees, tools, and materials, and complete charge of the management and development of the mine, no other officer or agent being present at the mine.²

It was also laid down that the effect of the provision was to give a cause of action against the employer for the wrongful act of any superior servant, whether or not he exercised any control over the injured person before or at the time of the accident.³

⁷ *Illinois C. R. Co. v. Bishop* (1899) 76 Miss. 758, 25 So. 867. So far as the report shows, the question of a difference of department was not raised.

⁸ *Illinois C. R. Co. v. Hunter* (1892) 70 Miss. 471, 12 So. 482.

⁹ *Mobile, J. & K. C. R. Co. v. Hicks* (1908) 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360.

¹⁰ *Yazoo & M. Valley R. Co. v. Block* (1905) 86 Miss. 426, 38 So. 372.

¹ *Wastl v. Montana Union R. Co.* (1900) 24 Mont. 159, 61 Pac. 9.

² *Kelley v. Fourth of July Min. Co.* (1895) 16 Mont. 484, 41 Pac. 273 (accumulation of debris allowed in a tunnel prevented the escape of a miner).

³ *Northern P. R. Co. v. Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114 (railway company held liable to a fireman of one train for the negligence of the conductor of another train).

But as the statute imposed a greater burden upon domestic than upon foreign companies, it was declared to have been annulled by art. 15, § 11, of the Constitution, which enacts that no company formed under the laws of any other country, state, or territory, shall exercise within the state of Montana any greater rights or privileges than those possessed by corporations of the same or similar character created under the laws of Montana.⁴ See the concluding chapter of this treatise.

The text of Mont. Rev. Codes 1907, §§ 5245-5250, is given, with a memorandum at the end of each section indicating the origin of the section:

Sec. 5245. Railway Corporation. Vice principals.—Every railway corporation, including electric railway corporations, doing business in this state, shall be liable for all damages sustained by an employee thereof, within this state, without contributing negligence on his part, when such damage is caused by the negligence of any train despatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman, or of any other employee who has superintendence of any stationary or hand signal. [Act approved March 5th, 1903, § 1.]

Sec. 5248. Mining companies liable for negligence of certain employees.—That every company, corporation, or individual operating any mine, smelter, or mill for the refining of ores shall be liable for any damages sustained by any employees thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift boss, hoisting, or other engineer, or crane men. [Act approved February 20, 1905, § 1.]

Sec. 5249. Contract of insurance no bar to recovery.—No contract of insurance, relief, benefit, or indemnity in case of injury or death, nor any other contract entered into before the injury, between the person injured and any of the employers named in this act, shall constitute any bar or defense to any cause of action brought under the provision of this act. [Act approved February 20, 1905, § 2.]

Sec. 5250. Survival of action.—In case of the death of any such employees in consequence of any injury or damages so sustained, the right of action shall survive and may be prosecuted and maintained by its heirs or personal representatives. [Act approved February 20, 1905, § 3.]

in leaving a switch open), reversing (1893) 57 Fed. 283, and approving construction given to the statute by Shiras, J., in *Ragsdale v. Northern P. R. Co.* (1890) 42 Fed. 383.

⁴ *Criswell v. Montana C. R. Co.* (1896) 18 Mont. 167, 33 L.R.A. 554, 44 Pac. 525 (conductor held not to be a vice principal), reversing (1895) 17 Mont. 189, 42 Pac. 767. The view of the court was that the Constitution was "self-executing as a prohibition, but not as an affirmative imposition upon, or securement to, foreign companies of the rights or privileges only accorded by state laws to domestic companies."

Sections 5246 and 5247 are sections 2 and 3 of the act of March 2, 1903, and are practically identical with sections 5248 and 5249.

See also §§ 5251, 5252 of the Code (§ 1785, *post*) for provisions abrogating entirely the fellow-servant rule in respect to railroad employees.

1756. Effect of Montana statute [Code of 1907].—If a plaintiff seeks to recover under this act, he must set forth a statement of facts which clearly show his right to recover under it.¹ Although the statute (Rev. Codes, §§ 5248–5250) makes the master liable for the negligence of a fellow servant, which liability did not previously exist, yet the act is to be regarded not as creating a new cause of action but merely as removing a defense which had been available.² The scope of the recovery of the heirs of an injured employee is the same as his would have been, but for his death, including damages for the pain and suffering he endured.³

The word “engineer,” as used in § 5245, refers only to employees in charge of locomotives used to move trains, and not an employee in charge of a stationary engine used to move a plow along the floor of flat cars for the purpose of unloading gravel.⁴

The statute applies to injuries caused by the shift boss when doing the ordinary work of the mine, such as removing tools to a place of safety, and is not limited to those occurring during the exercise of his duties as superintendent.⁵

E. OHIO.

1757. [747c] Text of statute.—Ohio Gen. Code 1910, § 9016 (as amended April 2, 1890), provides as follows:

Sec. 9016 [act of April 2, 1890, § 3]. In actions against a railroad company for personal injury to a person while in its employ, or for death result-

¹ *Kelly v. Northern P. R. Co.* (1906) 35 Mont. 243, 88 Pac. 1009 (holding complaint insufficient which alleged merely that “the defendant company so carelessly and negligently managed, operated, and ran” its cars that the injury resulted).

A complaint not charging negligence on the part of any vice principal within the statute does not state a cause of action. *Thurman v. Pittsburg & M. Copper Co.* (1910) 41 Mont. 141, 108 Pac. 588.

² *Beeler v. Butte & L. Copper Development Co.* (1910) 41 Mont. 465, 110 Pac. 528 (holding statute requiring action to enforce a “liability created by statute” to be brought within two years not applicable to actions brought under the fellow-servant act).

³ *Ibid.* See also *Dillon v. Great Northern R. Co.* (1909) 38 Mont. 485, 100 Pac. 960.

⁴ *Reinke v. Northern P. R. Co.* (1906) 145 Fed. 988.

⁵ *Johnson v. Butte & S. Copper Co.* (1910) 41 Mont. 158, — L.R.A. (N.S.) —, 108 Pac. 1057.

from such injury, arising from the negligence of such company, or any of its officers or employees, in addition to other liability it shall be held that every person in the employ of such company, with actual power or authority to direct or control another employee thereof, is not the fellow servant, but the superior, of such other employee. Every person, also, in the employ of such company, who has charge or control of employees in a separate branch or department, is to be held to be the superior, and not fellow servant, of employees in another branch or department, who have no power to direct or control in the branch or department in which they are employed. (87 v. 150 § 3.)

For a more recent statute in this state, see § 1791, *post*.

As to the constitutionality of this statute, see the concluding chapter of this treatise.

1758. [748] Effect of this section.—a. Generally.—This statute has been pronounced constitutional.¹

A freight car with the step bent back under the sill is within the prohibition of the statute.²

b. Superior servants.—A chief inspector of cars, having other inspectors under him, is not a fellow servant of a brakeman.³

A train despatcher is a representative of the railroad company as regards a locomotive engineer, both at common law and under this statute. But telegraph operators are not vice principals as to trainmen under the statute, any more than they were prior to its enactment.⁴

¹ A statute making employees having charge of other superior servants not only as to them, but as to subordinate employees in other departments of the service, but permitting the doctrine of fellow servants to be applied as between superior servants generally, is based on a reasonable classification, and does not deny to any employee the equal protection of the laws. *Kane v. Erie R. Co.* (1904) 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681, reversing (1904) 128 Fed. 474.

² *O'Connell v. Pennsylvania Co.* (1902) 55 C. C. A. 483, 118 Fed. 989.

³ *Columbus, H. Valley & T. R. Co. v. Erick* (1894) 51 Ohio St. 146, 37 N. E. 128.

⁴ *Baltimore & O. R. Co. v. Camp* (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952. The court said: "In our opinion the telegraph operator has neither power nor authority to direct or control the engineer. He is only the medium through whom orders from the train dispatcher are communicated to the engineer and the conductor. He

gives notice to the engineer and the conductor. He gives notice to the engineer of certain facts, from which the duty of the engineer arises, under the rules of the company. The conductor is in control of the train, and the engineer and the brakeman are his subordinates. Suppose that the conductor sends an order to the engineer by the brakeman. Does the brakeman thereby become a person actually having power or authority to direct or control the engineer? Manifestly not. When a switchman throws a switch, and signals to the engineer that he has done so, is he actually exercising power or authority to direct or control the engineer? Clearly not. The duty of the switchman, in such a case, is merely to give notice to the engineer of the condition of affairs upon which the engineer is required to act. And so the engineer's duty to act upon the signal from the telegraph operator does not come from any authority or power to control reposed in the telegraph operator. The authority or control is in the train dispatcher, who gives the or-

Under clause 2 of § 3 of the Ohio statute, a person in the employ of a railroad company may be the constructive superior of employees

der, not in the mere transmitter of it. When there is no order, but the telegraph operator conveys by signal, to the engineer, information as to the position of other trains, or the condition of the track ahead, the operator is the mere register of the fact; a mere notifier; a mere giver of information, upon which the engineer, under the rules of the company, at once knows his duty, and acts accordingly. . . . There is much less ground for holding that a telegraph operator has any control or authority over an engineer or a conductor, than there is that the engineer has control or authority over a brakeman. The engineer exercises discretion to determine when the brakes shall be put on, and when not. Knowing that his signals are to be acted on by the brakeman, and having discretion to give them as he thinks it proper, in the running of the train, he may, with some plausibility, be said to exercise actual power and authority over the brakeman, though, under the decision of the supreme court of Ohio, as we have seen, this is not the proper view. But a telegraph operator, in giving notice to an engineer of a train about to pass, has no discretion whatever. He gives the exact notice which the train dispatcher orders him to give, and no other. He exercises no discretion. He is a mere messenger boy. He is the vehicle by which the order is carried. But it is said that, while this might otherwise be a reasonable and proper construction of the statute, there is a clause in section 3 which imposes upon the court the duty of giving to the words 'actually having power or authority to direct and control,' a meaning they do not usually have. . . . The argument is that because, by the decisions of the supreme court of Ohio previous to the passage of this act, where one employee actually had power or authority to direct or control another employee, the two were not fellow servants, and the master was liable for the negligence of the superior, therefore the court must now strain the meaning of the words 'actually having power or authority to direct or control,' so as to give them a wider effect than the then-prevailing rule of liability, and so satisfy the legislative intent ex-

pressed in the words, 'in addition to the liability now existing by law.' From this necessity for a strained construction, the court is urged to hold that mere mediums of communicating orders mere signal givers, mere registers of facts, exercise actual power and authority to direct and control the persons to whom it is merely their duty to communicate information or orders issued by others. It is true that in the construction of a statute it is the duty of the court, when it can, to give effect and meaning to every clause and part of it. It is also true that, before the passage of the act, it was uniformly held by state courts of Ohio that any person in the employ of a railroad company or other master, actually having power or authority to direct or control any other employee of the same master, was his superior, and that the master was liable for injury to the inferior caused by the negligence of such superior. . . . But the words, 'in addition to the liability now existing by law,' can have no effect to pervert the ordinary meaning of language. Courts are not compelled to stultify themselves for the purpose of reconciling inexplicable inconsistencies of legislatures; nor, in this case, is it necessary for the court to do so. The second provision in section 3, namely, that the superior in one branch or department shall not be the fellow servant of a subordinate in another branch, does add to the liability of the railway companies under the decisions of the Ohio courts, as they were at the time of the passage of this act. . . . The words, 'in addition to the liability now existing by law,' therefore, may be given effect by referring them to this latter provision of the section. Taking the parts of the section together, it would seem that the first clause was introduced as merely declaratory of the law then existing, for the purpose of making fuller and clearer the meaning of the legislature with reference to the second clause. In commenting on the first clause, and the alleged implication in the statute that it increased the liability of railroad companies, Judge Bradbury, in delivering the opinion in *Cincinnati, H & D. R. Co. v. Margrat* (1894) 51 Ohio St. 130, 37 N. E. 11

in other departments, although he is the actual superior of but a single employee.⁵

The negligence of a superior servant of a railroad company causing injury to an employee under his control renders the employee liable, although the negligence was in respect of the performance of the work of the kind done by the injured person, and not in the performance of any duty imposed by law on the master personally.⁶

The conductor of a train, being in control of the same and the other employees thereon, in the absence of rules or proof of a custom or express authority to the contrary, is not deposed from such control by the accidental parting of the train *en route*, nor is the engineer thereby made the superior in direction and control of a brakeman who happens to be with him on a section of such divided train.⁷

c. Servants in different departments.—Separate train crews, whether on the road or on switch engines in the yard, are in separate branches or departments of labor.⁸ Trainmen and trackmen are not in the same department.⁹ But an engineer and a brakeman

(see next note), said: 'The remedy was so complete, where the relation of superior and subordinate actually existed that the statute here could have little or no operation. Still, it may be said, that the statute makes the rules of liability of certain and universal application, denying any exception to its operation, wherever the relation of subordinate and superior exist, and the subordinate is injured by the negligence of the superior while engaged in the common service.' There is no suggestion in this, by the court, that the words, 'actually having power and authority to direct and control,' do not describe a relation in which one is the 'superior' and the other the 'subordinate,' within the ordinary meaning of those terms. It seems too plain for further argument that the conductor and the engineer are not subordinates of the telegraph operator, within the statute."

⁵ Thus, an engineer is not the fellow servant of the brakeman on another train (*Cincinnati, H. & D. R. Co. v. Margrat* [1894] 51 Ohio St. 130, 37 N. E. 11); nor of a fireman on another engine (*Erie R. Co. v. Kane* [1902] 55 C. C. A. 129, 118 Fed. 223, second appeal [1906] 73 C. C. A. 672, 142 Fed. 682); nor of a member of a gang engaged in cleaning the yards (*New York, C. & St.*

L. R. Co. v. Roe [1903] 25 Ohio C. C. 628). Compare *Northern P. R. Co. v. Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114, decided under the Montana statute, § 1755, *ante*.

⁶ *Peirce v. Van Dusen* (1897) 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693. The court said that, if a different construction were adopted, the Ohio statute would be deprived of all practical value and the manifest object of the legislature in passing it would be defeated.

As to the common-law doctrine under similar circumstances, see §§ 1472-1476, *ante*.

⁷ *Cleveland, L. & W. R. Co. v. Shanower* (1904) 70 Ohio St. 166, 71 N. E. 279.

⁸ *Kane v. Erie R. Co.* (1906) 73 C. C. A. 672, 142 Fed. 682.

Switching crews, although in the same yard, are in separate branches of the force, and the members thereof are not fellow servants. *Erie R. Co. v. Kane* (1902) 55 C. C. A. 129, 118 Fed. 223. See also *R. Co. v. Munger* (1901) 64 Ohio St. 601, 61 N. E. 1147.

⁹ The conductor and engineer of a yard engine are in a different department from that of a switchman whose duty it is to open switches. *Lake Shore*

upon the same train are in the same department.¹⁰ An employee of a railroad, whose duty it is to hook and unhook the buckets used for unloading coal cars, is in the same department with the engineer operating the engine which hoists the buckets.¹¹

F. OREGON.

1759. Text of statute.— The provisions of Laws 1903, p. 20, §§ 1, 2 (Or. Comp. Stat. §§ 6946, 6947), are as follows:

Sec. 1 (Sec. 6946). Every corporation operating a railroad in this state, whether such corporation be created under the laws of this state or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such corporation, superior to the employee injured, or of a person employed by such corporation, having the right to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a coemployee engaged in another department of labor from that of the employee injured, or of a coemployee on another train of cars, or of a coemployee who has charge of any switch, signal point, or locomotive engine, or who is charged with despatching trains or transmitting telegraphic or telephonic orders. Knowledge by an employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation, shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous, or otherwise, results from an injury to any employee of such corporation, received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may recover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this section, or any part thereof, shall be null and void, and this section shall not be constructed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

cf. M. S. R. Co. v. Pero (1901) 22 Ohio C. C. 130, 12 Ohio C. D. 25.

An engineer on a train is not in the same department of service as a track walker. *Erie R. Co. v. McCormick* (1902) 24 Ohio C. C. 86.

¹⁰ An engineer and a brakeman, the latter not being under the actual direction and control of the former, being upon the same train of cars and engaged in the common purpose and employment of operating the same train of cars, are in the same branch or department, and not in separate branches or departments, within the meaning of § 3365-22, Rev. Stat. (87 O. L. 149); and they are fel-

low servants. *Cleveland, L. & W. R. Co. v. Shanover* (1904) 70 Ohio St. 166, 71 N. E. 279.

An engineer and brakeman upon the same train are fellow servants; being on the same train and in the promotion of a single object they are in a single department, and not in separate departments, and they are so associated together that they would naturally be careful of the train and consequently careful of each other. *Hill v. Lake Shore & M. S. R. Co.* (1901) 22 Ohio C. C. 291, 12 Ohio C. D. 241.

¹¹ *Froelich v. Toledo & O. C. R. Co.* (1903) 24 Ohio C. C. 359.

Sec. 2 (Sec. 6947). The rules and principles of law as to contributory negligence, which apply to other cases, shall apply to cases arising under this act, except in so far as the same are herein modified or changed.

The following statute was adopted by the people of Oregon on November 8, 1910, by virtue of the initiative power vested in them by the state Constitution:

Sec. 1 of this act imposes certain specific duties upon the master, and will be discussed in chapters LXXVIII. *et seq.*, *post*.

Sec. 2. The manager, superintendent, foreman, or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

Sec. 3. It shall be the duty of owners, contractors, subcontractors, foremen, architects, or other persons having charge of the particular work, to see that the requirements of this act are complied with; and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than \$10, nor more than \$1,000, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court; and this shall not affect or lessen the civil liability of such persons as the case may be.

Sec. 4. If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded.

Sec. 5. In all actions brought to recover from an employer for injuries suffered by an employee, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant, or machinery, of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetency or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetency or negligence of any person to whose orders the employee was bound to conform and did conform, and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions, or orders given by the employer or any other person who has authority to direct the doing of said act.

Sec. 6. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages.

Sec. 7. All acts or parts of acts inconsistent herewith are hereby repealed.

It has been held that this act took effect on the day of its adop-

tion, there being nothing to the contrary declared therein, without an official canvass of the votes and a proclamation by the governor.

1759a. Effect of statute (act of 1903).—A complaint under this statute is insufficient if it fails to allege that the defendant was operating a railroad.¹

A foreman in charge of a construction gang in directing and controlling the conduct and services of the employees is a representative of the master.²

G. SOUTH CAROLINA.

1760. [748a] Text of Constitution.—Const. 1895, art. 9, § 15. The contents of this constitutional provision are as follows:

Sec. 15. Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative of any remedy or right that he now has by the law of the land. The general assembly may extend the remedies herein provided for to any other class of employees.

1761. [748b] Effect of this provision.—a. Generally—The provisions of the Constitution on the subject of fellow servants cannot be avoided by a railroad company by the adoption or promulgation of rules on the subject.¹

¹ *Bradley v. Union Bridge & Constr. Co.* (1911) 185 Fed. 544.

¹ *Elliff v. Oregon R. & Nav. Co.* (1909) 53 Or. 66, 99 Pac. 76.

² *Sorenson v. Oregon Power Co.* (1905) 47 Or. 24, 82 Pac. 10.

¹ *Snipes v. Southern R. Co.* (1908) 91 C. C. A. 593, 166 Fed. 1.

In a few cases the question has arisen whether the injured servant was within the protection of the Constitution.²

b. Superior servants.—The right of a servant to recover under this provision is established by any evidence which justifies a jury in finding that the delinquent employee controlled the services of the person injured.³ An instruction which, in effect, states this doctrine, is proper.⁴

That a foreman directing the loading of wheels onto a car undertakes to block them so as to prevent their rolling back on the workmen does not, as matter of law, prevent his negligence in performing that act from being that of a superintendent.⁵

c. Servants in different departments.—The provision as to servants in different departments has been construed in a few cases.⁶

² An assistant car repairer while at work repairing a car is within the protection of the Constitution. *Whisonant v. Atlanta & C. Air Line R. Co.* (1910) 86 S. C. 300, 68 S. E. 566.

"A section hand in the employment of a railroad corporation is within the meaning of the words 'every employee of any railroad corporation,' provided for in art. 9, § 15 of the Constitution." *Hallums v. Southern R. Co.* 82 S. C. 299, 64 S. E. 147, 17 Ann. Cas. 511.

³ A member of a gang engaged in loading rails on flat cars may recover for injuries caused by the negligence of an employee who was charged with the duty of giving orders to the men when to take hold of rails, when to raise them, and when to throw them on the car. It is immaterial whether the "caller" is appointed by the foreman or selected by the workmen themselves. *Rutherford v. Southern R. Co.* (1899) 56 S. C. 446, 35 S. E. 136 (failure to countermand an order).

A conductor is not the fellow servant of the engineer of his train. *Snipes v. Southern R. Co.* (1908) 91 C. C. A. 593, 166 Fed. 1.

The conductor of a train is, as to the engineer, the representative of the railway company. *Reed v. Southern R. Co.* (1906) 75 S. C. 162, 55 S. E. 218.

An engineer is the vice principal of his fireman. *Pagan v. Southern R. Co.* (1907) 78 S. C. 413, 59 S. E. 32, 13 Ann. Cas. 1105.

The engineer having the right to direct or control the services of the fireman under the rules of the company, the latter is liable for injury to the fireman

resulting from the engineer's negligence. *Stephens v. Southern R. Co.* (1909) 82 S. C. 542, 64 S. E. 601.

But the railroad company is not liable for an injury to a brakeman caused by the negligence of the engineer. *Pagan v. Southern R. Co.* (1907) 78 S. C. 413, 59 S. E. 32, 13 Ann. Cas. 1105.

So, a flagman who is injured while he is obeying the orders of the conductor is the fellow servant of the engineer through whose negligence he was injured, although he was instructed to obey the orders of the engineer also. *Lyon v. Charleston & W. C. R. Co.* (1906) 77 S. C. 328, 58 S. E. 12.

And a roadmaster who, while at work clearing away a wreck, voluntarily divides the work between himself and the conductor of the work train, cannot recover for injuries caused by the negligence of the engineer of the train, who was a subordinate of the conductor. *McDaniel v. Charleston & W. C. R. Co.* (1904) 70 S. C. 95, 49 S. E. 2.

⁴ *Bussey v. Charleston & W. C. R. Co.* (1898) 52 S. C. 438, 30 S. E. 477.

⁵ *Rippy v. Southern R. Co.* (1908) 80 S. C. 539, 21 L.R.A. (N.S.) 601, 61 S. E. 1010.

⁶ The members of a car crew are not fellow servants of a watchman or flagman at a crossing. *Betchman v. Seaboard Air Line R. Co.* (1906) 75 S. C. 68, 55 S. E. 140.

Removing different portions of a wreck is not being engaged in different kinds of work. *McDaniel v. Charleston & W. C. R. Co.* (1904) 70 S. C. 95, 49 S. E. 2.

H. UTAH.

1762. [751b] Text of statute.—The contents of the fellow-servant statute of 1896 (Utah Comp. Laws 1907, §§ 1342, 1343) are as follows:

Sec. 1342. Who are vice principals. All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation, as employer, with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer and are not fellow servants.

Sec. 1343. Who are fellow servants. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other: Provided, That nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants.

As to the constitutionality of this statute, see the concluding chapter of this treatise.

1763. [752] Construction of this provision.—*a. Generally.* — The statute is not retroactive.¹

A master is liable for the killing of a servant struck by a bucket allowed to fall down a mine shaft because of the inexperience of a servant temporarily in charge of the hoisting mechanism, although this servant is permitted by the competent engineer to exchange places with him in violation of the master's instructions, where, under a statute, they are not fellow servants with the deceased; since the engineer, in permitting the exchange, does not act beyond the scope of his employment.²

b. Superior servants.—An engineer is the vice principal of his fireman.³ The acts of a mine foreman are chargeable to the com-

¹ *Stoll v. Daly Min. Co.* (1899) 19 Utah, 271, 57 Pac. 295.

² *Lewis v. Mammoth Min. Co.* (1908) 33 Utah, 273, 15 L.R.A.(N.S.) 439, 93 Pac. 732.

³ *Southern P. Co. v. Schoer* (1902) 57 L.R.A. 707, 52 C. C. A. 268, 114 Fed. 466. It was here said that §§ 1342 and

1343 of the Revised Statutes of Utah make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master

pany.⁴ A foreman is not a fellow servant of a lineman under him.⁵

c. Servants in different departments.—The engineer of a train is not the fellow servant of a section boss and the men under him, while they are performing their ordinary duties.⁶ Nor is a section hand, while unloading ties from a car a fellow servant of the engineer on an engine which is moving the car.⁷ But the brakeman of a construction train is a fellow servant of a laborer engaged in the construction of the roadbed.⁸

Where two sections of a train are run as separate and distinct trains, the crew of one section are not the fellow servants of the other.⁹

A workman employed in running the elevator used to take men and material into and out of the mine is not a fellow servant of a miner being transported.¹⁰ Whether or not a workman engaged in the lower tunnel of a mine was a fellow servant of one engaged in the upper tunnel, about 12 feet above, was held to be a question for the jury upon evidence that neither was ordinarily in sight or hearing of the other.¹¹

I. VIRGINIA.

1764. Text of Constitution and statute.—The Constitution of Virginia (Va. Code 1904, p. cclix) provides as follows:

Sec. 162. The doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is, to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair, or maintenance of its roadway, track, or any of

and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

⁴*Downey v. Gemini Min. Co.* (1902) 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414.

⁵*Black v. Rocky Mountain Bell Teleph. Co.* (1903) 26 Utah, 451, 73 Pac. 514. To the same effect, *Fritz v. Western U. Teleg. Co.* (1902) 25 Utah, 263, 71 Pac. 209.

⁶*Neesley v. Southern P. Co.* (1909) 35 Utah, 259, 99 Pac. 1067.

⁷*Braegger v. Oregon Short Line R. Co.* (1902) 24 Utah, 391, 68 Pac. 140.

⁸*Lukic v. Southern P. Co.* (1908) 160 Fed. 135.

⁹*Meyers v. San Pedro, L. A. & S. L. R. Co.* (1909) 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1129.

¹⁰*Jenkins v. Mammoth Min. Co.* (1902) 24 Utah, 513, 68 Pac. 845.

¹¹*Dryburg v. Mercur Gold Min. & Mill. Co.* (1898) 18 Utah, 410, 55 Pac. 367, declaring it to be gross negligence to remove the waste supporting one upright of a ladder used by workmen in passing from the upper to the lower level of a mine, where it was dark, and the changed condition was not observable to one attempting to pass from the upper level.

the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car, or engine and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master that a servant would have (at the time when this Constitution goes into effect) if such acts or omissions were those of the master himself in the performance of a nonassignable duty: Provided, that the injury so suffered by such railroad employee result from the negligence of an officer or agent of the company of a higher grade of service than himself, or from that of a person employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the coemployee through or by whose act or omission he is injured; or that it result from the negligence of a coemployee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with despatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or nonassignable duty. The physical construction, repair, or maintenance of the roadway, track, or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning, or operation of trains, cars, or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures, shall be no defense to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee, or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a coemployee while in the performance, as vice principal, of a nonassignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort, or relatives (or any trustee, curator, committee, or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the general assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend such rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads, or of employees of any person, firm, or corporation.

The Laws of 1901-2, p. 335 (Va. Code 1904, § 1294k), provides as follows:

Sec. 1294k. Every corporation operating a railroad in this state, whether such corporation be created under the laws of this state or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such corporation, superior to the employee injured, or of a person employed by such corporation, having the right to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a coemployee engaged in another department of labor from that of the employee injured, or of a coemployee on another train of cars, or of a coemployee who has charge of any switch, signal point, or locomotive engine, or who is charged with despatching trains or transmitting telegraphic or telephonic orders. Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation, shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous or otherwise, results from any injury to any employee of such corporation received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may recover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this action or any part thereof, shall be null and void; and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this state. The rules and principles of law as to contributory negligence, which apply to other cases, shall apply to cases arising under this act, except in so far as the same are herein modified or changed.

A street railway company is not within the operation of a constitutional provision abolishing the fellow-servant rules as to employees of a "railroad company," where the language of the provision deals with signal points, locomotive engines, switches, despatches, and telegraphic orders, which is not applicable to street railways.¹

1764a. Effect of these provisions.—The defense based on the doctrine of assumed risk has been abolished by the statute and the Constitution, but not the defense of contributory negligence.¹ But the statute does not prevent a railroad company from adopting any method of constructing its switches which is reasonably safe.²

¹ *Norfolk & P. Traction Co. v. Ellington* (1908) 108 Va. 245, 17 L.R.A. (N.S.) 117, 61 S. E. 779. *Southern R. Co.* (1904) 136 N. C. 510, 48 S. E. 830 (Virginia statute); *Norfolk & W. R. Co. v. Cheatwood* (1905)

¹ *Southern R. Co. v. Blanford* (1906) 103 Va. 356, 49 S. E. 489. ² *Potomac, F. & P. R. Co. v. Chichester* 105 Va. 373, 54 S. E. 1; *Hedrick v.*

An employee engaged in removing rotten timber from a pier which forms a part of the roadbed, in order that a safe pier may be constructed, is engaged in a work of construction, within the Constitution.³

The employee of a railroad company whose duty it is to turn the turntable for all engines coming out of the house or going in, and to throw the switch for whichever track they are to use, is engaged in the physical operation of a switch.⁴ A railroad company is liable for injuries caused by the negligence of an engineer to a yard master while he, in the course of his duties, rides about the yard on the engines.⁵

A railroad company is liable for injuries to an engineer caused by the failure of a telegraph operator to deliver a message to the conductor from the train despatcher.⁶

(1910) 111 Va. 153, 68 S. E. 404; *Cheshire* (1909) 109 Va. 741, 65 S. E. *Southern R. Co. v. Foster* (1911) 111 27.

Va. 763, 69 S. E. 972.

⁵ *Southern R. Co. v. Smith* (1907)

³ *Chesapeake & O. R. Co. v. Hoffman* 107 Va. 553, 59 S. E. 372.

(1909) 109 Va. 44, 63 S. E. 432.

⁶ *Virginia & S. W. R. Co. v. Clower*

⁴ *Washington Southern R. Co. v.* (1904) 102 Va. 867, 47 S. E. 1003.

CHAPTER LXXVI.

STATUTES ABROGATING THE DEFENSE OF COMMON EMPLOYMENT IN RESPECT OF MASTERS GENERALLY OR OF CERTAIN CLASSES OF MASTERS: UNITED STATES, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IOWA, KANSAS, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, WISCONSIN, WYOMING, SASKATCHEWAN.

1765. Scope of chapter.

A. UNITED STATES.

1766. Text of statute.

1767. Effect of statute.

B. ARKANSAS.

1768. Text of statute.

1769. Effect of this statute.

C. COLORADO.

1770. Text of the statute.

1771. Effect of this statute.

D. FLORIDA.

1772. Text of the statute.

1773. Effect of this section.

E. GEORGIA.

1774. Statute as to railway service.

1775. Effect of these sections.

1776. Provision declaratory of the doctrine of common employment.

F. IOWA.

1777. Statutory provisions.

1778. What injuries are within the purview of the statute.

G. KANSAS.

1779. Statutory provisions.

1780. What injuries are within the scope of the statute.

H. MINNESOTA.

1781. Statutory provisions.

1782. What injuries are within the purview of the statute.

I. MISSOURI.

1783. Text of statute.

1784. Effect of these provisions.

a. Generally.

b. "Operating" a railroad.

- c. Who are vice principals.
- d. Who are fellow servants.
- e. Contracts limiting liability for injuries.
- f. What are railroads.
- g. Where death results from the injury.

J. MONTANA.

1785. Text of statute.

K. NEBRASKA.

1786. Text of statute.

1787. Effect of statute.

L. NORTH CAROLINA.

1788. Statutory provisions.

1789. Effect of statute.

M. NORTH DAKOTA.

1790. Text of statute.

N. OHIO.

1791. Text of statute.

O. OKLAHOMA.

1792. Text of Constitution.

P. SOUTH DAKOTA.

1793. Text of statute.

Q. TEXAS.

1794. Statutes as to railway service.

1795. Effect of this statute.

a. Scope in general.

b. Who are vice principals.

c. Who are fellow servants.

1796. Text of statute.

R. WISCONSIN.

1797. Statutory provisions.

1798. Effect of these statutes.

1799. Later legislation.

1800. Effect of this provision.

1801. Text of statute.

1801a. Effect of statute.

S. WYOMING.

1802. Statutory provisions.

T. SASKATCHEWAN.

1802a. Text of ordinance.

1765. [753] Scope of chapter.—Another group of statutes which may be conveniently dealt with in the same chapter is composed of those by which all employers, without distinction, or, as is the effect of most of the enactments, railway companies only, have been, either

entirely or in regard to certain classes of injuries, deprived of the protection afforded by the defense of common employment.¹

A. UNITED STATES.

1766. Text of statute.—The act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, provides as follows:

Sec. 1. Liability of railroads for injuries to employees. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. Damages for injuries in territories, District of Columbia, Canal Zone, etc. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. Contributory negligence of employee. That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of

¹ Upon the question, Are private railroads within the meaning of statutes of this character? see note to *Ed. H. Cunningham & Co. v. Neal*, 15 L.R.A. (N.S.) 479.

Upon the question, Are street and suburban railroads within the meaning of statutes of this character? see note to *Norfolk & P. Traction Co. v. Ellington*, 17 L.R.A. (N.S.) 117.

contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. Assumption of risk of employment. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. Agreements, etc., for exemption from liability—set-off of insurance etc., contributions. That any contract, rule, regulation, or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employee, or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. Time limit for actions. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (The second paragraph of this section was added by Act of April 5, 1910, chap. 143, § 1).

Sec. 7. Receivers. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 8. Prior laws not affected. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to Their Employees," approved June 11, 1906.

Sec. 9. Survival of right of action of person injured. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and child or of such employee, and, if none, then of such employee's parents; and, if none then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (This section was added by Act of April 5, 1910, chap. 143, § 2.).

As to the constitutionality of this statute, see the concluding chapter of this treatise.

This act was the second attempt of the Federal legislature to establish an employers' liability act of this general character. The first act passed (act of June 11, 1906, chap. 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1911, p. 1316) was held to be unconstitutional in that it was an attempt by Congress to regulate intrastate commerce.¹ But the validity of the statute as applied to the District of Columbia and the territories has been upheld.²

1767. Effect of statute.—The statute of 1908 is constitutional.¹ It creates substantive rights which are available in any court of competent jurisdiction, state or Federal.² The laws of the several

¹ *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) (1908) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The act provided "that every common carrier engaged" in interstate commerce should be liable under the act, and the point was made that such a common carrier would be liable under the act, even if the injuries were received while the employee was engaged solely in intrastate commerce. The court was divided five to four, and the construction seems strained. One is prone to agree with the common-sense suggestion of Mr. Justice Holmes, that the phrase "every common carrier engaged in trade and commerce" may be construed to mean "while engaged in trade and commerce," without violence to the English language.

² *El Paso & N. E. R. Co. v. Gutierrez* (1909) 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; *Atchison, T. & S. F. R. Co. v. Tack* (1910) — Tex. Civ. App. —, 130 S. W. 596; *Hyde v. Southern R. Co.* (1908) 31 App. D. C. 466.

The Federal statute gives a cause of action arising in Indian territory and based on the negligence of an engineer running the train at a high rate of speed over a new track, causing injury to the fireman. *Missouri, K. & T. R. Co. v. Poole* (1910) — Tex. Civ. App. —, 123 S. W. 1176 (reversed in [1911] — Tex. —, 133 S. W. 239, for error committed on trial).

A railroad company in Indian territory is liable for the negligence of its section foreman and hands whose duty it was to keep in repair a platform on which the plaintiff, a brakeman, was

injured. *Missouri, K. & T. R. Co. v. Rogers* (1910) — Tex. Civ. App. —, 128 S. W. 711.

The statute applies to a fireman employed by a railroad company in the District of Columbia, who is rightfully and necessarily on the company's premises on his way to assume his duties, to which he has been called by the company. *Philadelphia, B. & W. R. Co. v. Tucker* (1910) 35 App. D. C. 123.

The earlier statute had been declared constitutional, or construed as though it were valid, in a number of decisions in the lower Federal courts before its invalidity had finally been determined by the Supreme Court. *Spain v. St. Louis & S. F. R. Co.* (1907) 151 Fed. 522; *Snead v. Central of Georgia R. Co.* (1907) 151 Fed. 608; *Plummer v. Northern P. R. Co.* (1907) 152 Fed. 206; *Kelley v. Great Northern R. Co.* (1907) 152 Fed. 211; *Lancer v. Anchor Line* (1907) 155 Fed. 433; *Malloy v. Northern P. R. Co.* (1907) 151 Fed. 1019.

The statute of 1906 cannot be construed as affecting any cause of action existing at the time of its passage. *Hall v. Chicago, R. I. & P. R. Co.* (1906) 149 Fed. 564.

¹ *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) (1912) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169; *Watson v. St. Louis, I. M. & S. R. Co.* (1909) 169 Fed. 942; *Owens v. Chicago G. W. R. Co.* (1910) 113 Minn. 49, 128 N. W. 1011; *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893.

² *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R.*

states, so far as they cover the same field, are superseded by the statute.³ And the statute supersedes the common law in the terri-

Co.) (1912) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, reversing (1909) 82 Conn. 373, 73 Atl. 762 (and in effect, *Hoxie v. New York, N. H. & H. R. Co.* [1909] 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324); *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893; *St. Louis, I. M. & S. R. Co. v. Conley* (1911) 110 C. C. A. 97, 187 Fed. 949; *St. Louis, I. M. & S. R. Co. v. Hesterly* (1911) 98 Ark. 240, 135 S. W. 874; *Owens v. Chicago G. W. R. Co.* (1911) 113 Minn. 49, 128 N. W. 1011.

In the United States Supreme Court, Mr. Justice Van Devanter says upon this point: "We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of the superior courts of the state of Connecticut, and in that case the supreme court of errors of the state answered the question in the negative. That, however, was not because the ordinary jurisdiction of the superior courts, as defined by the Constitution and laws of the state, was deemed inadequate or not adapted to the adjudication of such a case, but because the supreme court of errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the state respecting the liability of employers to employees for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act, and in others the different standards recognized by the laws of the state.

"We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was

originally intended to be restricted to the Federal courts. . . . The suggestion that the act of Congress is not in harmony with the policy of the state and therefore that the courts of the state are free to decline jurisdiction is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. . . . We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity,—as, where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.

"We conclude that rights arising under the act in question may be enforced as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

³*Second Employers' Liability Case: (Mondou v. New York, N. H. & H. R. Co.)* (1912) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, reversing (1909) 82 Conn. 373, 73 Atl. 762 (and in effect, *Hoxie v. New York, N. H. & H. R. Co.* [1909] 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324);

tories.⁴ A view somewhat at variance with the above as to the effect of the statute upon state legislation has been taken in some courts; or perhaps it should be said that the effect of the statute upon such legislation is viewed from a different standpoint.⁵

The statute is not retroactive.⁶

If the petition alleges facts which bring the case within the purview of the statute, it is governed by the statute, whether it is mentioned or not.⁷ In order to establish a cause of action under the act, the offending carrier at the time of the injury must be engaged in interstate commerce, and the injury must be suffered by the employee while employed by such carrier in such commerce.⁸ The complaint must allege that the defendant was engaged in interstate commerce.⁹

Fulgham v. Midland Valley R. Co. (1909) 167 Fed. 660; *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893; *Dewberry v. Southern R. Co.* (1910) 175 Fed. 307; *Whittaker v. Illinois C. R. Co.* (1910) 176 Fed. 130.

⁴ *Cound v. Atchison, T. & S. F. R. Co.* (1909) 173 Fed. 527; *Southern P. Co. v. McGinnis* (1909) 98 C. C. A. 403, 174, Fed. 649.

⁵ In *St. Louis, I. M. & S. R. Co. v. Hesterly* (1911) 98 Ark. 240, 135 S. W. 874, where the complaint was not based on the act, one count thereof was for the pain and suffering of the deceased for the benefit of the estate, and upon demurrer to this count, it was insisted that the Federal statute superseded the state statute, and consequently this count was bad; but the court said: "From the terms of the Federal statute no intention is disclosed to limit or take from employees any right theretofore existing by which they were entitled to a more extended remedy than that conferred upon them by the act, and it was evidently the purpose of Congress in passing it to extend further protection and enlarge the remedy provided by law to employees engaged in interstate commerce in case of death or injury to them while engaged in such service. It may be that this statute does not give a right of action for the injury to the person that survives his death, as some courts have held, but it is not in conflict with the state law giving or preserving such right, which we hold is not superseded by it, and that the remedy it provides is not exclusive of that under the state law permitting a recovery upon said surviving right of action. We are

not unaware of the decision in *Fulgham v. Midland Valley R. Co.* (1909) 167 Fed. 660, nor of other decisions of some of the state courts taking a contrary view of the law, nor of its amendment by Congress since the occurrence of this injury."

The act should be construed as one granting a new remedy where none or a less adequate one existed under state laws, and as not intended to abrogate or supplant a right of action of practically equal extent existing under the laws of a state; and an administratrix appointed under the laws of a state may not use such statute for the purpose of defeating the statute of such state regulating the distribution of personal property, she having a complete remedy under Code Civ. Proc. §§ 1902-1905. *Re Taylor* (1911) 145 App. Div. 940, 130 N. Y. Supp. 1132.

⁶ *Winfree v. Northern P. R. Co.* (1909) — L.R.A. (N.S.) —, 97 C. C. A. 392, 173 Fed. 65.

⁷ *Clark v. Southern P. Co.* (1909) 175 Fed. 122; *Cound v. Atchison, T. & S. F. R. Co.* (1909) 173 Fed. 527; *Whittaker v. Illinois C. R. Co.* (1910) 176 Fed. 130; *Smith v. Detroit & T. Shore Line R. Co.* (1909) 175 Fed. 506.

It is not necessary to plead a Federal statute, but allegations constituting a cause of action or defense thereunder must be made in order to have the benefit thereof. *St. Louis, I. M. & S. R. Co. v. Hesterly* (1911) 98 Ark. 240, 135 S. W. 874.

⁸ *Pedersen v. Delaware, L. & W. R. Co.* (1911) 184 Fed. 737.

⁹ *Walton v. Southern R. Co.* (1910) 179 Fed. 175.

The employee's cause of action does not survive his death.¹⁰ The next of kin has no right of action where there is no personal representative.¹¹ Damages for conscious suffering are not recoverable under the statute.¹²

That a suit for negligent death, under the Federal act, presents a different cause of action from that stated in a former suit under a state statute for such death, does not prevent the plea of *res judicata* being a bar, where the material questions of fact supporting the new cause of action are the same as those involved in the former suit.¹³

The statute of course has no application where the employee is engaged solely in intrastate commerce. In the note below are collected the cases which pass upon the question whether the injured employee was at the time engaged in interstate commerce so as to be within the protection of the statute.¹⁴

If the plaintiff's petition does not disclose that the suit is based upon the Federal statute, it must be said that he is not seeking to recover for an injury received while engaged in interstate commerce, and the sufficiency of his petition must be tested by the state law. *Missouri, K. & T. R. Co. v. Neaves* (1910) — Tex. Civ. App. —, 127 S. W. 1090.

The plaintiff's complaint is not demurrable as uncertain in respect to whether the Federal or the state statute is relied upon, where it clearly shows that the plaintiff was injured while engaged solely in intrastate commerce. *Missouri, K. & T. R. Co. v. Hawley* (1910) — Tex. Civ. App. —, 123 S. W. 726.

¹⁰ *Fulgham v. Midland Valley R. Co.* (1909) 167 Fed. 660.

¹¹ *Fithian v. St. Louis & S. F. R. Co.* (1911) 188 Fed. 842 (holding that wife and children could not maintain suit). See also *Thompson v. Wabash R. Co.* (1911) 184 Fed. 554.

Under the earlier statute the widow of an employee for whose death the employer was liable may sue as administrator in her own behalf, there being no children. *Gutierrez v. El Paso & N. E. R. Co.* (1909) 102 Tex. 378, 117 S. W. 426 (affirmed in [1909] 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21, but this point is not noticed).

¹² *Walsh v. New York, N. H. & H. R. Co.* (1909) 173 Fed. 494.

¹³ *Troxwell v. Delaware, L. & W. R. Co.* (1911) 185 Fed. 540.

¹⁴ A trackman engaged in repairing a switch connected with a track used for both interstate and intrastate commerce is within the protection of the statute. *Colasurdo v. Central R. Co.* (1910) 180 Fed. 832.

A section hand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in "interstate commerce." *Zikos v. Oregon R. & Nav. Co.* (1910) 179 Fed. 893.

An employee a part of whose duty it is to see to the coupling and air attachments of the cars a part of which are engaged in interstate commerce is himself engaged in the movement of interstate commerce. *Johnson v. Great Northern R. Co.* (1910) 102 C. C. A. 89, 178 Fed. 643.

A common laborer engaged in loading a flat car with rails that had been used in repair work, who was injured through the negligence of coemployees in the same work, was not engaged in interstate commerce. *Tsmura v. Great Northern R. Co.* (1910) 58 Wash. 316, 108 Pac. 774.

Where a railroad company employs a servant to work a part of his time on a train engaged in interstate commerce, and a part of his time to work on a train doing purely local service, and the employee is hurt while doing the local work, the transaction is governed

B. ARKANSAS.

1768. Text of statute.—Laws of 1907, p. 162. This statute provides as follows:

That hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal, who may employ agents, servants, or employees, such agents, employees, or servants being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee, or servant, resulting from the careless omission of duty or negligence of any other agent, servant, or employee of said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

This act has been pronounced constitutional.¹ For a discussion as to the constitutionality of this statute, see the concluding chapter of this treatise.

1769. Effect of this statute.—This statute does not apply where the injury occurred prior to its passage.¹ It applies to all corporations.² But it does not create liability against such municipal or quasi-municipal corporations, as were not liable for the negligence of their servants prior to the passage of the act.³ In Missouri it has been held that there could be no recovery under the Arkansas act of 1907, unless it was pleaded.⁴

By virtue of this statute, the negligent act of the fellow servant

by the law of the state where the injury occurs, and not by what is known as the Federal "employer's liability act" (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322). *Southern R. Co. v. Murphy* (1911) 9 Ga. App. 190, 70 S. E. 972.

An employee engaged in bridge construction, who was injured while carrying material from one part of the work to another, by a local train running between two points in the same state, is not within the statute. *Pederson v. Delaware, L. & W. R. Co.* (1911) 184 Fed. 737.

A member of a railroad bridge gang, injured while engaged, and within the scope of his employment, in repairing bridges, by an alleged defective scaffold, though his duties required work in the repair of bridges for the railroad com-

pany in different states, was not "employed in interstate commerce." *Taylor v. Southern R. Co.* (1910) 178 Fed. 380.

¹ *Ozan Lumber Co. v. Biddie* (1908) 87 Ark. 587, 133 S. W. 796; *Aluminum Co. v. Ramsey* (1909) 89 Ark. 522, 117 S. W. 568.

² *Western Coal & Min. Co. v. Corkille* (1910) 96 Ark. 387, 131 S. W. 963.

³ *Soard v. Western Anthracite Coal & Min. Co.* (1909) 92 Ark. 502, 123 S. W. 759.

⁴ *Board of Improvement v. Moreland* (1910) 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957 (drainage district not within the act).

⁵ *Ham v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 200, 130 S. W. 407.

is, so far as the rights of the injured servant are concerned, the same as if it were the negligent act of the master.⁵

The statute has been applied in the cases cited in the note.⁶

C. COLORADO.

1770. [753a] Text of the statute.—Sess. Laws 1901, chap. 67. The contents of this statute are as follows:

Sec. 1. That every corporation, company, or individual who may employ agents, servants, or employees, such agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee, or servant, resulting from the carelessness, omission of duty, or negligence of such employer, or which may have resulted from the carelessness, omission of duty, or negligence of any other agent, servant, or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed: Provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or, in case of death, the right of the husband or wife or other relatives of a deceased person to maintain an action against the employer.

⁵ *St. Louis Southwestern R. Co. v. Burd* (1910) 93 Ark. 88, 124 S. W. 239.

⁶ In *Ozan Lumber Co. v. Biddie* (1908) 87 Ark. 587, 113 S. W. 796, a dog-setter in a sawmill was allowed damages for injuries due to the negligence of the sawyer.

A railroad company is liable to a switchman riding upon an engine, for injuries caused by the negligence of the employees operating the engine. *St. Louis, I. M. & S. R. Co. v. Davis* (1910) 93 Ark. 484, 124 S. W. 754.

The fireman of a locomotive while standing on the deck preparing to put coal into the engine as it is backing toward its train does not assume the risk of the failure of the brakeman to give a slow-up signal as the engine is approaching its train, or of the failure of the engineer to obey such signal if it be given. *St. Louis, I. M. & S. R. Co. v. Booth* (1911) 98 Ark. 227, 135 S. W. 811.

A complaint which alleges that a switch was negligently left open so as to carry a train from the main track

onto a side track alleges a violation of a duty in respect to the operation of a railroad. *St. Louis, I. M. & S. R. Co. v. Ramsey* (1910) 96 Ark. 37, 131 S. W. 44, Ann. Cas. 1912 B, 383.

Under this statute a servant who becomes aware of a dangerous situation created by the negligence of a fellow servant, and appreciates the danger, must be held to assume the risk of such danger when he continues in the service with such knowledge and appreciation, for the negligence of the fellow servant is by the statute made the same as that of the master so far as it affects the responsibility of the latter; but he does not assume the risk of the negligent acts or omissions of which a fellow servant may be guilty in the future, although he knows that such fellow servant is incompetent. *St. Louis, I. M. & S. R. Co. v. Ledford* (1909) 90 Ark. 543, 119 S. W. 1123. To the same effect, *St. Louis Southwestern R. Co. v. Burd* (1910) 93 Ark. 88, 124 S. W. 239.

See also *St. Louis, I. M. & S. R. Co. v. Vann* (1911) — Ark. —, 135 S. W. 816.

This simple and straightforward enactment placed the state of Colorado in the honorable position of being the first of the jurisdictions in which the common law prevails, to abrogate entirely a doctrine which, as the writer has endeavored to show in an earlier section (1398), does not rest upon any satisfactory basis, logical, social, or economic, and which, by relegating the injured person to his action against a coemployee who is, as a general rule, financially irresponsible, leaves him, in the great majority of instances, without any prospect whatever of obtaining an adequate indemnity.¹

The act of May 27, 1911 (Morrison & De Soto, Stat. Anno. §§ 2060-2063), provides as follows:

(2060) Sec. 5. That every corporation or company which, or individual who, may employ agents, servants, or employees, such agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, servant, or employee, resulting from the carelessness, omission of duty, or negligence of such employer, or which may have resulted from the carelessness, omission of duty, or negligence of any other agent, servant, or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

(2061) Sec. 6. Whenever the death of a person shall be caused by an act of carelessness, omission of duty, or negligence, as provided in the preceding section, then, and in every such case, the corporation or company which, or individual who, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured; and in every such case the jury may give such damages as they deem fair and just, not exceeding the sum of five thousand (\$5,000) dollars, with reference to the necessary injury resulting from such death, to the party or parties who may be entitled to sue hereunder.

(2062) Sec. 7. Every such action shall in case of death be maintained,—

First—By the husband or wife of the deceased, or—

Second—If there be no husband or wife, or if he or she fails to sue within one year after such death, then by the children of deceased or their descendants, or—

Third—If such deceased be a minor or unmarried, without issue, then by the father or mother, or by both jointly, or—

Fourth—If there be no such person entitled to sue, then by such other next of kin of the deceased as may be dependent upon deceased for support.

Every such action, in case of death, may be maintained by any such person entitled to sue, for the use and benefit of the other or others so entitled to sue, as well as for the plaintiff so suing; and the verdict of the jury and the judgment of the court shall, in such case, specify the amount of damages award-

¹The employers' liability act (see § *R. Co.* (1903) 62 C. C. A. 48, 126 Fed. 1659, *ante*) was not impliedly repealed 338, by the act of 1901. *Lange v. Union P.*

ed to each such person; and if any such actions be separately brought, the same be consolidated with the action so first commenced in the court that shall have jurisdiction of said actions, when so consolidated.

(2063) Sec. 8. All actions provided for by this act shall be brought within two years from the time of the accident causing the injury, if death does not ensue, or within two years from the time of death, in the case of injury resulting in death. The amount of compensation recoverable under this act in case of personal injury resulting solely from the negligence of a coemployee shall not exceed the sum of five thousand (\$5,000) dollars.

This statute expressly repealed Session Laws 1901, chap. 67, but § 5 as given above is identical with § 1 of that act. This statute also expressly repeals the earlier employers' liability act. See chapter LXXIV., *ante*.

The power of the legislature to abrogate the fellow-servant doctrine has been sustained by the supreme court of the state.²

1771. [754] Effect of this statute.—A complaint charging either the common-law negligence of the master or the negligence of a fellow servant, for which plaintiff was entitled to recover under the statute, merely states different grounds of liability for the same ultimate act.¹

Even under statutes of this character, the master cannot be held liable if the negligent servant caused the injury while acting outside the scope of his employment.²

The effect of the provision as to contributory negligence is stated in § 1648, *ante*.

D. FLORIDA.

1772. [754a] Text of the statute.—Laws 1897, chap. 3744. The contents of this statute are as follows:

Sec. 1. That no person shall recover damages from a railroad company for injury to himself or his property, when the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover; but the damages shall be diminished by the jury trying the case, in proportion to the amount of default attributable to him.

Sec. 2. If the person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the

² *Vindicator Consol. Gold Min. Co. v. Firstbrook* (1906) 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108 (act of 1901). ² *Big Five Tunnel, Ore Reduction & Transp. Co. v. Johnson* (1908) 44 Colo. 236, 99 Pac. 63.

¹ *National Fuel Co. v. Green* (1911) 50 Colo. 307, 115 Pac. 709.

part of the person injured, his employment by the company shall be no bar to the recovery; and no contract which restricts such liability shall be legal or binding.

This act was repealed by chapter 4071, Laws 1901, which forms §§ 3148, 3149, 3150, of the General Statutes of 1906, which read as follows:

Sec. 3148. A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

Sec. 3149. No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him.

Sec. 3150. If any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by negligence of another employee, and without fault of negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding.

1773. [755] Effect of this section.— In one case it was held that the rights of any servant whose injury was received before this act came into force were governed by the common-law doctrine that a master was not liable to a servant for injuries from the negligence of a co-servant in a common work or in the same general employment.¹

The negligence complained of must be the proximate cause of the injury.²

The only apparent material change caused by the amendment was to confine the right of recovery by an employee injured by the negligence of another to cases where the injury complained of was caused "by the running of the locomotive or cars or other machin-

¹ *Parrish v. Pensacola & A. R. Co.* (1891) 28 Fla. 251, 9 So. 696, there recovery was denied in a case where the act had come into force while the appeal was pending.

² *Atlantic Coast Line R. Co. v. Mal-Jard* (1907) 54 Fla. 143, 44 So. 366.

"No presumption of liability arises against the defendant until it is shown either that plaintiff was not at fault or that his coemployee was." *Howard v. Atlantic Coast Line R. Co.* (1909) 83 S. C. 240, 65 S. E. 245 (construing Florida statute).

ery" of the master company.³ The adjudications of the courts or the other features of the act, therefore, remain unchanged.⁴

A corporation engaged in phosphate mining, and, as incident thereto, operating trolley engines and cars for carrying the phosphate, is not a railroad company within the meaning of §§ 3148, 3149, 3150 of the General Statutes of 1906.⁵

E. GEORGIA.

1774. [756] Statute as to railway service.—In 1855 *Laws*, p. 155 the doctrine of common employment was abrogated as regards servants of railroad companies by the following provision:

Railroad companies are common carriers, and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence.¹

This provision was subsequently incorporated in the Code of 1860 § 2057; of 1873, § 2057; of 1882, § 2083; of 1895, § 2297.

In view of the industrial conditions which prevailed in Georgia at the date when the act was first passed, the fact that this should have been the earliest of such statutes in any common-law jurisdiction is as Mr. McKinney observes in his work on *Fellow Servants* (p. 232), somewhat remarkable.

By the Code of 1873 it was further provided as follows:

Sec. 3033. A railroad company shall be liable for any damage done to persons stock, or other property by the running of the locomotives, or cars, or other ma-

³ *Atlantic Coast Line R. Co. v. Ryland* (1905) 50 Fla. 190, 40 So. 24.

⁴ *Atlantic Coast Line R. Co. v. Beazley* (1908) 54 Fla. 311, 45 So. 761.

⁵ *Taylor v. Prairie Pebble Phosphate Co.* (1911) 61 Fla. 455, 54 So. 904.

¹ The act of 1856, being only applicable to railroad companies, was held not to confer any rights on employees working on the Western & Atlantic Railroad, which belonged to the state. *Walker v. Spullock* (1857) 23 Ga. 436. But the benefits of its provisions were extended to these employees by the act of April, 1863, p. 182. See *Cannon v. Rowland* (1866) 34 Ga. 422.

Nor does this provision apply to a case where the injury in suit was re-

ceived by a laborer in the employ of an independent contractor, owing to the negligent operation of cars furnished to such contractor by the railway company, and entirely under his control. *Central R. & Bkg. Co. v. Grant* (1872) 46 Ga. 417.

The act of 1869, repealing the 3d section of the act of 1856, did not repeal §§ 2054 and 2980 of the Code of 1863 embodying the act of 1855. *Georgia R. & Bkg. Co. v. Oaks* (1874) 52 Ga. 410. That act had been repealed or superseded by the act of 1860 adopting the Code, as well as by the adoption of the Code by the Constitution of 1868. *East Tennessee, V. & G. R. Co. v. Dugan* (1874) 51 Ga. 212.

chinery of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence,—the presumption in all cases being against the company. The same provision is found in Code of 1882, § 3033, and in Code of 1895, § 2321.

Sec. 3036. If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery. The same provision is found in the Code of 1882, § 3036, and in Code of 1895, § 2323.²

The Georgia Code of 1911 (Acts 1909, p. 160) provides as follows:

Sec. 2782. Injury by coemployee. Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband, or child, or children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment: Provided, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence. The measure of damage in case the injury results in death of the employee shall be that prescribed in §§ 4424 and 4425: Provided, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections may sue and recover in their own name or names in the manner prescribed by § 4424, in case no administrator or executor has been appointed at the time suit is filed. In case death results from injury to the employee, the employer shall be liable unless it make it appear that its agents and employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company.

Sec. 2783. Contributory negligence and ordinary care. In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this, the preceding, or the four succeeding sections, to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of

² This section was not repealed by the act of 1869 repealing the act of 1856. The act of 1856 had been repealed or superseded by the act of 1860 adopting the Code, as well as by the adoption of the Code by the Constitution of 1868. *East Tennessee, V. & G. R. Co. v. Dugan* (1874) 51 Ga. 212.

contributory negligence not amounting to a failure to exercise ordinary care shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 2785. Contract to exempt from liability, and set-off of indemnity. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding sections, shall, to that extent, be void: Provided that in any action brought against any such common carrier, under or by virtue of any of said sections, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in the event of death, to the person or persons entitled thereto on account of the injury or death for which said action is brought.

Sec. 2784. Risk of employment. In any action brought against any common carrier under and by virtue of any of the provisions of the two preceding sections, to recover damages for injuries to or the death of any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee.

1775. [757] Effect of these sections.—The cases cited in this section all refer to the statutes prior to the act of 1909.

A chartered street railroad is a railroad company within the meaning of §§ 2297 and 2323 of the Civil Code of 1895, and therefore is liable to one servant for injuries inflicted by the negligence of a fellow servant.¹

Under § 2297 of the Code of 1895, a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, whether such injuries are connected with the running of trains or otherwise.² The stat-

¹*Savannah, T. & I. of H. R. Co. v. Williams* (1903) 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751.

²*Thompson v. Central R. & Bkg. Co.* (1875) 54 Ga. 509.

The doctrine thus established was reaffirmed in *Georgia R. Co. v. Ivey* (1884) 73 Ga. 499 (injury received in shops). The court thus disposed of the contention that the doctrine of *stare decisis* did not bear on the case: "A construction of a statute in reference to the legal status of all employees of railroad companies, in their relation to

other employees and to the corporations, was given in that case [*i. e.* the *Thompson Case*] by a unanimous bench, and became settled law; it entered into every contract between master and servant; it fixed the liability of the master for the default of a coemployee in case of none by the servant hurt; it took railroad companies without the ordinary rule of the liability of the master to his servant; it made the corporation, on the one hand, more careful to employ competent fellow servants, and the injured servant more cautious in his own

ute has, therefore, extended the liability of railroad companies further than has been done in Iowa, Kansas, and Minnesota. See subtitles F, G, and H of this chapter.

It has also been held that the benefit of the provision is not re-

acts so as to be free of all fault himself; and thus the master when he contracted with employees, and the employee when he engaged to work with his master, the railroad corporation, contracted with each other in the light of this law as construed by this court."

Later cases in which the same doctrine was again applied are these: *Georgia R. & Bkg. Co. v. Brown* (1890) 86 Ga. 320, 12 S. E. 812 (piece of timber fell on foot of servant working in shop); *Georgia R. & Bkg. Co. v. Hicks* (1894) 95 Ga. 301, 22 S. E. 613 (injury received in putting a line of gas pipe on the ceiling of a car shop); *Georgia R. & Bkg. Co. v. Miller* (1892) 90 Ga. 571, 16 S. E. 939 (holding that a charge to the effect that the plaintiff could not recover unless his injuries were connected with the running of trains had been properly refused); *Southern R. Co. v. Johnson* (1901) 114 Ga. 329, 40 S. E. 235 (piece of slag on track was struck by engine and thrown against trackhand).

A railroad company is liable for the death of a yardmaster who was under the orders of the superintendent, and who, without fault on his own part and in obedience to the directions of such superintendent, to break into a gasroom to extinguish a fire, was killed by the walls falling in upon him, where the superintendent knew or ought to have known of the danger in which he was placed. *Augusta Factory v. Hill* (1889) 83 Ga. 709, 10 S. E. 450.

The questions whether the kicking of a hand car following another, by one sitting upon the forward car, to prevent it from running into the latter, was such an act of negligence as would render the railroad company liable for injury to a fellow servant by the subsequent derailling of the car, and whether the injured person himself put in motion the chain of events which led to the injury by the manner in which he ran the cars, and whether the kicking of such car was sufficient to account for the derailment of the front car,—are for the jury where

there is evidence each way. *Smith v. Southern R. Co.* (1896) 75 Fed. 105 (verdict for defendant upheld).

A nonsuit is erroneous where there is evidence tending to show that the injury was caused by the negligence of a fellow servant, although there may be some testimony tending to show that when the plaintiff was hurt he was a vice principal of the defendant company. *Chandler v. Southern R. Co.* (1901) 113 Ga. 130, 38 S. E. 305.

There is no error in refusing to charge that a railroad employee is prevented from recovering from his employer for an injury because the negligence of a coemployee was the sole cause thereof. *Georgia R. & Bkg. Co. v. Cosby* (1895) 97 Ga. 299, 22 S. E. 912.

Where a rule of the company enjoins upon a coemployee of the plaintiff the performance of a particular duty, such coemployee is bound to exercise ordinary care in the discharge of that duty. It is not cause for reversal that the court charged the jury that, if such coemployee failed to exercise ordinary care in discharging such duty, they "ought to find the defendant company negligent in that regard." *Western & A. R. Co. v. Bussey* (1894) 95 Ga. 584, 23 S. E. 207.

In a suit against a railroad on account of the homicide of an employee, an allegation that the company did the negligent or careless act which caused the homicide, or omitted the diligence which would have prevented it, is sufficient, and is equivalent to an allegation that the coemployees of the decedent were guilty of such negligence. *Central R. Co. v. Crosby* (1885) 74 Ga. 737, 58 Am. Rep. 463.

When construed in connection with this provision as to railways, § 2971 of the Code, which gives a widow an action for the homicide of her husband, precludes recovery for a death caused by the negligence of a fellow servant, unless the homicide amounted to a crime in the delinquent servant, either murder or manslaughter of some grade. *Daly v. Stoddard* (1880) 66 Ga. 145.

stricted to employees who cannot control those whose function it is to operate trains.³

Under § 3033 (Code of 1873) alone, an employee of a railroad company would not be entitled to recover damages for an injury sustained by him, caused by the negligence of other employees of the company. Without §§ 2083 and 3036, he would be under the common-law rule, and could not maintain an action.⁴ But the effect of these three sections, when construed together, is that, when the plaintiff shows that the injury was inflicted through the negligence of a fellow servant engaged in and about the common employment, and without fault on the part of the former, the burden is cast upon the company of showing only that its servants exercised ordinary and reasonable care. An instruction to the jury which imposes upon the defendant the superadded duty of showing how the casualty occurred is erroneous.⁵

The effect of the clause as to the absence of contributory negligence is discussed in § 1648, *ante*.

1776. [758] Provision declaratory of the doctrine of common employment.—The doctrine of common employment is embodied in the following provision:

The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same work. Code of 1873, § 2202; Code of 1882, § 2202; Code of 1895, § 3030.

In the Code of 1895, § 2610, the following provision was also added:

Except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business.

³ *Georgia R. & Bkg. Co. v. Goldwire* (1876) 56 Ga. 196, negating the theory that trainmen were not within the purview of the statute, as they can control the conductor and engineer by reporting them for neglect of duty.

⁴ *Campbell v. Atlanta & R. Air Line R. Co.* (1873) 53 Ga. 488.

A charge with reference to this section, that the company is liable for damage "to" any person in the employment of the company, is erroneous. *Western & A. R. Co. v. Vandiver* (1890) 85 Ga. 470, 11 S. E. 781.

⁵ *Georgia R. & Bkg. Co. v. Hicks* (1894) 95 Ga. 301, 22 S. E. 613.

A charge to the effect that, under this section, the onus of proving that ordinary care was exercised is upon the railway company when a person in its employ is injured by the negligence of a coservant, is erroneous. *Western & A. R. Co. v. Vandiver* (1890) 85 Ga. 470, 11 S. E. 781, laying it down that the presumption is not against a railway company when the servant injured is connected with the act which caused the injury unless he shows his freedom from fault.

These provisions operate as an explicit declaration of what is obviously a matter of necessary inference from the others already commented on in the preceding sections, *viz.*, that the common-law rule as to coservice is applied in Georgia in all cases except those in which a railroad employee is injured. The particular form under which that rule prevails in this state has already been considered in former chapters. See chapter LX., subtitle B, and the summary in § 1478, *an'e.*¹

¹ In *Bussey v. Charleston & W. C. R. Co.* (1907) 78 S. C. 352, 58 S. E. 1015, in construing § 2610 of the Georgia Code, the court says that the plain implication is that where an employee of a railroad is injured by the negligence of a fellow servant the master is liable. It is evident that § 3036 (§ 2323, of the Code of 1895; see § 1774, *ante*) had not been called to the court's attention.

In *Moore v. Dublin Mills Co.* (1907) 127 Ga. 609, 10 L.R.A.(N.S.) 772, 56 S. E. 839, the court, after quoting § 2610, said: "It is not the position of the servant in the service that fixes the liability of the master, but it is the duty which the servant is performing towards other servants." See also *Self v. Adel Lumber Co.* (1909) 5 Ga. App. 846, 64 S. E. 112.

The statute is not applicable to a lumber company operating cars on a track for the purposes mainly of its own business; and even though it does on some occasions transport passengers and freight for hire, it is not a railway company, within the purview of that statute, so as to render it liable to a track repairer who is injured by a movement of the locomotive at a time and upon an occasion when it is in no sense engaged in transacting business as a public carrier. *Ellington v. Beaver Dam Lumber Co.* (1893) 93 Ga. 53, 19 S. E. 21; *White v. Kennon* (1889) 83 Ga. 343, 9 S. E. 1082; *Railey v. Garbutt* (1900) 112 Ga. 288, 37 S. E. 360 (woodcutter injured by negligence of engineer); *Stevens v. Bunn* (1909) 6 Ga. App. 315, 64 S. E. 1002 (wood-cutter, engineer, and brakeman held to be fellow servants).

A teamster employed by a coal and iron company to assist in hauling a boiler from the furnace plant of the company to its coal mines, to be there used in getting out coal for consumption in the furnace and locomotive of the company, is a fellow servant with the

engineer and fireman of a locomotive operated in the yards of and in connection with such furnace plant. *Georgia Coal & I. Co. v. Bradford* (1908) 131 Ga. 289, 127 Am. St. Rep. 228, 62 S. E. 193.

No recovery can be had where an operative in a cotton factory is injured by the negligence of a workman having charge of two others in the picker room. *McGovern v. Columbus Mfg. Co.* (1887) 80 Ga. 227, 5 S. E. 492.

A servant whose duties were to stand on a scaffold used in the construction of a building, and receive and detach timbers from the derrick when they were sufficiently elevated for the use intended, was a fellow servant of one who stood on the ground and operated the derrick, where the evidence shows that they were under one common employment and received orders from another as superintendent of the entire construction, although it may also be proved that the person who operated the derrick was invested with authority to direct how and when the elevation of the timbers should be made. *Gunn v. Willingham* (1900) 111 Ga. 427, 36 S. E. 804.

A mason and a carpenter working on the same building are coservants. *Keith v. Walker Iron & Coal Co.* (1888) 81 Ga. 49, 12 Am. St. Rep. 296, 7 S. E. 166.

It has been held with special reference to § 2610 of the Code of 1895, that the master is not liable to one servant for injuries arising from the negligence of another servant about the same business, though they may be employed in different departments of business, and so far removed from each other that one can in no degree control or influence the conduct of the other. *Brush Electric Light & P. Co. v. Wells* (1900) 110 Ga. 192, 35 S. E. 365 (engineer in power house of electric company held to be fellow servant of lineman).

Under §§ 2610, 2323, of the Code of 1895, it is not error to charge the jury that the employee of a railway company does not assume the risk of the negligence of his coemployees.²

The act of August 16, 1909 (Acts 1909, p. 160), now embodied in Civil Code 1910, § 2782, amended the law somewhat. The chief change worked was to allow the injured employee to recover though he was somewhat at fault, unless his fault or neglect amounted to a "failure to exercise ordinary care," or unless he "by the exercise of ordinary care could have avoided the consequences of the defendant's negligence." The doctrine of comparative negligence (by which the damages may be apportioned where both parties are at fault, but the fault of the plaintiff is the lesser), theretofore applicable generally as to other negligence cases, was made applicable also to the class of cases dealt with in the statute.³

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1777. [758a] Statutory provisions.—As to the constitutionality of these statutes, see the concluding chapter of this treatise. By Laws 1862, chap. 169, § 7, it was provided as follows:

"Every railroad company shall be liable for all damages sustained by any person in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employee of the corporation, to any person sustaining such damage."

This act was superseded by chapter 65, § 1, of the Laws of 1872, to the following effect:

Every corporation and person owning or operating a railroad in this state shall be liable for all damages sustained by any person in consequence of the wilful wrongs, whether of commission or omission, of their agents and employees, when such wilful wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed.

Another recent ruling is that a complaint averring that plaintiff's husband was a night watchman in the employ of defendant, who was operating a saw-mill, and was killed by the explosion of a boiler used in running the mill, which was occasioned by negligence of an engineer having charge of the boiler, fails to state a cause of action. *McCosker v. Hilton & D. Lumber Co.* (1900) 110 Ga. 328, 35 S. E. 369.

² *Atlanta & B. Air Line R. Co. v. McManus* (1907) 1 Ga. App. 302, 58 S. E. 258.

³ See *Wrightsville & T. R. Co. v. Tompkins* (1911) 9 Ga. App. 154, 70 S. E. 955.

The act of August 16, 1909 (Acts 1909, p. 160), is not applicable to an injury occurring in 1906. *Louisville & N. R. Co. v. Bradford* (1910) 135 Ga. 522, 69 S. E. 870.

By the Code of 1873, § 1307, this provision was modified so as to read thus:

Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding. Same provision in McClain's Anno. Code, § 2002, and Code of 1897, § 2071.

Railway construction companies engaged in building railroads, which operate railroads for the purpose of carrying on their work of building railroads, are within the act.¹ But it does not enure to the benefit of the employees of independent contractors engaged in constructing a railway, where the injury complained of was caused by the acts of servants of the railway company.²

Sec. 2033b of the Code (29 G. A. chap. 81, § 2; Code Supp. 1902, p. 212) provides that the words "railway" or "railroad" as used in the Code or acts of the general assembly, are applicable to interurban railroads. But it has been held that such parts of interurban railroads as occupy city streets are to be considered street railways, and are not within the purview of the statute.³

1778. [759] What injuries are within the purview of the statute.—The class of acts for which railroad companies were rendered liable by the act of 1862 is held to have been narrowed by the amendment of the law in 1873. The words "such wrongs," in the limiting clause of the second act, are deemed not to relate alone to the wilful wrongs spoken of in the preceding clause, but also to the mismanagement and negligence spoken of in a preceding clause.¹ Under this construction the liability of the companies, which, by the unrestricted terms of the act of 1862, extended to any negligence whatever which their employees might commit in the course of their employment, is now

¹ A construction company which is engaged in building a railway, and is for that purpose running gravel trains, is operating a railway within the meaning of the statute. *McKnight v. Iowa & M. R. Constr. Co.* (1876) 43 Iowa, 406.

² *Ney v. Dubuque & S. C. R. Co.* (1866) 20 Iowa, 347.

³ *McLeod v. Chicago & N. W. R. Co.* (1904) 125 Iowa, 270, 101 N. W. 77.

¹ *Foley v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124.

limited to "such damages as are occasioned by the negligence or mismanagement or wilful wrongs of its employees which are connected with the use and operation of the railroad on or about which they are employed."² In the case cited it was argued that the employment of the plaintiff was entire, and that, as part of his service related to the business of operating the road, he had his remedy under the statute even though the injury was not sustained while in the performance of that particular part of the service. The court, in rejecting this theory, said: "The subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that to entitle an employee now to recover against the company for injuries which he has sustained in consequence of the negligence, or mismanagement, or wilfulness of a coemployee, he must show (1) that he belonged to the class of employees to whom the statute affords a remedy, and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given."

To bring a case within the statute it is not necessary to show that the injured person was actually engaged in the operation of the road. Its provisions take effect wherever it appears that the injury was caused by the operation of the road.³

² *Malone v. Burlington C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756.

³ *Pierce v. Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783.

In *Pyne v. Chicago, B. & Q. R. Co.* (1880) 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 281, the court said: "The statute is not construed to mean that actions can be maintained by trainmen only, or by men whose employment is such as pertains to the running of trains. . . . There is language in some of the cases which seems to imply that the statute embraces only those who are engaged in the actual operation of a railroad in running the trains. But that the right of action is not thus limited is apparent. Trackmen, switch tenders, and others, whose duty requires them to be upon the track are more or less exposed to the hazards of the business of railroading, and such employees, when injured by the use or operation of the road and by the negligence of coemployees, are as plainly within the provisions of the statutes as those whose duty requires them to assist in the running of trains. We think the proper test in determining the question is,

Does the duty of the employee require him to perform service which exposes him to a hazard peculiar to the business of using and operating a railroad? If it does, and if, while in the line of his duty, he by the negligence of a coemployee receives an injury from a passing train or from other appliances used in the use and operation of the road, he may recover."

"The cases are all grounded upon the view that the statute applies when the employment and the wrong are connected with the handling of railroad machinery moved upon railroad tracks." *Larson v. Illinois C. R. Co.* (1894) 91 Iowa, 81, 58 N. W. 1076.

A railroad company, therefore, is held liable whenever the injured person was one who was "exposed by the nature of his employment to the peculiar hazards" incident to the operation of railways (*Butler v. Chicago, B. & Q. R. Co.* [1893] 87 Iowa, 206, 54 N. W. 208); or who was, by the nature of his employment, exposed to the hazards incident to moving trains, even though he may not have been engaged in operating them (*Smith v. Humeston & S. R. Co.* [1889] 78 Iowa, 583, 43 N. W. 545);

The subjoined note indicates the classes of employees who are, and those who are not, deemed to be entitled to recover under this broad construction of the statute.⁴ For other cases involving the same

or who, "in the performance of the duties of his employment was necessarily exposed to all of the ordinary risks and dangers which arise from the operation of the trains" (*Handelun v. Burlington, C. R. & N. R. Co.* [1887] 72 Iowa, 709, 32 N. W. 4).

In *Williams v. Iowa C. R. Co.* (1903) 121 Iowa, 270, 96 N. W. 774, the employee was engaged in unloading rails, and it was held error as an abstract proposition of law to direct the jury that the plaintiff could not recover without showing that his employment was in connection with the operation of the road.

⁴See notes to *Johnson v. Great Northern R. Co.* 18 L.R.A.(N.S.) 478, and *Hanson v. Northern P. R. Co.* 22 L.R.A.(N.S.) 968.

(a) *Employees held to be within the statute.*—That the statute is applicable to members of train crews is, of course, beyond dispute. The essential questions in cases where such employees are injured are merely whether the coservant was, as matter of fact, negligent, and whether the injured servant was himself in fault.

Whether, under the circumstances, the conductor of a train was negligent in applying the brake when he did, whereby a brakeman engaged in cutting the train while running slack was injured, was held to be a question for the jury in *Dunlavy v. Chicago, R. I. & P. R. Co.* (1885) 66 Iowa, 435, 23 N. W. 911.

Where a brakeman, at the direction of his conductor, goes between a moving train and car, separated by a space of 7 feet, for the purpose of holding a post between them so that the car can be staked over a switch, and the conductor then negligently causes the train to be moved in the direction of the car with unusual, unnecessary, and increasing force and speed, whereby the brakeman is fatally injured, the enhanced and extraordinary peril arising from the conductor's negligence is not among the risks assumed by the brakeman. *Crotty v. Chicago G. W. R. Co.* (1909) 95 C. C. A. 91, 169 Fed. 593.

In *Buckle v. Central Iowa R. Co.* (1884) 64 Iowa, 603, 21 N. W. 103, a

brakeman was held entitled to recover for injuries caused by the negligence of an engineer.

In *Whalen v. Chicago, R. I. & P. R. Co.* (1888) 75 Iowa, 563, 39 N. W. 894, it was held that the railroad company was liable for the negligence of a "wiper" while in charge of an engine.

A rule by which conductors are "cautioned as to flying switches," and directed to "avoid such switching even if it increases their work," is advisory merely, and does not forbid such switches. The fact, therefore, that a conductor orders a brakeman to make such a switch is not such negligence as will render the company liable for injuries to the latter. *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346, 23 N. W. 736.

Where detached cars are following a short distance behind a train, a conductor and brakeman are negligent in not soon discovering the detachment, and in not being on top of the cars. *Farley v. Chicago, R. I. & P. R. Co.* (1881) 56 Iowa, 337, 9 N. W. 230.

The facts that a freight train standing at a station started while the conductor was attending to business inside of the station, supposing the brakes to have been sufficiently set, he himself not having set the brakes; and that the cars collided with other detached cars, killing a brakeman thereon,—do not show negligence on the conductor's part. *Brady v. Burlington, C. R. & N. R. Co.* (1887) 72 Iowa, 53, 33 N. W. 360.

A verdict for the plaintiff is justified by evidence showing that he was employed on a construction train and in the discharge of his duty walked to the rear of the train while it was in motion; that, when within 5 feet of the last car in front of the caboos, the latter was uncoupled by the conductor; and that at a signal the engineer caused a sudden jerk which threw the plaintiff from the car, and he was run over. *Jeffrey v. Keokuk & D. M. R. Co.* (1881) 56 Iowa, 546, 9 N. W. 884.

Negligence of which a locomotive fireman, injured by falling from the engine as cars attached to it came in contact with standing cars, may complain, can-

question arising under other statutes, see §§ 1660, 1780, 1782 1784, *b*, 1790, 1795, *a*, 1801a.

not be predicated of the act of a trainman in giving a signal indicating a longer distance to the point of coupling than should have been indicated, where the signals were only designed to indicate in a general way the distance to be traversed before reaching the coupling point, and the trainman did not know, and had no reason to expect, that the fireman was in a place of danger. *Kelsey v. Chicago & N. W. R. Co.* (1898) 106 Iowa, 253, 76 N. W. 670.

The fact that a brakeman's foot was caught in a rail so that he could not escape, as he otherwise might have done, from a car which was driven over him, will not excuse the company, if the manner in which the cars were moved betokened negligence irrespective of the brakeman's actual condition, whether he was free to get out of the way or not. *Beems v. Chicago, R. I. & P. R. Co.* (1882) 58 Iowa, 150, 12 N. W. 222.

Employees operating a switch engine, whose duty it is to be on the lookout for employees on or near the tracks, and to warn them of the approach of the engine by ringing the bell or blowing the whistle or in some other manner, are not, as matter of law, free from negligence toward an employee walking along the track in the course of his duty, where no signal of any kind is given of the approach of such engine. *McLeod v. Chicago & N. W. R. Co.* (1897) 104 Iowa, 139, 73 N. W. 614.

In *Locke v. Sioux City & P. R. Co.* (1877) 46 Iowa, 109, the railroad company was held liable for injuries caused by the negligence of the employee charged with the duty of looking after a bridge.

Employees in charge of an engine have the right to assume that a switchman who has attempted to mount on the front footboard for the purpose of making a switch has succeeded in doing so, where he is hidden from their view by the boiler; and they are not required to stop the engine to ascertain whether or not he has done so. *Ferguson v. Chicago, M. & St. P. R. Co.* (1897) 100 Iowa, 733, 69 N. W. 1026.

A delay by trackmen of a little over twenty minutes after the commencement of a storm, in inspecting the track as required by a rule of the company in

case of a storm, does not constitute negligence which will support an action for injuries to an employee, caused by the engine catching up a limb which had been blown upon the track. *Coax v. Chicago & N. W. R. Co.* (1897) 102 Iowa 711, 72 N. W. 301.

Recovery has been allowed where the injury was received by the following employees engaged in working on or near the track under the circumstances indicated:

A foreman of a bridge gang whose duty it was to set out a slow flag or the approach of a train, if the condition of the track over the bridge required it. *Keatley v. Illinois C. R. Co.* (1897) 103 Iowa, 282, 72 N. W. 545 (freight car left the track and fell on plaintiff).

One employed to carry water to railroad employees working near the approach of a bridge, and to perform such other services as the foreman shall direct, the injury being caused by the negligent running of a train at a dangerous speed across the bridge, which is unfinished and insecure. *Keatley v. Illinois C. R. Co.* (1895) 94 Iowa, 685, 63 N. W. 560, second appeal (1897) 103 Iowa, 282, 72 N. W. 545.

A car inspector whose duty required him to go under all cars. *Canon v. Chicago, M. & St. P. R. Co.* (1897) 101 Iowa, 613, 70 N. W. 755.

A car cleaner working on a standing car on a side track. *Jensen v. Omaha & St. L. R. Co.* (1902) 115 Iowa, 404, 88 N. W. 952.

A car repairer injured while on his way to a car standing on a side track. *Hughes v. Iowa C. R. Co.* (1905) 128 Iowa, 207, 103 N. W. 339.

An employee engaged in transferring rails from one car to another by means of a locomotive. *Stebbins v. Crooked Creek R. & Coal Co.* (1902) 116 Iowa, 513, 90 N. W. 355.

Men employed to remove ashes, etc., from locomotives, to supply them with water and sand, and to couple locomotive tanks forming a necessary part of a train, so that they could be moved to their proper place for train service. *Butler v. Chicago, B. & Q. R. Co.* (1893) 87 Iowa, 206, 54 N. W. 208 (injury received while coupling the tanks).

A person employed in a railway car

An injured employee is none the less entitled to the benefit of the statute, for the reason that the person by whose negligence he was

shop, who, while on a ladder leaning against one of the cars in a train, was injured by the negligence of employees in charge of the train in moving it without notice. *Pierce v. Central Iowa R. Co.* (1887) 73 Iowa, 140, 34 N. W. 783.

One whose duty it was to operate a turntable. *Malone v. Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756, conceded in the opinion; for actual decision, see subd. (b), *infra*.

A detective injured, while in the discharge of his duty, by the negligence of an engineer. *Pyne v. Chicago, B. & Q. R. Co.* (1880) 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 281 (complaint held not demurrable which alleged that he set out to walk along the track to a house in compliance with the orders of the defendant's agent, and, being prostrated by sunstroke, was run over while in a state of insensibility).

A laborer working in connection with a construction train, who, although he was engaged exclusively in shoveling gravel and had nothing to do with the management of the train, was shoveling gravel from the train, and was therefore not less dependent for his safety upon the skill and fidelity of those who were managing it, than if part of the management devolved upon himself. *McKnight v. Iowa & M. R. Constr. Co.* (1876) 43 Iowa, 406 (injury caused by sudden starting of train).

An employee whose duty it was to assist in loading and unloading gravel cars, and to perform any other service required of him in or about such work, and to ride to and fro on the gravel cars. *Handelun v. Burlington, C. R. & N. R. Co.* (1887) 72 Iowa, 709, 32 N. W. 4.

A laborer who was engaged in shoveling earth on flat cars which carried it to a place where it was used in making an embankment, and who sometimes went with the train to unload the earth, and at other times remained behind while the train was absent, and helped to undermine the bank which was being excavated. *Deppe v. Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52 (bank fell on the plaintiff). "It is true," said the court, the plaintiff "was not injured while, or by, operating the train; but

neither the act itself nor the constitutional limitation requires us to put this very narrow construction upon it. The plaintiff was employed for the discharge of a duty which exposed him to the perils and hazards of the business of railroads; and although the injuries did not arise from such hazards, they cannot be separated from the employment. If the plaintiff had been employed exclusively for shoveling or loading the dirt he could not recover, although he might have ridden to and from his work on the cars." This decision was declared to be correct in *Malone v. Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756, though it was pointed out that some of the expressions used in the opinion were no longer authoritative under the later act.

A laborer employed in the working of a ditching machine on a railroad, which was operated by moving along the track the train of which it formed a part. *Nelson v. Chicago, M. & St. P. R. Co.* (1887) 73 Iowa, 576, 35 N. W. 611 (plaintiff was struck by the crank of a windlass used to lower the scoop bucket). The court said: "The ditching machine is altogether unlike a steam shoveler, or a dredge worked by a stationary engine. It was propelled by a moving engine upon the track of the road. It is true, the plaintiff was not injured by contact with the wheels of a car or engine; but this was not necessary in order to entitle him to recover, because it is equally true that, if the car had not been in motion at the time, it would have been useless to raise or lower the bucket or shovel. It was the movement of the train that made it necessary to lower the rear end of the bucket. It was not necessary, to maintain the action, that the plaintiff should be an employee engaged in the actual movement of the train, as an engineer, brakeman, or conductor; it is sufficient if he was one of the crew necessary for the performance of the work intended to be done by the train and its machinery and appliances."

The foreman of a crew working a pile-driver car. *Houser v. Chicago, R. I. & P. R. Co.* (1882) 60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778. The injury

in this case was caused by the fall of a gin pole, so that the decision seems of doubtful correctness. See authorities cited, *infra*.

One of two employees engaged in filling tenders with coal from cars upon an adjoining track, the injury being caused by the negligence of the other employee in pushing into the coal car a plank extending from the coal car to the tender and used in filling the tender, after the work had been completed and the engine was about to start. *Akeson v. Chicago, B. & Q. R. Co.* (1898) 106 Iowa, 54, 75 N. W. 676.

A person employed to travel on a train, and to remove snow and ice at various points from the track of the railway, is entitled to recover for injuries resulting from the negligence of the employees of the road, although the train was not in motion at the time of the accident, and he was not then engaged in the duties required of him. *Smith v. Humeston & S. R. Co.* (1889) 78 Iowa, 583, 43 N. W. 545.

In a case where a workman engaged in taking down a bridge was injured while traveling on the train which was transporting the timbers to the place where they were to be deposited, it was held that the case was properly left to the jury, with instructions to the effect that, if the plaintiff was employed for the purpose of taking down and moving the bridge, and in doing this work a train was used on defendant's road upon which plaintiff, in the course of his employment and in obedience to the requirements of his superior, was riding at the time he sustained the injury, he was engaged in operating the road, and that if the negligence of the defendant and the care of the plaintiff were found, the defendant was liable under the statute. The court said that the purpose for which the train was operated could not relieve the defendants from liability, if the injury was sustained in its operation. *Schroeder v. Chicago, R. I. & P. R. Co.* (1877) 47 Iowa, 375, first appeal (1875) 41 Iowa, 344.

Recovery has been allowed where an accident occurred to a section man while he was engaged in track repairing (*Haden v. Sioux City & P. R. Co.* [1894] 92 Iowa, 226, 60 N. W. 537 [section foreman, after stepping on the track after the first section of a train had passed, was struck down by the second section, the approach of which he had

no reason to expect]); and while he was trying to remove a hand car from the track (*Frandsen v. Chicago, R. I. & P. R. Co.* [1873] 36 Iowa, 372); and while he was engaged in removing a hand car from a track to permit a train to pass (*Cahill v. Illinois C. R. Co.* [1910] 148 Iowa, 241, 28 L.R.A. (N.S.) 1121, 125 N. W. 331); and while he was traveling on freight cars loaded with material for ballasting, which was to be unloaded at a specified place (*Raybur. v. Central Iowa R. Co.* [1888] 74 Iowa 637, 35 N. W. 606, 38 N. W. 520 [plaintiff while getting on a car was thrown off by a sudden jerk]); and while he was traveling on a hand car (*Smith v. Chicago G. W. R. Co.* [1899] — Iowa, — 80 N. W. 658 [collision with another hand car]; *Larson v. Illinois C. R. Co.* [1894] 91 Iowa, 81, 58 N. W. 1076 [similar accident]).

In the last-cited case the court said "It is true . . . that running hand cars is not attended with the same degree of danger that attends the running of engines and trains of cars; yet in instances of serious accidents in that service are numerous. They are not so noticeable as other railroad accidents because fewer persons are exposed and the casualties are less. It is probable that, if the introduction of railroads had brought no greater perils than attend the movements of hand cars, the rule of the common law would not have been changed. It has been changed, and, we think, so as to include such a case as that stated in plaintiff's petition."

An employee who received an injury while riding on a small and overcrowded hand car, owing partly to the company's failure to provide the hand car with appliances for removing snow from the rails and a proper brake and foot rests, and partly to the negligent construction of the cattle guard, is within the statute. *Chicago, M. & St. P. R. Co. v. Artery* (1890) 137 U. S. 507, 34 L. ed. 747, 11 Sup. Ct. Rep. 129. The court said: "The plaintiff was upon a moving car propelled by hand power. The movement of the car, its speed, the position of the plaintiff upon it, and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and

the plaintiff were, and they were coemployees. . . . The railway was being used and operated in the movement of the hand car, quite as much as if the latter had been a train of cars drawn by a locomotive. If a single locomotive be on its way to its engine house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employee upon it, another employee is injured, the injury takes place in the use and operation of the railway, under § 1307, quite as much as if it takes place while the locomotive is drawing a train of cars. This we understand to be the manifest purport and effect of the decisions of the supreme court of Iowa on the subject, as well as obviously the proper interpretation of the statute."

A jury may properly find a foreman in charge of a hand car guilty of negligence where, upon the car's coming up behind another traveling much more slowly, he gave the signal to slacken speed, by motion merely, and not by speaking to the brakemen to the end that there might be no misunderstanding. *Lombard v. Chicago, R. I. & P. R. Co.* (1877) 47 Iowa, 494.

Although section hands incur more than ordinary danger where they are taken over a road in a hand car when a train is overdue, their safety is not of such paramount importance that a section boss must necessarily be pronounced guilty of negligence, if he has exposed them to that danger. *Campbell v. Chicago, R. I. & P. R. Co.* (1876) 45 Iowa, 76, disapproving instructions which implied that such a course was negligent if it involved "more than ordinary danger."

An engineer of a special train was not guilty of negligence in running down a hand car proceeding in the same direction and operated by employees whose backs were toward the train, where he gave all the signals that diligence required, appreciating the fact that a strong wind then blowing might prevent his signals from being heard, and used every appliance and effort at his command to stop the train as soon as he had reason to believe that his signals had not been heard. *Nelling v. Chicago, St. P. & K. C. R. Co.* (1895) 98 Iowa, 554, 63 N. W. 568. On the second appeal the rule was laid down

that a railroad engineer has a right to assume that a section man will perform his duty in watching for trains, and is under no obligation "to check his train on seeing him and another section man on a hand car on the track, until it is reasonably apparent that they are not likely to clear the track in time." *Nelling v. Chicago, St. P. & K. C. R. Co.* (1896) 98 Iowa, 559, 67 N. W. 404.

A superintendent of construction work directed to procure a pile driver and arrange the same for use becomes a vice principal, whose negligence in setting up the machine is that of the master, and the master is liable for an injury to a workman resulting from such negligence. *Wildor v. Great Western Cereal Co.* (1906) 134 Iowa, 451, 109 N. W. 789.

A hostler who, upon assuming charge of an engine, ran it out some distance, at the request of the yardmaster, to take that official to his dinner, is not without the scope of his employment while running the engine back to the roundhouse. *Jensen v. Omaha & St. L. R. Co.* (1902) 115 Iowa, 404, 88 N. W. 952.

(b) *Employees not deemed to be within the statute.*—A section hand injured while loading timber on a car. *Smith v. Burlington, C. R. & N. R. Co.* (1882) 59 Iowa, 73, 12 N. W. 763.

A car repairer who, although he was at times required to take passage upon the caboose of a freight train, or in a passenger car, to ride to his work, was not required to engage in his employment at points where there were moving trains. *Foley v. Chicago, R. I. & P. R. Co.* (1884) 64 Iowa, 644, 21 N. W. 124 (injury caused by the fall of a car which was being elevated by jackscrews), distinguishing *Deppe v. Chicago, R. I. & P. R. Co.* (1872) 36 Iowa, 52 (see above), on the ground that in that latter case part of plaintiff's duties were peculiar to the operation of a railroad, he being one of the force necessary to make the crew of a construction train. Special stress was laid on the dictum in that case that, if the plaintiff "had been employed exclusively in shoveling or loading the dirt he could not recover, although he might have ridden to and fro from his work on the cars."

A member of a construction gang, whose duties required him to go and ride upon, and to work upon and about, cars and tracks. *Matson v. Chicago,*

R. I. & P. R. Co. (1885) 68 Iowa, 22, 25 N. W. 911 (plaintiff was injured by a heavy stone thrown by a coemployee while the gang were raising ties).

One employed in a railway coal house, where the injury resulted from the negligence of a coemployee while coal was being loaded on a car. *Luce v. Chicago, St. P. M. & O. R. Co.* (1885) 67 Iowa, 75, 24 N. W. 600.

An employee handling a derrick used in coaling an engine. *Reddington v. Chicago, M. & St. P. R. Co.* (1899) 108 Iowa, 96, 78 N. W. 800, reversing on rehearing (1898) — Iowa, —, 75 N. W. 679 (Distinguishing *Akeson v. Chicago, B. & Q. R. Co.* (1898) 106 Iowa, 54, 75 N. W. 676).

One whose sole duty is to elevate coal to the platform convenient for delivering it to the tenders of the engines. *Stroble v. Chicago, M. & St. P. R. Co.* (1886) 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 63 (steps leading to platform gave way).

Workmen employed in the machine shops. *Potter v. Chicago, R. I. & P. R. Co.* (1877) 46 Iowa, 399.

A sweeper in a roundhouse, injured by falling into a hole which he alleged was negligently left uncovered by other employees. *Manning v. Burlington, C. R. & N. R. Co.* (1884) 64 Iowa, 240, 20 N. W. 169.

One engaged in wiping locomotive engines, opening and closing doors of an engine house, and removing snow from a turntable and the tracks. *Malone v. Burlington, C. R. & N. R. Co.* (1884) 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756 (where recovery was denied for an injury received, not in working the turntable, but in closing the doors).

In *Williams v. Chicago, R. I. & P. R. Co.* (1904) 106 Mo. App. 61, 79 S. W. 1167, it was held that the Iowa statute did not apply to employees engaged in loading iron bridge beams onto cars, since the statute applied only to injuries caused by moving trains.

The Iowa statute does not apply to employees engaged in building a bridge. *Depuy v. Chicago, R. I. & P. R. Co.* (1904) 110 Mo. App. 110, 84 S. W. 103.

Substituting new wheels for old on an engine in a repair shop of a railroad is not within the statute, although the engines to be repaired rest on rails connected with the main track of a system, and therefore a helper injured by

the starting, by a fellow servant, with out warning, while he is in a position of danger, of an engine to move another upon which such substitution is being made, cannot hold the railroad company liable for the injury. *Slaats v. Chicago M. & St. P. R. Co.* (1910) 149 Iowa, 735 — L.R.A. (N.S.) —, 129 N. W. 63, Ann Cas. 1912 D, 642.

In *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 337, 60 N. W. 655, it was held that the railroad company was not liable for the negligence of its machinist while engaged in setting a spring in a locomotive, which caused injuries to one of his helpers.

The reconstruction of an old and abandoned track preparatory to a resumption of its use as a railway is not within the Iowa statute. *Mitchell v. Wabash R. Co.* (1902) 97 Mo. App. 411, 76 S. W. 647.

Where an employee, while preparing to couple cars, was caught by the foot between the guard rail and one of the rails of the track, and, being unable to extricate himself, made outcries which were heard by a fellow brakeman who caused the train to be stopped, but not in time to prevent such employee from being run over, judgment upon a verdict for plaintiff was reversed, there being nothing whatever to show negligence on the part of defendant's employees. *Ford v. Central Iowa R. Co.* (1886) 69 Iowa, 627, 21 N. W. 587, 21 N. W. 755.

A railroad company is not liable for an injury to an employee caused by the starting of a hand car by a fellow servant while the former's hand was in a dangerous position, where no one knew of its position, and the car was started without directions from the foreman. *Hamilton v. Chicago, R. I. & P. R. Co.* (1894) 93 Iowa, 46, 61 N. W. 415.

In *Dunn v. Chicago, R. I. & P. R. Co.* (1906) 130 Iowa, 580, 6 L.R.A. (N.S.) 452, 107 N. W. 616, 8 Ann. Cas. 226, it was held that a section hand, although exposed to the hazards of injury due to passing trains, cannot recover for injuries caused by the negligence of another hand in leaving a bar where it would be struck by a train, since the negligence of the other hand was not connected with the use and operation of the railroad.

injured was under his control.⁵ Under this statute a servant assumes the risks of known dangers, even if they were created by the prior negligence of a fellow servant.^{5a}

An instruction to the effect that a railway company is bound, under the statute, to see that extraordinary diligence and care are exercised by coemployees is erroneous.⁶

It has been held that a complaint in an action on this statute should state that the negligence of an employee is relied on as the cause of action, and also what employee was negligent. In the case cited, the court refused to discuss whether allegations charging a railroad company with negligence could be supported by evidence of the negligence of a coemployee.⁷

G. KANSAS.

1779. [759a] Statutory provisions.—As to the constitutionality of the statutes discussed below, see the concluding chapter of this treatise.

The statute as first enacted in this state ran thus:

Every railroad company organized or doing business in this state shall be liable for damages done to any employee of such company, in consequence of any negligence of its agents, or by any misunderstanding of its engineers or other employees, to any person sustaining such damage. (Stat. 1874, chap. 93, § 1.)

A later provision (Gen. Stat. 1889, ¶ 1251; Gen. Stat. 1897, chap. 70, § 15) is substantially the same:

Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage.

⁵ In *Houser v. Chicago, R. I. & P. R. Co.* (1882) 60 Iowa, 230, 46 Am. Rep. 65, 14 N. W. 778, where the foreman of a bridge gang was the plaintiff, the court said: "The statute authorizing recovery by employees for the negligence of other employees is very broad and general in its terms. It makes no distinction as to the character of the employment, or the station or grade of the employee. If we should hold that the foreman of a gang of bridge builders is not a coemployee with the men working under his direction, and thus by construction limit the language of the statute, it would lead to all manner of distinctions which would be extremely difficult of application. We would be

called upon to determine whether a conductor under whose orders the brakeman performs his duty, a section foreman whose duty it is to direct the men under his charge, and who, as we understand, employs his men and discharges them at will, and other employees who have the direction and supervision of men under them, come within the provisions of the statute."

^{5a} *Chicago G. W. R. Co. v. Crotty* (1905) 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

⁶ *Hunt v. Chicago & N. W. R. Co.* (1868) 26 Iowa, 363.

⁷ *Burns v. Chicago, M. & St. P. R. Co.* (1886) 69 Iowa 450, 58 Am. Rep. 227, 30 N. W. 25.

This was amended in 1903 (Laws 1903, p. 599, chap. 393) by the addition of the following proviso:

That notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident.

The law as amended by Laws 1905, p. 566, chap. 341, extended the period within which the notice must be given to eight months. The provision as to the service of notice does not extend to actions at common law,¹ and is not applicable to cases where the servant was killed;² but in cases to which it applies, the giving of the notice is a condition precedent to a recovery.³ The bringing of the suit itself within the time limit does not dispense with the necessity for notice,⁴ and the defendant may avail himself of the failure to give the notice, although he has not pleaded it.⁵ The plaintiff must allege that the statutory notice was given.⁶ The requirement as to notice being wholly for the benefit of the employer, it may be waived by him.⁷

The notice may be served upon a ticket agent.⁸ A notice of an injury to a section hand engaged in track repairing, due to the negligence of a fellow laborer, and a claim for damages required by the fellow servant act, mailed to an assistant claim agent of the railroad company whose duty it is to examine and act upon such claims, and who received the notice and made an examination in pursuance thereof, is notice, to the company.⁹

The statute as amended by Laws 1907, chap. 281, §§ 1, 2 (Kan. Gen. Stat. 1909, §§ 6999, 7000), is as follows:

Sec. 1 (§ 6999). Every railroad company organized or doing business in the state of Kansas shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage: Provided, That notice in writing that an injury has been sustained stating the time and place thereof, shall have been given by or on behalf of

¹ *St. Louis & S. F. R. Co. v. Little* (1907) 75 Kan. 716, 90 Pac. 447.

² *Missouri P. R. Co. v. Larussi* (1908) 88 C. C. A. 230, 161 Fed. 66.

³ *Simerson v. St. Louis & S. F. R. Co.* (1909) 97 C. C. A. 618, 173 Fed. 612; *Pohlman v. Chicago, R. I. & P. R. Co.* (1910) 105 C. C. A. 36, 182 Fed. 492.

⁴ *Simerson v. St. Louis & S. F. R. Co.* (1909) 97 C. C. A. 618, 173 Fed. 612.

⁵ *Ibid.*

⁶ *Mathieson v. St. Louis & S. F. R. Co.* (1909) 219 Mo. 542, 118 S. W. 9 (case arose in Kansas).

⁷ *Smith v. Chicago, R. I. & P. R. Co.* (1910) 82 Kan. 136, 28 L.R.A.(N.S.) 1255, 107 Pac. 635.

⁸ *St. Louis & S. F. R. Co. v. Burges.* (1905) 72 Kan. 454, 83 Pac. 991.

⁹ *Smith v. Missouri P. R. Co.* (1910) 82 Kan. 248, — L.R.A.(N.S.) —, 108 Pac. 76.

the person injured, to such railroad company within eight months after the occurrence of the injury: Provided, however, That where an action is commenced by the injured person within said eight months, it shall not be necessary to give such notice: And provided further, That where any person injured is in the hospital of or under the charge of the railroad company causing the injury, or is prevented by the effects of said injury, the said eight months shall not begin to run until such injured person is discharged from said hospital or care of said railroad company, or until such disability be removed: Provided further, That in case said injured person shall die, as a result of said injuries, within said eight months, it shall not be necessary to give said notice: Provided further, That said notice need not state whether or not suit is intended to be brought.

Sec. 2 (§ 7000). The service mentioned in § 1 hereof may be served by a written copy thereof, by the person injured or anyone on his behalf, upon any person designated by the railroad, in any county in which the action might be brought, as provided in § 4499 of the General Statutes of Kansas of 1901 or if no such person has been designated or appointed, as in said section provided, then upon any local superintendent of affairs, freight agent, agent to sell tickets, or station keeper of such company or corporation in such county, or such service may be made by leaving a copy thereof at any depot or station of such company or corporation in such county, with the person in charge thereof or in the employ of such company or corporation, and such service shall be held and deemed complete and effectual. Proof of such service shall be made by the affidavit of the party making the same, or other persons knowing the facts.

It is to be noted that the substantive provisions of the statute of 1907 do not differ materially from those of the act of 1874, and consequently, so far as these provisions are concerned, all the various acts may be considered as one statute.

The operation of this statute is confined strictly to railroad corporations. A partnership of private persons engaged in constructing a road is not within its purview, although it is operating cars and trains in the prosecution of its work, having servants and employees at work upon the road and in charge of the trains.¹⁰

Although the fellow servant act of Kansas in terms makes a railroad company liable to employees for "negligence of its agents" and the "mismanagement of its engineers and other employees," it cannot be contended that it is intended by the act to make a distinction between agents on the one hand, and the engineers and other employees on the other, and also between negligence and mismanagement.¹¹

"The statute changes this rule [common-law rule of assumption of

¹⁰ *Beeson v. Busenbark* (1890) 44 *man* (1905) 39 Tex. Civ. App. 274, 87 Kan. 669, 10 L.R.A. 839, 25 Pac. 48. S. W. 401.

¹¹ *Missouri, K. & T. R. Co. v. Keller-*

risk] so far as it affects railway employees engaged in the operation of the road, and such an employee assumes the risk of injury through the negligence of another, only when he knows that the other is incompetent or habitually negligent, and continues to work with him without protest and without inducement on the part of the employer that a change will be made."¹²

1780. [760] What injuries are within the scope of the statute.—The Kansas statute is couched in language very similar to that found in the first Iowa act, upon which it is avowedly based. In Kansas, therefore, the liability of railway companies is determined upon principles similar to those discussed in the preceding subtitle, employees being held entitled or not, according as their work was or was not "directly connected with the operation of the road."¹

But in the absence of any amending act similar to that of Iowa the provisions of the Kansas statute are deemed to be applicable to various classes of employees, who under the decisions rendered with reference to the more recent legislation in the sister state, would not be entitled to recover. The Iowa doctrine which confines the benefit of the act to cases where the delinquent and injured employees, or either of them, were engaged in the use and operation of a railroad, is rejected in Kansas.²

The cases collected in the subjoined note indicate the employees who are and who are not, entitled to claim the benefit of the statute.³ For other cases involving the same question arising under

¹² *Missouri, K. & T. R. Co. v. Green* (1907) 75 Kan. 504, 89 Pac. 1042.

¹ *Chicago, R. I. & P. R. Co. v. Stahley* (1894) 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Chicago, K. & W. R. Co. v. Pontius* (1894) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Atchison, T. & S. F. R. Co. v. Koehler* (1887) 37 Kan. 463, 15 Pac. 567.

In *Iarussi v. Missouri P. R. Co.* (1907) 155 Fed. 654, it was said that, as the statute was adopted from Iowa, the construction given in that state to the statute was adopted also.

² *Union P. R. Co. v. Harris* (1885) 33 Kan. 416, 6 Pac. 571.

³ See notes to *Johnson v. Great Northern R. Co.* 18 L.R.A. (N.S.) 478, and *Hanson v. Northern P. R. Co.* 22 L.R.A. (N.S.) 968.

(a) *Employees within the statute.*—A brakeman thrown from a moving car by the engineer's suddenly stopping the engine and car with a violent jerk,

without signal or necessity, when the car was moving at about 6 miles an hour and was about 400 feet away from the stationary part of the train to which it was to be coupled under signals from the brakeman. *Kansas City, Ft. S. & M. R. Co. v. Murray* (1895) 55 Kan. 336, 40 Pac. 646.

An employee who, while engaged in ditching along the track, was struck by a piece of coal from the tender of a passing engine on which it had been piled to a dangerous height. *Croll v. Atchison, T. & S. F. R. Co.* (1896) 57 Kan. 548, 46 Pac. 972, reversing (1896) 3 Kan. App. 242, 45 Pac. 112.

A section man injured, while traveling on a hand car, by a collision with another car. *Union Trust Co. v. Thomson* (1881) 25 Kan. 1.

In *Iarussi v. Missouri P. R. Co.* (1907) 155 Fed. 654, affirmed in (1908) 88 C. C. A. 230, 161 Fed. 66, it was held that a track repairer injured, while be

other statutes, see §§ 1660, 1778, 1782, 1784, *b*, 1790, 1795, *a*, 1801a.

ing taken from his work in a caboose, by a collision with another train, was within the statute.

A section hand upon whom a collaborer let a rail fall. *Union P. R. Co. v. Harris* (1885) 33 Kan. 416, 6 Pac. 571.

A section man engaged in track repairing, who is injured by the negligence of a fellow laborer, is within the protection of the fellow servant act. *Smith v. Missouri P. R. Co.* (1910) 82 Kan. 248, — L.R.A.(N.S.) —, 108 Pac. 76.

A section man injured while unloading ties from a car for the purpose of repairing a railroad track, by the negligence of a coemployee in turning the tie before the former has secured a good hold, and pulling it so as to strike him. *Atchison, T. & S. F. R. Co. v. Brassfield* (1893) 51 Kan. 167, 32 Pac. 814.

One employed on the track and in the yard to assist in loading rails, whose particular duty it was to assist in placing the rails on the car after they were lowered from the pile by another set of employees, the injury being due to the negligence of the latter employees in lowering a rail before plaintiff had sufficient time to get out of the way after being duly warned. *Atchison, T. & S. F. R. Co. v. Koehler* (1887) 37 Kan. 463, 15 Pac. 567.

An employee upon a construction train, whose business was to carry water for the trainmen and to gather and put up tools, and who, while riding upon the train, was directed to pick up a tool on the rear flat car, and in attempting to do so was thrown off by the reversing of the engine without a signal. *Missouri P. R. Co. v. Haley* (1881) 25 Kan. 35 (negligence on part of engineer was denied, as engine was reversed to prevent a collision with cattle).

An employee in a roundhouse, employed in putting an engine into condition for immediate use. *Chicago, R. I. & P. R. Co. v. Stahley* (1894) 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363.

A fireman on a switching engine, who was injured by a collision with another switching engine while he was shoveling coal into the engine. *Missouri P. R. Co. v. Mackey* (1885) 33 Kan. 298, 6 Pac. 291.

An employee whose general employ-
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ment was as a bridge carpenter, but who received injuries by reason of the negligence of a coemployee while engaged in loading timbers on a car for transportation over the road. *Chicago, K. & W. R. Co. v. Pontius* (1893) 52 Kan. 264, 34 Pac. 739, affirmed in (1895) 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

The engineer in charge of a switch engine is not, as matter of law, free from negligence in failing to observe that a push car which he sees in front of him at a sufficient distance to stop the engine before reaching it is so close to the track as to collide with an employee riding on the engine. *Atchison, T. & S. F. R. Co. v. Slattery* (1896) 57 Kan. 499, 46 Pac. 941.

A freight engineer who approaches a work train in plain view in front of him, so near and at such a rate of speed that it is necessary to make a sudden and violent application of the air brakes to prevent a collision, whereby a brakeman is thrown from the top of a car and killed, is guilty of negligence. *Atchison, T. & S. F. R. Co. v. Carter* (1898) 60 Kan. 65, 55 Pac. 279.

A railway company is not liable for personal injuries sustained by a fireman on a motor or dummy, through the alleged negligence of the engineer in failing to keep a proper lookout for obstructions upon or near the track, unless the obstruction is there for a sufficient length of time to enable the engineer in the exercise of reasonable care to know of it, and stop the motor before reaching it. That it is there at the precise moment of the collision is insufficient. *Telle v. Leavenworth Rapid Transit R. Co.* (1893) 50 Kan. 455, 31 Pac. 1076 (for general principle here applied, see chapter XLIII., *ante*).

An engineer was negligent in failing to stop a train in time to prevent a collision with a hand car upon the track, where he had time to do so after it was reasonably apparent to him that the car could not be moved from the track by workmen who were engaged in such an attempt. *Walker v. Shelton* (1898) 59 Kan. 774, 52 Pac. 441.

The foreman of a crew of section men who takes one end of a rail upon his shoulder to relieve a section man who

H. MINNESOTA.

1781. [760a] Statutory provisions.—As to the constitutionality of these statutes, see the concluding chapter of this treatise. By Law of 1887, chap. 13, and Gen. Stat. 1894, § 2701, it is enacted as follows:

Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributorily negligence on his part, when sustained within this state; and no contract, rule or regulation between such corporation and any agent or servant shall impair or diminish such liability; Provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use.

This statute was amended (Rev. Laws 1905, § 2042) to read as follows:

Every company owning or operating, as a common carrier or otherwise, a railroad, shall be liable for all damages sustained within this state by any

has been carrying it, and gives the word to throw it down before the latter has stepped to a place of safety, by reason of which he is injured, is guilty of negligence which will render the company liable to the latter. *Atchison, T. & S. F. R. Co. v. Vincent* (1896) 56 Kan. 344, 43 Pac. 251 (service necessary to the use and operation of the road).

A section hand who, while in the performance of his duties, took a hand car off the track to allow a train to pass, and while standing near it and in sight of the engineer was struck in the eye by steam and water thrown from the passing engine, was held to have a cause of action. *Atchison, T. & S. F. R. Co. v. Thul* (1884) 32 Kan. 255, 49 Am. Rep. 484, 4 Pac. 352.

The act of a railroad employee in throwing the forward end of a plank from a car in motion before the signal to throw had been given, and before the employee holding the rear end had thrown the same, was gross negligence. *Riley v. Grand Island Receivers* (1897) 72 Mo. App. 280 (decision as to Kansas statute).

Where a section of a train has been shunted onto a track, those in the management of the train must use reason-

able diligence to see that it has gone sufficiently far to be cleared by any other cars which may afterwards be shunted on to an adjoining track; and if the second section strikes, the company is liable for any injury which may be caused by the collision to an employee on the first section. *Atchison, T. & S. F. R. Co. v. Butler* (1896) 56 Kan. 433, 43 Pac. 767.

A railway company is not liable to an employee injured through the act of a coemployee who, while they were jointly lifting out of its place the fire box of a locomotive, suddenly, without warning, dropped his end of the box and injured the former, because some ashes fell into his eyes, causing intense pain. *Union P. R. Co. v. Mahaffy* (1896) 4 Kan. App. 88, 46 Pac. 187.

(b) *Employees not within the statute.*—A stone mason employed by a railroad company in setting curbing around a depot and office building, who is injured by the fall of a curbstone left standing in an insecure position by a coemployee, is not within the protection of the act. *Missouri, K. & T. R. Co. v. Medaris* (1899) 60 Kan. 151, 55 Pac. 875 (not "a peculiar peril incident to the operation of the railroad").

agent or servant thereof, without contributory negligence on his part, by reason of the negligence of any other servant thereof, and no contract nor any rule or regulation of such company shall impair or limit such liability. But this section shall not be so construed as to render any railroad company liable for damages sustained by any such agent or servant while engaged in the construction of a new road or any part thereof not open to public travel or use.

The statute is constitutional.¹ It is not applicable to street railways, although they may be operated by cable.²

¹The equal protection of the laws is not denied by construing the proviso excepting cases of injuries sustained by railway employees "while engaged in the construction of a new road or any part thereof not open to public travel or use," from the provisions of Minn. Gen. Stat. 1894, § 2701, abrogating the fellow-servant rule, as only exempting incomplete railroads, and therefore as not excepting from the operation of the statute an accident on a narrow-gauge track on which dump cars were run by a mining company for the purpose of stripping the earth from the surface of its mine. *Minnesota Iron Co. v. Kline* (1905) 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159.

²*Funk v. St. Paul City R. Co.* (1895) 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099. Mitchell, J., in a concurring opinion, said: "In its original literal sense the word 'railroad' means a road with rails laid on it, upon which the wheels of carriages or vehicles run. In this sense it would, of course, include street railroads. But according to common popular usage the word 'railroad,' without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight; and whenever street railroads are referred to the word 'street' is prefixed. This is also the general legislative use of the words. In all the legislation of this state I have found no act (unless this be an exception) in which the word 'railroad' or 'railway,' standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an act (unless this be an exception) which had reference to street railroads in which the word 'street' was not prefixed. I do not claim that there might not be a law enacted where it

would be evident from its subject-matter and object that the word 'railroad' was intended to include street railroads. But in my opinion this is clearly not such a case. The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those resulting from the negligence of fellow servants. The remedy sought to be attained was better protection to railroad employees from these peculiar hazards. The peculiar conditions which were considered to require peculiar legislation for the protection of employees engaged in the operation of railroads are too familiar to require repetition. Generally, it may be stated that the most cogent ones were the high rate of speed at which trains are run; and great momentum acquired by long and heavy trains, where an accident to one car is liable to wreck the entire train; the peculiar dangers incident to the operation of freight trains; that the roads are often built upon high embankments or trestles where an accident would be peculiarly dangerous; the danger of collisions, owing to the fact that numerous trains are operated over the same tracks; the vast number of employees of different grades and engaged in different lines of work, many of whom are necessarily personally unknown to the others. The mere fact that steam was used as a motive power was not, in and of itself, either the occasion or the justification for the enactment of a law establishing for railroad companies a special rule of liability for the negligence of their servants. If one of these companies was to substitute electricity for steam as its motive power, it would still be subject to the provisions of the act. In the case of street railways, whatever be the motive power, the peculiar conditions above referred to either do not exist at all, or, at most, only in a very modi-

Under the earlier statute, it was held in a Federal case that a private logging company which has built and operates a railroad for its own private use is not a railroad corporation within the terms of the statute.³ But under the state decisions that the act is based upon a distinction in the nature of the employment, and not of the employers, it has been held to apply to a private company making use of locomotives and cars the employees of which are subjected to the same dangers as employees of railroads engaged as common carriers. It is to be noted that any question as to the correct interpretation of the statute upon this point was removed by the express terms of the later act.

To bring a railroad company within the act it is not necessary that it should own, but only that it should be "operating," a railroad in the state.⁵

fied degree. This is a fact of such common knowledge that it need not be more than stated. The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have in fact done so. The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word 'railroad' in its ordinary popular sense, and in the sense in which they themselves had generally used it in other statutes."

To the same effect, see *Lundquist v. Duluth Street R. Co.* (1896) 65 Minn. 387, 67 N. W. 1006.

³ *Williams v. Northern Lumber Co.* (1901) 113 Fed. 382.

⁴ *Schus v. Powers-Simpson Co.* (1902) 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68 (logging company); *Kline v. Minnesota Iron Co.* (1904) 93 Minn. 63, 100 N. W. 681, affirmed in (1905) 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159 (mining road); *Glines v. Oliver Iron Min. Co.* (1909) 108 Minn. 278, 122 N. W. 161 (mining road); *Papkovich v. Oliver Iron Min. Co.* (1909) 109 Minn. 294, 123 N. W. 824 (mining road).

In *Schoen v. Chicago, St. P. M. & O. R. Co.* (1910) 112 Minn. 38, — L.R.A. (N.S.) —, 127 N. W. 433, it was held that where a railroad company and a

brewing company entered into a contract with each other whereby for a fixed rental the railroad company furnished to the brewing company a locomotive for its express use in a yard containing tracks and switches the tie and rails for which were owned by the railway company and the real estate by the brewing company, the engineer and fireman operating the locomotive being selected by the railway company and paid by the brewing company, the maintenance and operation of such yard is the operation of a railroad as defined by § 2042, Rev. Laws 1905.

In *Mahoning Ore & Steel Co. v. Blomfelt* (1908) 91 C. C. A. 390, 163 Fed. 827, it was held that the act of 1894 as construed by the supreme court of the state, applies to injuries received by a brakeman employed on a short railroad operated by a mining company to carry its ore. To the same effect, *Kibbi v. Stevenson Iron Min. Co.* (1905) 61 C. C. A. 145, 136 Fed. 147.

In *Cook v. Modern Brotherhood* (1911) 114 Minn. 299, 131 N. W. 334 it was held that a mining company which used in its mining operations a system of railway tracks of standard gauge, aggregating in length some 10 miles, operated a railroad within the meaning of Rev. Laws 1905, § 2042; but that it did not operate a freight railway within the meaning of an insurance policy which prohibited the insured from acting as a "railway freight brakeman."

⁵ *Moran v. Eastern R. Co.* (1892) 48 Minn. 46, 50 N. W. 930 (defendant was

Work done by a railroad company in constructing a yard to be used in connection with a line already open to the public is not construction of a new road within the proviso with which the statute concludes.⁶

1782. [761] What injuries are within the purview of the statute.—To enable a servant to claim the benefit of this statute it is not necessary that the injury should have been received through negligence in the operation of trains, or in the moving of detached cars. Recovery is allowed wherever the injured person was engaged in work which exposed him to some element of hazard or condition of danger peculiar to the repair and operation of railroads. The scope and effect of the statute, therefore, are virtually the same as that which has been enacted in Kansas.¹ For other cases involving the same question arising under other statutes, see §§ 1660, 1778, 1780, 1784, *b*, 1790, 1795, *a*, 1801a.

operating a line composed of the tracks of several companies).

⁶ *Moran v. Eastern R. Co.* (1892) 48 Minn. 46, 50 N. W. 930; *Schneider v. Chicago, B. & N. R. Co.* (1889) 42 Minn. 68, 43 N. W. 783 (negligent employee was operating engine hauling cars on a temporary track for the purpose of filling in low land for a yard).

¹ See notes to *Johnson v. Great Northern R. Co.* 18 L.R.A.(N.S.) 478, and *Hanson v. Northern P. R. Co.* 22 L.R.A.(N.S.) 968.

(a) *Employees within the statute.*—A section hand injured, while at work on the road, by the negligence of an engineer in operating his engine. *Smith v. St. Paul & D. R. Co.* (1890) 44 Minn. 17, 46 N. W. 149.

A section hand injured by the negligence of trainmen may recover. *Northern P. R. Co. v. Behling* (1893) 6 C. C. A. 681, 12 U. S. App. 662, 57 Fed. 1037.

A car cleaner engaged inside a passenger coach, and injured by the kicking against it of another coach at a dangerous and unusual speed through the negligence of a switching crew. *Mitchell v. Northern P. R. Co.* (1895) 70 Fed. 15.

An engine wiper in a roundhouse, injured while assisting in coaling an engine, by the negligence of a coemployee in moving the same. *Mikkelsen v. Truesdale* (1895) 63 Minn. 137, 65 N. W. 260.

A wiper in a roundhouse, injured by the negligence of his fellow servants while engaged in straightening a wire

cable used to pull a plow in unloading gravel from flat cars in repairing the road. *Nichols v. Chicago, M. & St. P. R. Co.* (1895) 60 Minn. 319, 62 N. W. 386. The court said: "It is claimed by respondent that the use of a cable is not peculiar to the railroad business: that cables are used in operating elevators and mines, in transmitting power in factories, and in many ways, and that, therefore, the statute does not apply. The test is not whether the conditions are in any respect parallel to those to be found in some other kind of business, or whether the appliances are in any respect similar to those used in some other kind of business. If there is any element of hazard or condition of danger which contributed to the injury, and which is peculiar to the railroad business, the statute applies. There certainly are such elements and conditions in this case."

An employee whose duty it was to step from a high platform onto stock cars as they drew up opposite the platform, and pull bundles of hay from the platform on the top of the cars, and who was thrown to the ground and injured by stepping from the platform onto the top of a car moving, without his knowledge, at an unsafe rate of speed, in obedience to the order of the conductor. *Leier v. Minnesota Belt-Line R. & Transfer Co.* (1895) 63 Minn. 203, 65 N. W. 269.

The danger incident to great and extraordinary haste in which the work of

replacing ties is performed in order to avoid danger to trains is peculiar to the "railroad business," within the construction placed upon the statute; and a section man injured under such circumstances by the dropping of a rail by a fellow servant is within the protection of the statute. *Blomquist v. Great Northern R. Co.* (1896) 65 Minn. 69, 67 N. W. 804. See also *Anderson v. Great Northern R. Co.* (1898) 74 Minn. 432, 77 N. W. 240, where the doctrine of the *Blomquist Case* was approved.

Where there was evidence tending to show that the crew of men engaged in repairing a railroad track were being hastened in order to prepare the track for an approaching train, it was for the jury to determine whether they were being subjected to the hazards peculiar to the use and operation of a railroad. *Christiansen v. Chicago, M. & St. P. R. Co.* (1909) 107 Minn. 341, 120 N. W. 300.

An employee engaged in unloading rails from hand cars may be found to be subjected to railroad hazards, where there is evidence that the work had to be performed with unusual haste because a train was waiting to take the cars out. *Janssen v. Great Northern R. Co.* (1909) 109 Minn. 285, 123 N. W. 664.

The jury may find that a servant engaged in replacing old rails with new is subjected to railroad hazards. *Tay v. Willmar & S. F. R. Co.* (1907) 100 Minn. 131, 110 N. W. 433.

"The act of separating and discarding the waste matter from the coal upon the right of way while supplying the engine with fuel was just as much a part of the operation of the railroad with respect to risk and hazard arising therefrom to other employees as was the work of the section man in taking up rails and putting in new ties in *Blomquist v. Great Northern R. Co.* (1896) 65 Minn. 69, 67 N. W. 804, or as the work of clearing away a railway wreck, as held in *Kreuzer v. Great Northern R. Co.* (1901) 83 Minn. 385, 86 N. W. 413." *Swartz v. Great Northern R. Co.* (1904) 93 Minn. 339, 101 N. W. 504 (section hand injured by piece of slate or stone thrown from the tender of a passing engine).

An employee while removing cinders from a locomotive is within the statute.

Stauning v. Great Northern R. Co. (1903) 88 Minn. 480, 93 N. W. 518.

It is negligence in an engineer to drive a locomotive against a car to which it is to be coupled, with an extraordinary sudden impulse. *McKnigh v. Chicago, M. & St. P. R. Co.* (1890) 44 Minn. 141, 46 N. W. 294.

A railway company is liable for injuries to a section man on a hand car under the direction of the foreman, sustained by the negligence of the foreman in not stopping the car and having it taken off the track when he knew that a train was following, that fact being unknown to the section man. *Slette v. Great Northern R. Co.* (1893) 53 Minn. 341, 55 N. W. 137.

A swingman on top of freight car next the engine, whose special duty it is to look out for signals from the rear end of the train, and watch so as to avoid accidents in case the train breaks in two, does not, as matter of law, exercise reasonable care where he fails while setting a brake, to observe a signal from the conductor at the rear end of the train after a break occurs, repeated several times, for the engineer to go ahead, as a result of which a brakeman is injured while attempting to uncouple the engine. *Wood v. Chicago, St. P. M. & O. R. Co.* (1896) 66 Minn. 49, 68 N. W. 462.

Evidence which shows that an engineer, on receiving from the conductor a signal to stop after the train had passed the mile board, adopted the usual course for a station stop, except that he put on a little more air than usual, does not show that the engineer was guilty of negligence in making an unduly sudden stop. *Crane v. Chicago, M. & St. P. R. Co.* (1901) 83 Minn. 278, 86 N. W. 328.

Whether or not the work was being executed under such circumstances as to expose the plaintiff to the peculiar hazards of railroad service is a question for the jury, where the evidence shows that, while at work with a number of others clearing away a wrecked train he entered a car, and was handing out the contents to others on the top of the car; that, owing either to their number or the removal of the contents from within, the roof sagged down on him; and that the road master had given no directions as to the manner of executing his orders, but had repeatedly told the men to hurry the work. *Kreuzer v.*

Great Northern R. Co. (1901) 83 Minn. 385, 86 N. W. 413.

The conduct of a switching crew in using the main track of a railroad for switching purposes at the time a passenger train is due, and in plain violation of the rules of the company, is gross negligence, almost wanton and criminal, which renders the company liable for injuries to the engineer of the passenger train resulting therefrom. *Hall v. Chicago, B. & N. R. Co.* (1891) 46 Minn. 439, 49 N. W. 239.

Whether an engineer in charge of a second locomotive was guilty of negligence in failing to heed a signal to shut off steam is for the jury, where the testimony shows that such signal was given after the leading locomotive left the rails, but the engineer in charge of the second engine testifies that he did not hear it. *McGrath v. Great Northern R. Co.* (1899) 76 Minn. 146, 78 N. W. 972.

Negligence is predicable from evidence which shows that, after the forward part of a train had been uncoupled and moved some distance away from the rear section, the engineer, finding that the forward section was stalled, backed down again without ringing a bell or sounding a whistle, and crushed to death the brakeman, who, after uncoupling the two sections of the train, was proceeding to do some work on the coupler. *Hooper v. Great Northern R. Co.* (1900) 80 Minn. 400, 83 N. W. 440.

An engineer who is about to back a train onto a side track for the purpose of having attached to it some loaded cars, and observes that there is another car further on which is only partially loaded, is bound to know that there may be someone working on the latter car, and is therefore negligent if he propels the train with such force that the coupling is missed and the loaded cars driven against one partially loaded, the result being that a person engaged in loading that car is killed. *Jacobson v. St. Paul & D. R. Co.* (1889) 41 Minn. 206, 42 N. W. 932.

The work of a yard or shop employee who is injured by the negligent operation of a locomotive under steam and upon the tracks in a roundhouse is within the hazards peculiar to the operation of railroads. *Hoveland v. Chicago, R. I. & P. R. Co.* (1910) 110 Minn. 329, 125 N. W. 266.

A mason at work on the wall of a warehouse which is within 15 inches of

the side of an ordinary car standing on the track is within the protection of the Minnesota statute, where the cars are suddenly moved and he is crushed against the wall by a car of unusual width. *Bain v. Northern P. R. Co.* (1904) 120 Wis. 412, 98 N. W. 241.

The work of removing merchandise from wrecked cars, the result of a collision in a railroad yard, may embrace elements of danger peculiar to railroading, when performed in haste, under the direction of a foreman, and under unusual circumstances, such as working at night and over hours, for the purpose of clearing the tracks for the movement of trains. *Hanson v. Northern P. R. Co.* (1909) 108 Minn. 94, 22 L.R.A. (N.S.) 968, 121 N. W. 607.

In *Schoen v. Chicago, St. P. M. & O. R. Co.* (1910) 112 Minn. 38, — L.R.A. (N.S.) —, 127 N. W. 433, it was held that one who is run down by a locomotive upon a railroad track is injured as the result of exposure to a railroad hazard.

A switchman who, in the performance of his duty, is required to ride on his engine while assisting in pulling a train out of the depot yards, is entitled to recover from his master, the railroad company, for injuries received by reason of the negligence of the depot-company servants in operating a switch. *Floody v. Great Northern R. Co.* (1907) 102 Minn. 81, 13 L.R.A. (N.S.) 1196, 112 N. W. 875.

Servants at work on a pile-driver car propelled, by an engine on the car, along the tracks of a railroad, are exposed to "railroad hazards." *Johnson v. Great Northern R. Co.* (1908) 104 Minn. 444, 18 L.R.A. (N.S.) 477, 116 N. W. 936.

The statute is applicable to injuries caused by the operation of a hand car, as well as those caused by the operation of trains. *Steffenson v. Chicago, M. & St. P. R. Co.* (1891) 45 Minn. 355, 11 L.R.A. 271, 47 N. W. 1068 (action held maintainable where an employee was thrown off a moving hand car by the carelessness of a coservant); *Benson v. Chicago, St. P. M. & O. R. Co.* (1899) 75 Minn. 163, 74 Am. St. Rep. 444, 77 N. W. 798 (collision between hand cars); *Lindgren v. Minneapolis & St. L. R. Co.* (1902) 86 Minn. 152, 90 N. W. 381 (removing hand car from tracks).

In *Hider v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1911) 115 Minn. 325,

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1783. [746, 746aa] Text of statute.—The text of the Revised Statutes of 1909 is given, with a memorandum at the end of each section indicating the origin of the section:

Sec. 5434. Liability of railroad corporation for damages to agents or servants.—Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury. (Rev. Stat. 1899, § 2873.)

Sec. 5435. Vice principals defined.—All persons engaged in the service of any such railroad corporation doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection, or other duty owing by the master to the servant are vice principals of such corporation, and are not fellow servants with such employees. (Rev. Stat. 1899, § 2874.)

Sec. 5436. Fellow servants defined.—All persons who are engaged in the common service of such railroad corporation, and who while so engaged are working together at the same time and place, to a common purpose of same grade

132 N. W. 316, it was held that a section hand was within the protection of the statute, where he was injured by the act of two of the other hands, suddenly and without warning, jumping from the hand car while in motion, thus unexpectedly releasing his support and causing him to fall from the car.

Railroad employees are not, as matter of law, free from negligence in running a hand car at a high rate of speed on a down grade and slippery track, only 60 feet behind another hand car, where the usual distance at which hand cars are kept apart is 540 feet. *Christianson v. Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640.

(b) *Employees not within the statute.*—One of a crew of men engaged in repairing a bridge, who is injured by the negligence of a fellow servant in leaving the draw unfastened. *Johnson v. St. Paul & D. R. Co.* (1890) 43 Minn. 222, 8 L.R.A. 419, 45 N. W. 156.

Employees engaged in tearing down a bridge. *O'Neil v. Great Northern R. Co.* (1900) 80 Minn. 27, 51 L.R.A. 532, 82 N. W. 1086.

One of a crew of section men injured,

while engaged in loading railroad iron upon a flat car, by a rail negligently allowed by the others to fall upon his arm. *Pearson v. Chicago, M. & St. P. R. Co.* (1891) 47 Minn. 9, 49 N. W. 302

A servant injured, while putting a hose on an engine tender, then standing still, by the falling of loose coal dislodged by another servant standing on the tender to receive the hose. *Weise v. Eastern R. Co.* (1900) 79 Minn. 245, 82 N. W. 576.

An employee injured by a bolt driver through the bottom of a car which he was assisting to repair. *Holtz v. Great Northern R. Co.* (1897) 69 Minn. 524, 72 N. W. 805.

A boiler maker's assistant injured by the negligence of a coservant in letting fall the smokestack of a locomotive which was being removed. *Lavallee v. St. Paul, M. & M. R. Co.* (1889) 40 Minn. 249, 41 N. W. 974.

Employees engaged in operating a steam shovel in a gravel pit are not within the statute. *Jemming v. Great Northern R. Co.* (1905) 96 Minn. 302, 1 L.R.A. (N.S.) 686, 104 N. W. 1079.

neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employees, are fellow servants with each other: Provided, that nothing herein contained shall be so construed as to make any agent or servant of such corporation in the service of such corporation a fellow servant with any other agent or servant of such corporation engaged in any other department or service of such corporation. (Rev. Stat. 1899, § 2875.)

Sec. 5437. Contracts limiting liability declared invalid.—No contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of §§ 5434 to 5437, inclusive, shall be valid or binding, but all such contracts or agreements shall be null and void. (Rev. Stat. 1899, § 2876.)

Sec. 5438. Actions not to abate by reason of death.—Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver, or corporation liable for such injuries and his legal representatives; and the liability and the measure of damages shall be the same as if such death or deaths had not occurred. (Laws 1907, p. 252.)

Sec. 5439. Railroads and railroad corporations, or companies, as used in this article, defined.—Whenever the words "railroad companies" or "railroad corporation" shall be found in any section of this article, it shall be taken and construed to include all companies, corporations, person, or persons operating any railroad in this state, and wherever the word "railroad" occurs in any section in this article, it shall be taken and construed to include all railroads operated in this state, by whatever motive or power propelled, and shall include all railroads or railways commonly known as street railways, and all railroads operated by terminal companies or associations, known as "terminal railroads" or "railways," as well as all railways or railroads operated anywhere in the state, commonly known as electric railroads, whether they be wholly or in part in the city or country districts; also all railroads within the country or city, operated by what is commonly known as cable or motor power, or by horse power. (Laws 1905, p. 138.)

Sec. 5440. Owners of mines liable for damages to employees by negligence of fellow servants.—Every person, company, or corporation operating a mine or mines in this state producing lead, zinc, coal, or other valuable minerals, shall be liable for all damages sustained by any agent or servant thereof, while engaged in operating such mine or mines, by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury. (Laws 1907, p. 251.)

Sec. 5441. Vice principals defined.—All persons engaged in the service of any such person, company, or corporation doing business in this state, who are intrusted by such person, company, or corporation with the authority of super-

intendence, control, or command of other persons in the employ or service of such person, company, or corporation, or with authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection, or other duty owing by the master to the servant, are vice principal of such person, company, or corporation, and are not fellow servants with such employees. (Laws 1907, p. 251.)

Sec. 5442. Fellow servants defined.—All persons who are engaged in the common service of such person, company, or corporation operating a mine or mines, and while so engaged are working together at the same time and place to a common purpose of the same grade, neither of such persons being intrusted by such person, company, or corporation with any superintendence or control over their fellow employees, are fellow servants with each other. (Laws 1907 p. 251.)

Sec. 5443. Contracts limiting liability invalid.—No contracts made between any person, company, or corporation so operating such mine or mines and their agents or servants, based upon the contingency of the injury or death of any such agent or servant, limiting the liability of the employer for any damages under the provisions of this and the three next preceding sections shall be valid or binding, but all such contracts or agreements shall be null and void. (Laws 1907, p. 251.)

Sec. 5444. Construction and application of four preceding sections.—Nothing in the four next preceding sections shall be so construed as applying to or including the operation, construction, or repairing of concentrating mills, flumes or tramways wholly above ground. (Laws 1907, p. 251.)

Sec. 5445. Survival of right of action in certain cases, in favor of whom and when.—Whenever any cause of action shall accrue to any agent or servant of any person, company, or corporation under §§ 5440 to 5444, inclusive, and death shall ensue to such agent or servant by reason of the negligence provided for in said sections, the cause of action shall survive in favor of the widow and minor children of the deceased: Provided, that action therefor shall be brought by the widow within six months after such death, and if she shall fail to bring such action, then within twelve months after such death by such minor children; and provided, further, that recovery in case of such death shall not exceed the sum of ten thousand dollars. (Laws 1909, p. 463.)

Sec. 5425. Damages for injuries resulting in death in certain cases, where and by whom recoverable.—Whenever any person, including an employee of the corporation, individual, or individuals hereinafter referred to, whose death is caused by the negligence of a coemployee thereof, shall die from any injury resulting or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car, or train of cars, or any street, electric, or terminal car or train of cars, or of any master, pilot, engineer, agent, or employee whilst running, conducting, or managing any steamboat, or any of the machinery thereof, or of any driver of any stagecoach, automobile, motor car, or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal railroad, or any part thereof, or in any locomotive, car, street car, electric car, or terminal car, or in any steamboat, or the machinery thereof, or

in any stagecoach, automobile, motor car, or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver shall be at the time such injury is committed, or who owns, operates, or conducts any such railroad, locomotive, car, street car, electric car, terminal car, automobile, motor car, stagecoach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskilfulness, negligence, or criminal intent above declared, shall forfeit and pay as a penalty, for every such person, employee, or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural-born or adopted child or children of the deceased: Provided, that if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption; or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural-born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or, fourth, if there be no husband, wife, minor child, or minor children, natural-born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor, and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased, and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual, or individuals may show as a defense that such death was caused by the negligence of the deceased. In suits instituted under this section, it shall be competent, for the defendant for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskilfulness, negligence, or criminal intent. (Rev. Stat. 1899, § 2864, amended, Laws 1905, p. 135.)

As to the constitutionality of these provisions, see the concluding chapter of this treatise.

1784. [746a] Effect of these provisions.— *a. Generally.*—The fellow servant act as applied to railroads is constitutional.¹

This statute is *in pari materia* with Rev. Stat. 1889, § 2666, defining the term "railroad corporation;" and both statutes must be construed together.²

¹ *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* (1902) 170 Mo. Rep. 857, 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, affirmed in (1904) 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857.
² *Powell v. Sherwood* (1901) 162 Mo. 605, 63 S. W. 485.

This act includes a corporation whose charter expressly authorizes it "to operate terminal lines of railroads."³ It appears that the earlier statute would apply to interurban roads.⁴ That the railroad is operated by receivers is immaterial.⁵

The statute is inapplicable to injuries occurring in another state, and caused by a railroad company which was not operating a railroad within the state.⁶ It does not give any cause of action for injuries not caused by the negligence of a fellow servant,⁷ and is inapplicable where there is no evidence of any negligence on the part of anyone save the injured servant himself.⁸ And it does not apply to servants in other occupations.⁹

Under the fellow servant act the negligence of a fellow servant is the negligence of the master, which, under the common-law rule of assumption of risk as applied in Missouri, is never assumed by the servant.¹⁰ The doctrine that the liability of a master is confined to the acts done within the real or apparent scope of the authority confided to his agents or servants has not been affected by the fellow servant act.¹¹

Prior to the passage of the act of April 13, 1905 (Mo. Rev. Stat. 1909, § 5425), the servant's cause of action for injuries due to the negligence of a fellow servant did not survive his death.¹²

³ *Penney v. St. Joseph Stock Yards Co.* (1908) 212 Mo. 309, 111 S. W. 79.

⁴ *Edge v. Southwest Missouri Electric R. Co.* (1907) 206 Mo. 471, 104 S. W. 90.

⁵ *Powell v. Sherwood* (1901) 162 Mo. 605, 63 S. W. 485. The court said: "In the case at bar, the individual holding the office of receiver is not the defendant, but the party really in interest is the corporation represented by the receiver. True, the word 'receiver' is not contained in the act of 1897, but we are warned by the maxim, *Qui hæret in litera, hæret in cortice*, that we must not always adhere to the letter. To do so in this case would violate the spirit of the statute, and render it obnoxious to the Constitution of this state. We hold, therefore, that the act of 1897 applies not only to railroad corporations, but also to receivers of such."

⁶ *McDermott v. Southern P. Co.* (1903) 122 Fed. 669.

⁷ *Strottman v. St. Louis, I. M. & S. R. Co.* (1908) 211 Mo. 227, 109 S. W. 769.

⁸ *Caldwell v. Missouri P. R. Co.* (1904) 181 Mo. 455, 80 S. W. 897.

⁹ *National Candy Co. v. Miller* (1908) 87 C. C. A. 207, 160 Fed. 51 (statute held not to apply to employees of candy factory).

¹⁰ *Briscoe v. Chicago, B. & Q. R. Co.* (1908) 130 Mo. App. 513, 109 S. W. 93.

¹¹ *Hamlett v. Chicago & A. R. Co.* (1901) 89 Mo. App. 354 (unauthorized order of fellow servant); *Bequette v. St. Louis, I. M. & S. R. Co.* (1900) 86 Mo. App. 601 (engine wiper attempted to move engine over side tracks for convenience of other employees engaged in making up train).

The negligent act of the fellow servant must have been committed not only while employed by the master, but must pertain to the duties which the servant was employed to perform. *Overton v. Chicago, R. I. & P. R. Co.* (1905) 111 Mo. App. 613, 86 S. W. 503 (servant on hand car running by its own momentum leaned over to put hat on the floor, and was struck by handle bars and thrown against plaintiff).

¹² *Strottman v. St. Louis, I. M. & S. R. Co.* (1908) 211 Mo. 227, 109 S. W. 769; *McMurray v. St. Louis, I. M. & S.*

b. "Operating" a railroad.—All employees whose functions are directly connected with the running of trains are, of course, covered by the words "engaged in the operation of such railroad."¹³ But the phrase is not applicable to such employees alone. To bring a servant within the statute it is merely necessary that he should be "engaged in some service that is necessary to the movement of trains."¹⁴

R. Co. (1910) 225 Mo. 272, 125 S. W. 751; *Sumner v. Missouri P. R. Co.* (1910) 151 Mo. App. 506, 132 S. W. 32 (engineer and fireman of train held to be fellow servants of an employee employed to pilot trains over a washed-out portion of the track).

The fellow servant statute does not confer any right of action against the railroad upon the widow of an employee who had been killed by the negligence of his fellow servant; the rights conferred are personal to the servant himself. *Broadwater v. Wabash R. Co.* (1908) 212 Mo. 437, 110 S. W. 1084.

¹³ In a case where an extra freight train was dispatched, with orders to look out between two specified points for a work train which on that section of the road had the right of way, except as to regular trains, it was held (1) that the failure of the train dispatcher to notify the operators of the work train of the approach of the freight, so that flags could have been set, constituted negligence; (2) that the persons operating the freight train were guilty of negligence in omitting to send out a flagman to locate the work train; (3) and that, as the cars of the work train were being pushed before the engine, the failure to post a flagman on the leading car to warn the engineer of approaching danger, as required by the rules of the company, constituted negligence. *Rinard v. Omaha, K. C. & E. R. Co.* (1901) 164 Mo. 270, 64 S. W. 124.

¹⁴ *Stubbs v. Omaha, K. C. & E. R. Co.* (1900) 85 Mo. App. 192, holding that an employee engaged in replacing old rails by new ones could recover for the negligence of a coemployee engaged in the same work; *Phippin v. Missouri P. R. Co.* (1906) 196 Mo. 321, 93 S. W. 410, holding that a switchman whose duties consisted chiefly in coupling and uncoupling cars could recover for injuries caused by the negligence of a switch tender.

A railroad company is liable for injuries to an employee caused by negli-

gence of another employee engaged in removing "fish plates" from the sides of rails. *Prash v. Wabash R. Co.* (1910) 151 Mo. App. 410, 132 S. W. 57.

A member of a section gang engaged in repairing the track to enable trains to run safely over it, who is stationed beneath a track running over a public street into which discarded ties are being thrown, to warn travelers on the street and remove the ties, is, while attempting to remove beyond danger a child which has appeared in the street, within the protection of the statute. *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.* (1902) 170 Mo. 473, 60 L.R.A. 249, 94 Am. St. Rep. 746, 71 S. W. 208, affirmed in (1904) 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857.

A section hand on a hand car is within the protection of the statute. *Overton v. Chicago, R. I. & P. R. Co.* (1905) 111 Mo. App. 613, 86 S. W. 503; *Rice v. Wabash R. Co.* (1902) 92 Mo. App. 35.

A section hand engaged in putting a hand car on the track is engaged in operating a railroad. *Thompson v. Chappell* (1902) 91 Mo. App. 297.

A pile-driving crew while at work in constructing a bridge is operating a railroad within the statute. *Huston v. Quincy, O. & K. C. R. Co.* (1908) 129 Mo. App. 576, 107 S. W. 1045.

Repairing or reconstructing a bridge over which railroad tracks are laid is operating a railroad within the meaning of the Missouri statute. *Ibid.*

One repairing bridges for a railroad company, if injured while in the line of duty, though not actually engaged in work on a bridge, is within the beneficial influence of the statute. *Gibler v. Quincy, O. & K. C. R. Co.* (1910) 148 Mo. App. 475, 128 S. W. 791.

An employee engaged in conveying freight from the warehouse to a car is engaged in operating a railroad. *Orendorff v. Terminal R. Asso.* (1906) 116 Mo. App. 348, 92 S. W. 148.

Employees engaged in loading and un-

For other cases involving the same question arising under other statutes, see §§ 1660, 1778, 1780, 1782, 1790, 1795, *a*, 1801a.

c. Who are vice principals.—A foreman of a train crew was not in giving orders, a fellow servant of a brakeman acting under his orders.¹⁵

d. Who are fellow servants.—A foreman while engaging in the performance of the duties of a laborer is a fellow servant of the other laborers.¹⁶

The engineer of a passenger train under the fellow servant law is not the fellow servant of a mere section hand.¹⁷ An engineer and conductor in the operating department of a railroad are not fellow servants of a master mechanic who was in the construction and repair department.¹⁸

A car repairer is not, as a matter of law, a fellow servant of a construction train crew working under a separate foreman, neither foreman having any authority and control over the other crew.¹⁹

A car starter does not represent the principal in ordering the motor man of a street car to move the car forward so as to clear the switch at the terminus of the line, where the car is being moved from one track to the other, preparatory to making the return trip, so as to render the principal liable for an injury thereby caused to the conductor; but he is a fellow servant of the conductor.²⁰

e. Contracts limiting liability for injuries.—A contract made voluntarily by a railroad employee with its "relief department," whereby, in consideration of the receipt of benefits from the depart-

loading freight are operating a railroad. *Turner v. Terminal R. Asso.* (1908) 132 Mo. App. 38, 111 S. W. 841.

For a fireman to stand on the pilot for a short time after attending to the headlight of his engine, in order to see what crew is operating a passing train, does not take him without the protection of the statute. *St. Louis & S. F. R. Co. v. Bussong* (1905) 40 Tex. Civ. App. 476, 90 S. W. 73 (Missouri statute).

A brakeman while lighting the lamps in the caboose, which is being switched so as to attach it to the train, is engaged in operating a railroad within the meaning of the statute. *St. Louis & S. F. R. Co. v. Smith* (1905) — Tex. Civ. App. —, 90 S. W. 926 (construing Missouri statute).

See notes to *Johnson v. Great North-*

ern R. Co. 18 L.R.A. (N.S.) 478, and *Hanson v. Northern P. R. Co.* 22 L.R.A. (N.S.) 968.

¹⁵ *McGuire v. Quincy, O. & K. C. R. Co.* (1908) 128 Mo. App. 677, 107 S. W. 411.

¹⁶ *Robinson v. St. Louis & S. F. R. Co.* (1908) 133 Mo. App. 101, 112 S. W. 730.

¹⁷ *Degonia v. St. Louis, I. M. & S. R. Co.* (1909) 224 Mo. 564, 123 S. W. 807.

¹⁸ *Tabor v. St. Louis, I. M. & S. R. Co.* (1908) 210 Mo. 385, 124 Am. St. Rep. 728, 109 S. W. 764.

¹⁹ *McMurray v. St. Louis, I. M. & S. R. Co.* (1910) 225 Mo. 272, 125 S. W. 751.

²⁰ *Sams v. St. Louis & M. River R. Co.* (1903) 174 Mo. 53, 61 L.R.A. 475 73 S. W. 686.

ment, the employee waives any right to recover damages for injuries he may have received, is not invalid under § 5437.²¹

f. What are railroads.—Prior to the adoption of § 5439 of the Revised Statutes of 1909 (Laws of 1905, p. 138, Mo. Rev. Stat. 1906, § 2876a), a street car company was not within the statute.²²

g. Where death results from the injury.—The amendment (Laws 1905, p. 135) to § 5425 of the Revised Statutes of 1909 extended the application of this section to employees, and caused the action given in favor of an employee for injuries due to the negligence of fellow servants by the fellow servant act to survive the death of the injured employee for the benefit of his heirs. See note 12, *supra*.

In regard to the scope of this statute it has been said: "It seems to us that the statute was intended to cover all cases where the employee was killed by the negligent act in moving cars of any character used on the railroad tracks, and regardless of the question whether the car at the time of the injury was being propelled by steam, electricity, horse power, or even by means of pinch bars, or by pushing the same by hand."²³

It has been said that the effect of this statute is that if there was negligence the fact that it was the negligence of a fellow servant is not a defense.²⁴

An assistant station agent in directing one of his assistants to run alongside of a train to get a hoop by means of which the station agent had just delivered an order from a despatcher to a moving train passing the station was in no respect engaged either in managing, conducting, or running the locomotive and train, and consequently his assistant, who was injured while obeying his order, was not within the protection of Rev. Stat. 1909, § 5425.²⁵

²¹ *Hamilton v. St. Louis, K. & N. W. R. Co.* (1902) 118 Fed. 92. And see *McDermon v. Southern P. Co.* (1903) 122 Fed. 669 (holding Pullman car porter not within the statute).

²² *Sams v. St. Louis & M. River R. Co.* (1903) 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686 (electric); *Johnson v. Metropolitan Street R. Co.* (1904) 104 Mo. App. 588, 78 S. W. 275 (cable); *Godfrey v. St. Louis Transit Co.* (1904) 107 Mo. App. 193, 81 S. W. 1230 (electric); *Stocks v. St. Louis Transit Co.* (1904) 106 Mo. App. 129, 79 S. W. 1176 (electric).

²³ *Peters v. St. Louis & S. F. R. Co.* (1910) 150 Mo. App. 721, 131 S. W. 917 (car being moved by pinch bars). This decision by the Springfield court of appeals was adopted by the St. Louis court of appeals when the case was transferred to that branch of the court. (1911) 160 Mo. App. 629, 140 S. W. 1197.

²⁴ *Patrum v. St. Louis & S. F. R. Co.* (1910) 146 Mo. App. 332, 129 S. W. 1041.

²⁵ *Gray v. Wabash R. Co.* (1911) 157 Mo. App. 92, 137 S. W. 324.

J. MONTANA.

1785. Text of statute.—Act of Jan. 16, 1905, §§ 1, 2 (Mont. Rev Codes 1907, §§ 5251, 5252), provide as follows:

Sec. 1 (5251). Railway corporations liable for negligence of fellow servant.—Every person or corporation operating a railway or railroad in this state shall be liable for all damages sustained by any employee of such person or corporation in consequence of the neglect of any other employee or employees thereof or by the mismanagement of any other employee or employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of any other employee or employees thereof, when such neglect, mismanagement, or wrongs are in any manner connected with the use and operation of any railway or railroad on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding.

Sec. 2 (5252). Survival of action.—In case of the death of any such employee in consequence of any injury or damage so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives.

Sec. 5252 does not give a cause of action where the death of the employee was instantaneous.¹

A railroad company is liable for injuries to a conductor caused by the negligence of a yard foreman.²

K. NEBRASKA.

1786. Text of statute.—Neb. Laws 1907, p. 191, chap. 48, §§ 1-2 (Neb. Comp. Stat. 1909, §§ 2803a-2803c), provide as follows:

Sec. 1 (2803a, sec. 3). That every railway company operating a railway engine, car, or train in the state of Nebraska shall be liable to any of its employees who at the time of injury are engaged in construction or repair work or in the use and operation of any engine, car, or train for said company, or in the case of his death, to his personal representatives for the benefit of his widow and children, if any, if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2 (2803b, sec. 4). That in all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his

¹ *Dillon v. Great Northern R. Co.* 41 Mont. 272, 108 Pac. 1062 (cars were sent against caboose in which conductor

² *Moyse v. Northern P. R. Co.* (1910) was sleeping).

contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; all questions of negligence and contributory negligence shall be for the jury.

Sec. 3 (2803c, sec. 5). That no contract of employment, insurance, relief benefit, or indemnity for injury or death, hereafter entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, that upon the trial of such action against any railway company the defendant may set off any sum it has contributed toward any such insurance, relief benefit, or indemnity, that may have been paid to the injured employee, or, in case of his death, to his personal representative.

This act has been pronounced constitutional both by the state court and by the Federal court of appeals.¹ For a discussion as to the constitutionality of this statute, see the concluding chapter of this treatise.

The negligent act of the fellow servant must be one committed while the servant is acting within the scope of his employment.²

1787. Effect of statute.—An employee in a railroad blacksmith shop, injured while operating a steam hammer for the purpose of flattening iron washers, by reason of the negligence of another employee in causing the hammer to descend at an improper time, is "engaged in construction or repair work" within the meaning of the statute.¹

An employee of a railroad company, engaged in digging a well to supply its locomotive with water, is within the statute.²

L. NORTH CAROLINA.

1788. [761a, 761aa] Statutory provisions.—Private Laws 1897, chap. 56, p. 83 (Revisal 1905, § 2466; Pell's Revisal 1908, § 2466) provides as follows:

Sec. 1. That any servant or employee of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death, in the course of his services or employment with said company by the negligence, carelessness,

¹ *Missouri P. R. Co. v. Castle* (1909) 97 C. C. A. 124, 172 Fed. 841; *Swoboda v. Union P. R. Co.* (1910) 87 Neb. 200, 138 Am. St. Rep. 483, 127 S. W. 215.

¹ *Swoboda v. Union P. R. Co.* (1910) 87 Neb. 200, 138 Am. St. Rep. 483, 127 S. W. 215.

² *Jackson v. Chicago, R. I. & P. R. Co.* (1910) 102 C. C. A. 159, 178 Fed. 432.

² *Metz v. Chicago, B. & Q. R. Co.* (1911) 83 Neb. 459, 129 N. W. 994.

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or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company.

Sec. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void.

As to the constitutionality of this statute, see the concluding chapter of this treatise.

This statute is a public law, of which the court will take notice without its being pleaded, although it has been improperly published among the private acts.¹

1789. [762] Effect of statute.—As the defense of common employment by this statute is wholly abolished, so far as railways are concerned, the question whether the delinquent servant was or was not in control of the injured one has ceased to be material in North Carolina.¹ (See summary in § 1478, *ante*, for common-law rule in this state.)

This statute has been declared to be inapplicable to an accident which occurred before its enactment.² But it is applicable to all railroads which operate in the state, and is not limited merely to injuries received in the state.³

The contention that the defendant owned and operated a railroad cannot be sustained where the answer denies it and no appropriate issues were framed.⁴

The act does not apply to corporations other than those operating

¹ *Hancock v. Norfolk & W. R. Co.* (1899) 124 N. C. 222, 32 S. E. 679. See also *Wright v. Southern R. Co.* (1898) 123 N. C. 280, 31 S. E. 652.

¹ *Kinney v. North Carolina R. Co.* (1898) 122 N. C. 961, 30 S. E. 313; *Mabry v. North Carolina R. Co.* (1905) 139 N. C. 388, 52 S. E. 124; *Fitzgerald v. Southern R. Co.* (1906) 141 N. C. 530, 6 L.R.A. (N.S.) 337, 54 S. E. 391 (caretaker of engine injured by negligence of another servant engaged in throwing coal into tender). See *Smith v. Southern R. Co.* (1910) 87 S. C. 136, 69 S. E. 18 (case arose in North Carolina).

Collision between two passenger trains in broad daylight, one of which was running at a high rate of speed, the other having slowed up when the former was seen approaching, is of itself evidence of negligence, in an action by the engineer of the latter train for personal

injuries sustained in the collision. *Kinney v. North Carolina R. Co.* (1898) 122 N. C. 961, 30 S. E. 313.

² *Rittenhouse v. Wilmington Street R. Co.* (1897) 120 N. C. 544, 26 S. E. 922; *Wright v. Southern R. Co.* (1898) 123 N. C. 280, 31 S. E. 652.

³ *Williams v. Southern R. Co.* (1901) 128 N. C. 286, 38 S. E. 893 (injury received in Tennessee).

Where by a contract of service made in North Carolina the provisions of the fellow servant act must be read into the contract, and there is no evidence that the service was to be performed altogether in another state, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. *Miller v. Southern R. Co.* (1906) 141 N. C. 45, 53 S. E. 726.

⁴ *Tanner v. Frank Hitch Lumber Co.* (1906) 140 N. C. 475, 53 S. E. 287.

railroads;⁵ nor to the servants of an independent contractor engaged in lowering a grade for a railroad;⁶ nor to an employee building a trestle for the extension of a railroad at a point some miles from the track on which trains are being operated;⁷ nor to a railroad in the process of construction.⁸ But it includes private roads as well as those operated as common carriers,⁹ and applies to street railroads.¹⁰

The fellow servant law applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service.¹¹ A cross piece nailed to the standards of a flat car loaded with lumber has been held to be an appliance within the statute, even when used by the employees to get down from the lumber onto the floor of the car, if such cross pieces are customarily used for that purpose.¹² The fact that the railroad company in loading logs onto its cars is doing the duty of another company does not take it out of the fellow servant act.¹³

The effect of the 2d section of the statute is to abolish the defense

⁵ *Blevins v. Erwin Cotton Mills Co.* (1909) 150 N. C. 493, 64 S. E. 428.

⁶ *Avery v. Southern R. Co.* (1904) 137 N. C. 130, 49 S. E. 91.

⁷ *Nicholson v. Transylvania R. Co.* (1905) 138 N. C. 516, 51 S. E. 40.

⁸ *O'Neal v. South & W. R. Co.* (1910) 152 N. C. 404, 67 S. E. 1022; *Bailey v. Meadows Co.* (1910) 152 N. C. 603, 68 S. E. 11.

⁹ The act applies to logging roads. *Roberson v. Greenleaf Johnson Lumber Co.* (1911) 154 N. C. 328, 70 S. E. 630; *Twiddy v. Dare Lumber Co.* (1911) 154 N. C. 237, — L.R.A. (N.S.) —, 70 S. E. 282; *Bissell v. Greenleaf Johnson Lumber Co.* (1910) 152 N. C. 123, 67 S. E. 259; *Wright v. Caney River R. Co.* (1909) 151 N. C. 529, 66 S. E. 588, 19 Ann. Cas. 384; *Liles v. Fosburg Lumber Co.* (1906) 142 N. C. 39, 54 S. E. 795.

The act applies to lumber roads. *Hemphill v. Buck Creek Lumber Co.* (1906) 141 N. C. 487, 54 S. E. 420.

Where a corporation chiefly engaged in the manufacture of leather and extraction of tannic acid in connection with, and in aid of, its primary purpose, owns and operates a railroad, having its own engines, cars, crew, etc., the act applies. *Bird v. United States Leather Co.* (1906) 143 N. C. 283, 55 S. E. 727.

An industrial company which operates, in connection with its plant, about 10 or 12 miles of track, standard gauge, is within the statute. *Hairston v. United States Leather Co.* (1906) 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698 (failure to use automatic coupler).

But the fact that a lumber company operates a railroad for the carriage of logs does not bring employees engaged exclusively in sawing logs in the loading yard, preparatory to their being placed on the cars, within the operation of a statute abolishing the fellow servant rule with respect to employees of railroad companies. *Twiddy v. Dare Lumber Co.* (1911) 154 N. C. 237, — L.R.A. (N.S.) —, 70 S. E. 282.

¹⁰ *Brookshire v. Asheville Electric Co.* (1910) 152 N. C. 669, 68 S. E. 215.

In *Hemphill v. Buck Creek Lumber Co.* (1906) 141 N. C. 487, 54 S. E. 420, it was said, *obiter*, that the act embraced street railroads.

¹¹ *Sigman v. Southern R. Co.* (1904) 135 N. C. 181, 47 S. E. 420.

¹² *Wallace v. Seaboard Air Line R. Co.* (1906) 141 N. C. 646, 13 L.R.A. (N.S.) 384, 54 S. E. 399.

¹³ *Britt v. Carolina & N. R. Co.* (1907) 144 N. C. 242, 56 S. E. 910.

of assumption of risk in all cases to which the statute is applicable. See § 1647, *ante*.¹⁴ But it does not deprive the master of the defense of contributory negligence.¹⁵

M. NORTH DAKOTA.

1790. Text of statute.—Laws of 1903, chap. 131, p. 178 (N. D. Rev. Codes 1905, § 4400), provides as follows:

Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage; and no contract which restricts such liability shall be legal or binding.

Laws of 1907, chap. 203, provides as follows:

Sec. 1. Liability of common carriers.—Every common carrier shall be liable to any of its employees, or in case of the death of any employee, to his personal representative, for the benefit of his widow, children, or next of kin, for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. Contributory negligence no bar to recovery, when.—In all actions hereinafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, where his contributory negligence was slight and that of the employee was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Sec. 3. Contracts to avoid liability void.—No contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute a bar or

¹⁴ *Coley v. North Carolina R. Co.* (1901) 128 N. C. 534, 57 L.R.A. 817, 39 S. E. 43; (1901) 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195; *Mott v. Southern R. Co.* (1902) 131 N. C. 234, 42 S. E. 601; *Walker v. Carolina C. R. Co.* (1904) 135 N. C. 738, 47 S. E. 675; *Cogdell v. Southern R. Co.* (1901) 129 N. C. 398, 40 S. E. 202; *Thomas v. Raleigh & A. Air Line R. Co.* (1901) 129 N. C. 392, 40 S. E. 201; *Hairston v. United States Leather Co.* (1906) 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698 (failure to use automatic coupler); *Biles v. Seaboard Air Line R. Co.* (1905) 139 N. C. 528, 52 S. E. 129, second appeal (1906) 143 N. C. 78, 55 S. E. 512.

¹⁵ In *Coley v. North Carolina R. Co.* *supra*, it was held that the defense of contributory negligence is not destroyed by a statute making railroad companies liable to employees for injuries caused by defects in machinery, ways, or appliances, and forbidding the waiving of this liability by contract.

If a servant while repairing a machine is injured by his own want of care there can be no recovery. *Mathis v. Atlantic Coast Line R. Co.* (1907) 144 N. C. 162, 56 S. E. 864.

defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, that upon the trial of said action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity, that may have been made to the injured employee, or in case of his death, to his personal representative.

Sec. 4. Time of action limited.—No action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

The earlier statute has been held to apply only to those employees engaged in operating the railroads, and so exposed to the peculiar dangers attending that business.¹ For other cases involving the same question arising under other statutes, see §§ 1660, 1778, 1780, 1782, 1784, *b*, 1795, *a*, 1801a.

N. OHIO.

1791. Text of statute.—Ohio Gen. Code 1910, §§ 9013, 9017, 9018, provide as follows:

Sec. 9013. No railroad company, insurance society, or association, or other person, shall demand, accept, or enter into an agreement or stipulation with a person about to enter, or in, the employ of a railroad company, whereby he stipulates or agrees to surrender or waive any right to damages against a railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts such right, any other right. (87 v. 149, § 1.)

Sec. 9017. Every railroad company operating a railroad which in whole or part is within this state shall be liable for all damages sustained by any of its employes by reason of personal injury or death of such employee:

1. When such injury or death is caused by a defect in any locomotive, engine, car, hand car, rail, track, machinery, or appliance required by such company to be used by its employees in and about the business of their employment, if such defect could have been discovered by reasonable and proper care, tests, or inspection. Proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company. An employee of such railroad company, who is injured or killed as a result of such a defect, shall not be deemed to have assumed the risk occasioned thereby, although continuing in the employment of the company after knowledge of the defect; nor shall continuance in employment after such knowledge by an employee be deemed an act of contributory negligence.

2. While such employee is engaged in operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, and in the performance of his duties, and when such injury was caused by the carelessness.

¹ *Beleal v. Northern P. R. Co.* (1906) cake off platform onto another servant; 15 N. D. 318, 108 N. W. 33 (servant statute not applicable).
engaged in loading car with ice pushed

or negligence of any other employee, officer, or agent of such company, in the discharge of or for failure to discharge his duties as such. (99 v. 25, § 1.)

Sec. 9018. In all actions hereafter brought against a railroad company operating a railroad in whole or part within this state, for personal injury to an employee, or where such injuries have resulted in his death, the fact that he was guilty of contributory negligence shall not bar a recovery, when such negligence was slight and that of the employer greater, in comparison. But the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury. (99 v. 25, § 2.)

Ohio Act Feb. 28, 1908 (99 Ohio Laws, p. 25), relating to the liability of railroad companies for injuries to employees, may be applied in the Federal courts in Ohio.¹

O. OKLAHOMA.

1792. Text of Constitution.—Article 9, § 36, of the Oklahoma Constitution, provides as follows:

The common-law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a nonassignable duty; and when death, whether instantaneous or not, results to such employee from any injury for which he could have recovered under the above provisions, had not death occurred, then his legal or personal representative, surviving consort or relatives, or any trustee, curator, committee or guardian of such consort or relatives, shall have the same rights and remedies with respect thereto as if death had been caused by the negligence of the master. And every railroad company and every street railway company or interurban railway company, and every person, firm, or corporation engaged in underground mining in this state, shall be liable, under this section, for the acts of his or its receivers.

Nothing contained in this section shall restrict the power of the legislature to extend to the employees of any person, firm, or corporation the rights and remedies herein provided for.

The common-law rule as to fellow servants applies to a case where the injury occurred before the Constitution took effect.¹

¹*Erie R. Co. v. White* (1911) 109 C. C. A. 322, 187 Fed. 556, rehearing denied (1911) 109 C. C. A. 326, 187 Fed. 944. ¹*Farrar v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 188, 130 S. W. 373.

Where the negligence of the fellow servant causes the injury of a person engaged in the service of a corporation, as a rope rider in the slope of a coal mine, his act constitutes a breach of duty of the master, and at the same time a breach of duty on his own part towards his coemployee, and the person injured may maintain a joint action against the master and servant for the injury.²

Under the provisions of the Oklahoma Constitution the administrator of a railroad employee receiving injuries resulting in death while engaged in interstate commerce can recover damages for the pecuniary loss to his next of kin, including damages for pain and mental anguish suffered by decedent.³

P. SOUTH DAKOTA.

1793. Text of statute.—S. D. Laws 1907, chap. 219, provides as follows:

Sec. 1. That every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employees, or, in case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was less than the negligence of the employer, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Sec. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. Provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed towards any insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

² *Coalgate Co. v. Bross* (1909) 25 Okla. 244, 138 Am. St. Rep. 915, 107 Pac. 425. ³ *St. Louis, I. M. & S. R. Co. v. West-erty* (1911) 98 Ark. 240, 135 S. W. 874.

This statute has been declared unconstitutional by a Federal court.¹ For a discussion as to the constitutionality, see the concluding chapter of this treatise.

Q. TEXAS.

1794. [749, 749b, 750a, 751a] Statutes as to railway service.—A to the constitutionality of the statutes discussed below, see the concluding chapter of this treatise.

The most recent statute of this state, as is shown in § 1796, *post* is modeled closely after the Federal statute of 1908. The earlier statutes (Laws 1891, chap. 24; Laws 1893, chap. 91; Laws 1897 chap. 6, p. 14) are virtually identical so far as their bearing upon the relations between the servants themselves are concerned, but in the last revision some important alterations were made with respect to the classes of employers who were to be deemed within the purview of the statute.¹

¹ *Chicago, M. & St. P. R. Co. v. Westby* (1910) — L.R.A. (N.S.) —, 102 C. C. A. 65, 178 Fed. 619.

¹ One of the alterations was intended to counteract the effect of a decision in which a street-railway company was held not to be a "railway corporation" within the meaning of the act of 1893. *Riley v. Galveston City R. Co.* (1896) 13 Tex. Civ. App. 247, 35 S. W. 826 (adopting the strong intimation to that effect in *Austin Rapid Transit R. Co. v. Grothe* [1895] 88 Tex. 262, 31 S. W. 196.) The court stated its reasons for this conclusion as follows: "The many and great dangers to life and limb to which the numerous persons engaged in operating railroads whose cars are moved by steam were exposed, and the many different departments of labor in which such operatives were employed, were doubtless the principal reasons which induced the legislature to modify the rule of law heretofore governing the relation of master and servant, and prescribing their reciprocal duties and liabilities. But these reasons for changing the law do not exist in respect to those engaged in operating street railways. The same article of the Revised Statutes which authorizes the creation of a private corporation for the construction and maintenance of a street railway authorizes also private corpora-

tions for the following purposes: For manufacturing or mining business; for the manufacture and supply of gas; for the supply of light or heat to the public by any means; for the building and navigation of steamboats, and the carriage of persons and property thereon; for the construction and maintenance of mills and gins. The employees of any one of these corporations are exposed to quite as great and as many risks as are the employees of street railways, and yet the legislature has not thought it necessary to make any change in the law for their protection. These considerations are persuasive, if not conclusive, that the intention of the legislature in passing the fellow-servants act was not to include street railways within its provisions, and that the words 'any railway corporation' in the 1st section of the act, should be restricted to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons."

Another alteration overrode the effect of a decision denying the applicability of the statute where a line was in the hands of a receiver. *Campbell v. Cook* (1894) 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486.

The provisions in respect to the class of employers embraced within the statute are as follows:

Sec. 1. Every person, receiver, or corporation operating a railroad or a street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employee of such person, receiver, or corporation; and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability.

The provisions defining vice principals are as follows:

Sec. 2. All persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees.

In the act of 1891 (entitled "An Act to Define Who are Fellow Servants and Who are not Fellow Servants"), chap. 24, § 1; Sayles's Civ. Stat. Supp. 1888-1893, art. 2430f, this provision was worded as follows:

That all persons engaged in the service of any railroad corporations, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such corporation, and are not fellow servants with such employee.

In the act of 1893, § 1 (Rev. Stat. 1895, chap. 12b, art. 4560f), the phraseology was somewhat changed, and the provision assumed the following form:

All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, or in the service of a receiver, manager, or of any person controlling or operating such corporation, who are intrusted by such corporation, receiver, or person in control thereof, with the authority of superintendence, control, or command of other persons in the employment of such corporation, or receiver, manager, or person in control of such corporation, or with the authority to direct any other employee in the performance of the duty of such employee, are vice principals of such corporation, receiver, manager, or person controlling the same, and are not fellow servants of such employee.

It has been held that, as the only material difference between the acts of 1891 and of 1893 was that the scope of the law was extended so as to embrace railway corporations operated by a receiver, manager, or any other person, the result of the repeal of the former act and the re-enactment of the provisions as to fellow servants is determined by the rule of construction that, when one statute is repealed by another which is substantially of the same tenor, the binding force of the earlier one is neither destroyed nor interrupted. *San Antonio & A. P. R. Co. v. Keller* (1895) 11 Tex. Civ. App. 569, 32 S. W. 847.

The provisions defining fellow servants are as follows:

Sec. 3. All persons who are engaged in the common service of such person receiver, or corporation, controlling or operating a railroad or street railway and who, while so employed, are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work, and to a common purpose are fellow servants with each other. Employees who do not come within the provisions of this section shall not be considered fellow servants.

The corresponding section (2) in the act of 1891 runs as follows: That all persons who are engaged in the common service of such railway corporations and who, while so engaged, are working together at the same time and place to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other: Provided, That nothing herein contained shall be so construed so as to make employees of such corporation in the service of such corporation, fellow servants with other employees of such corporation, engaged in any other department or service of such corporation Employees who do not come within the provisions of this section shall not be considered fellow servants.

Sec. 2 of the act of 1893 (Rev. Stat. 1895, chap. 12b, art. 4560g) is slightly different: All persons who are engaged in the common service of such railway corporation, receiver, manager, or person in control thereof, and who, while so employed, are in the same grade of employment and are working together at the same time and place, and to a common purpose, neither of such persons being intrusted by such corporation, receiver, manager, or person in control thereof with any superintendence or control over their fellow employees, or with the authority to direct any other employee in the performance of any duty of such employee, are fellow servants with each other: Provided, That nothing herein contained shall be so construed as to make employees of such corporation receiver, manager, or person in control thereof, fellow servants with other employees engaged in any other department or service of such corporation, receiver manager, or person in control thereof. Employees who do not come within the provisions of this chapter shall not be considered fellow servants.

Other provisions of the statute are as follows:

Sec. 4. No contract made between the employer and employee, based on the contingency of injury or death of the employee, limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid or binding. (This provision is the same as that of sec. 3 in each of the earlier acts.)

Sec. 5. Nothing in this act shall be held to impair or diminish the defense of contributory negligence when the injury of the servant or employee is caused proximately by his own contributory negligence.

1795. [749a, 750, 751] Effect of this statute.—a. Scope in general
—The statute is virtually of the same tenor as those of Iowa, Kansas, and Minnesota. (See §§ 1660, 1778, 1780, 1782, 1784, b 1790, 1801a.)

The statute suspends the law of fellow servants as to persons employed to operate cars, locomotives, or trains, only while they are actually engaged in the work, and does not affect their relations to other employees beyond the time of their active employment in the work.¹

A hand car is a car within the meaning of the statute.² So is a push car.³ But carrying rails by hand is not operating a railroad, although sometimes the rails are carried on a push car.⁴

The statute applies to private roads.⁵ A contractor engaged in

¹ *Gulf, C. & S. F. R. Co. v. Howard* (1904) 97 Tex. 513, 80 S. W. 229.

A roundhouse hostler while walking on the track, although for the purpose of going to an engine to bring it to the roundhouse, is not engaged in the work of operating cars, locomotives, or trains. *Ibid.*

² *Texas & P. R. Co. v. Smith* (1902) 52 C. C. A. 360, 114 Fed. 728.

The operation of a hand car is within the statute. *San Antonio & A. P. R. Co. v. Stevens* (1904) 37 Tex. Civ. App. 80, 83 S. W. 235.

Section hands engaged in putting a hand car back onto the track are operating a railroad. *Texas & N. O. R. Co. v. McCraw* (1906) 43 Tex. Civ. App. 247, 95 S. W. 83; *Houston & T. C. R. Co. v. Jennings* (1904) 36 Tex. Civ. App. 375, 81 S. W. 822.

Removing a hand car from the track is operating a railroad. *Texas & P. R. Co. v. Hervey* (1905) — Tex. Civ. App. —, 89 S. W. 1095.

Sections hands while operating a hand car in the course of their employment are operating a railroad. *Perez v. San Antonio & A. P. R. Co.* (1902) 28 Tex. Civ. App. 255, 67 S. W. 137.

³ *Texas & P. R. Co. v. Webb* (1903) 31 Tex. Civ. App. 498, 72 S. W. 1044; *Seery v. Gulf, C. & S. F. R. Co.* (1903) 34 Tex. Civ. App. 89, 77 S. W. 950.

Conveying rails on a push car is within the statute. *Texarkana & Ft. S. R. Co. v. Anderson* (1908) — Tex. Civ. App. —, 111 S. W. 173.

⁴ *Gulf, C. & S. F. R. Co. v. Johnson* (1907) 47 Tex. Civ. App. 74, 103 S. W. 447.

And servants engaged in laying rails for a track, who make use of a flat car merely for the sake of convenience, are not engaged in operating the car. *Lakey v. Texas & P. R. Co.*

(1903) 33 Tex. Civ. App. 44, 75 S. W. 566.

⁵ *Lodwick Lumber Co. v. Taylor* (1905) 39 Tex. Civ. App. 302, 87 S. W. 358; *Keystone Mills Co. v. Chambers* (1909) — Tex. Civ. App. —, 118 S. W. 178 (logging road).

A private railroad operated by a company not incorporated for railroad purposes is within the terms of a fellow servant act relating to "railroads." *Cunningham v. Neal* (1908) 101 Tex. 338, 15 L.R.A. (N.S.) 479, 107 S. W. 539.

A corporation engaged in the production of sugar, which owned and operated a standard-gauge track for use in connection with its factory, renting an engine from a railroad company, is a corporation operating a railroad within the statute. *Cunningham v. Neal* (1908) 49 Tex. Civ. App. 613, 109 S. W. 455.

An employee of a logging company, who was injured while transporting logs on cars along the company's private road, was operating a railroad within the meaning of the statute. *Mounce v. Lodwick Lumber Co.* (1906) — Tex. Civ. App. —, 91 S. W. 240.

But an employee of a logging contractor, whose duties consist of fastening the tongs of a logging cable by means of which logs are drawn from the woods to the vicinity of the pile from which they are to be loaded onto the skidding car, and then of fastening other tongs to the log by means of which it is drawn onto the pile, the motive power being furnished by an engine placed at one end of the skidding car, is not engaged in operating a railroad, although the engine furnishes the motive power for moving the skidding car over spurs connecting with a logging road. *Hampton v. Woolsey* (1911) — Tex. Civ. App. —, 139 S. W. 888.

supplying logs to a sawmill by means of a spur to a railroad, over which he operates a flat car or "log skidder," solely for the purpose of transporting logs, operates a railroad.⁶

The statute excludes the defense of fellow servants in all cases where the employee is actually engaged in the moving of cars or trains.⁷ A fire knocker while trying to remove blocks from the wheels of cars which it was his duty to move and unload is within the statute.⁸ So is an employee engaged in blocking up a turntable so as to turn a push car.⁹ And the engineer and fireman of a locomotive are while oiling the parts and filling the tank with water, engaged in operating a railroad.¹⁰ A section foreman may recover for injuries due to the negligence of the section hands under him.¹¹ An employee of a railroad engaged in replacing on the track a derailed car used in the transporting of cross ties is engaged in operating a railroad.¹² Section men engaged in loading a car are not "operating" it in such a sense that one of them may recover for injuries caused by another's negligence.¹³ But loading flat cars with gravel, and hauling the same to make a fill, is operating a railroad.¹⁴ And employees of a railroad engaged in unloading ties from a car used to distribute the ties along the tracks are within the statute.¹⁵ And an employee engaged in distributing ties along a railroad, who, while straightening a tie that

⁶ *Ibid.*

⁷ A switchman employed in coupling cars while a train is being made up in a yard is within the statute. *Missouri, K. & T. R. Co. v. Baker* (1900) — Tex. Civ. App. —, 58 S. W. 964.

So is a brakeman engaged in coupling cars. *Ibid.*

A railroad company is liable for injuries to one brakeman caused by the negligence of another. *Galveston, H. & S. A. R. Co. v. Henefy* (1909) — Tex. Civ. App. —, 115 S. W. 57.

A railroad company is liable for the negligence of an engineer which causes injuries to his fireman. *Missouri, K. & T. R. Co. v. Keaveney* (1904) — Tex. Civ. App. —, 80 S. W. 387.

The failure of fellow servants to secure the standard which holds telephone poles onto a flat car renders the defendant liable for plaintiff's injuries caused thereby. *Lodwick Lumber Co. v. Mounce* (1907) 46 Tex. Civ. App. 230, 102 S. W. 142.

⁸ *Texas & P. R. Co. v. Johnson* (1909) 55 Tex. Civ. App. 495, 118 S. W. 1117.

⁹ *Missouri, K. & T. R. Co. v. Bailey* (1909) 57 Tex. Civ. App. 295, 115 S. W. 601.

¹⁰ *Texas & N. O. R. Co. v. Walter* (1907) 47 Tex. Civ. App. 43, 104 S. W. 415.

¹¹ *Galveston, H. & S. A. R. Co. v. Perry* (1905) 38 Tex. Civ. App. 81, 85 S. W. 62.

¹² *Missouri, K. & T. R. Co. v. Smith* (1907) 45 Tex. Civ. App. 128, 99 S. W. 743.

¹³ *Lawrence v. Texas C. R. Co.* (1901) 25 Tex. Civ. App. 293, 61 S. W. 342; *Walker v. Texas & N. O. R. Co.* (1908) 51 Tex. Civ. App. 391, 112 S. W. 430; *Lakey v. Texas & P. R. Co.* (1903) 33 Tex. Civ. App. 44, 75 S. W. 566 (unloading rails from hand car); *Texarkana & Ft. S. R. Co. v. Anderson* (1909) 102 Tex. 402, 118 S. W. 127 (unloading rails from push car).

¹⁴ *Texas C. R. Co. v. Pelfrey* (1904) 35 Tex. Civ. App. 501, 80 S. W. 1036.

¹⁵ *St. Louis S. W. R. Co. v. Thornton* (1907) 46 Tex. Civ. App. 649, 103 S. W. 437.

has been thrown off, is injured by a tie being slid off by another employee, is within the statute.¹⁶

The fellow servant law does not apply to an employee of a saw-mill.¹⁷

b. *Who are vice principals.*—This section, except in so far as it makes vice principalship depend solely upon the exercise of control, apart from the question whether the controlling employee possessed the power of discharge (see § 1451, *ante*), is merely declaratory of the "superior servant" doctrine, which, as will be seen by referring to chapter LXL, subtitle D, *ante*, still prevails in Texas under the common law, in all cases in which the statute is not applicable.¹⁸

The following employees have been held to be vice principals as regards the servants under their control:

A master mechanic in charge of a railway roundhouse;¹⁹ a conductor;²⁰ a locomotive engineer, as to his fireman;²¹ a yard mas-

¹⁶ *Freeman v. Shaw* (1910) — Tex. Civ. App. —, 126 S. W. 53.

¹⁷ *Quinn v. Glenn Lumber Co.* (1909) — Tex. Civ. App. —, 118 S. W. 733.

As to what constitutes railroad hazards, see notes to *Johnson v. Great Northern R. Co.* 18 L.R.A.(N.S.) 478, and *Hanson v. Northern P. R. Co.* 22 L.R.A.(N.S.) 968.

¹⁸ The continuity of doctrine under the common law and the statute is indicated by the fact that the decisions under the common law, both in Texas and in other states where the superior servant doctrine is adopted, are sometimes cited as authorities in decisions construing the statute. Thus, the precedent relied upon in *Ft. Worth & D. C. R. Co. v. Peters* (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077, is *Missouri P. R. Co. v. Williams* (1889) 75 Tex. 4, 16 Am. St. Rep. 867, 12 S. W. 835. Similarly, in *Texas C. R. Co. v. Frazier* (1896) 90 Tex. 33, 36 S. W. 432, the authority cited is *Pittsburgh, C. & St. L. R. Co. v. Ranney* (1882) 37 Ohio St. 665.

An instruction in an action for the death of a railroad employee that if a designated person was intrusted with power to direct such employee and gave any direction as to the performance of the work which was an improper and unusual method of performing it, and it was attended with unusual danger and hazard, and it was negligence to so order, and such negligence, if any, directly caused the death of the employee, plain-

tiff is entitled to recover, is not objectionable as permitting a recovery if the performance of the work was attended with unusual danger and hazard, without reference to whether or not such danger and hazard were ordinarily incident to the character of the work. *Galveston, H. & S. A. R. Co. v. Bonnet* (1896) — Tex. Civ. App. —, 38 S. W. 813.

Where the evidence justifies the court in assuming that the culpable superior servant was a vice principal for the reason that he had the power of hiring and discharging, and in instructing the jury accordingly, the defendant cannot complain of the failure to submit to them the question whether he had such power. *Austin Rapid Transit R. Co. v. Grothe* (1895) 88 Tex. 262, 31 S. W. 196.

¹⁹ *Missouri P. R. Co. v. Sasse* (1893) — Tex. Civ. App. —, 22 S. W. 187.

²⁰ *Culpepper v. International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 386, reversing on this point (1897) — Tex. Civ. App. —, 38 S. W. 818; *Galveston, H. & S. A. R. Co. v. Robinett* (1899) — Tex. Civ. App. —, 54 S. W. 263.

In an earlier case, it had been merely laid down that a conductor was a vice principal as to a brakeman, if it should be shown, as a matter of fact, that he had control over such brakeman, and that the question whether he was "in charge of a train" should have been submitted to the jury. *Moore v. Jones*

ter; ²² a yard superintendent, as regards the foreman of yard engine engaged in switching cars about the yard; ²³ a foreman of a switching crew; ²⁴ a foreman of track repairers; ²⁵ a foreman of construction work on a bridge. ²⁶

(1897) 15 Tex. Civ. App. 391, 39 S. W. 593.

Where an engine of another railroad, at the request of the complainant, a conductor in the employ of the defendant, was fastened to the rear of his train to assist it, and signals were given by the conductor and the whistle of the other road's engine, which were answered by the starting up of the train, and afterwards, on a "slow-up signal" from the yard foreman, defendant's engineer applied the "emergency air," stopping the train so suddenly that an accident resulted to plaintiff, defendant's servant, the question of the negligence of defendant's engineer was for the jury. *Galveston, H. & S. A. R. Co. v. Adams* (1900) — Tex. Civ. App. —, 55 S. W. 803, judgment affirmed in (1900) 94 Tex. 100, 58 S. W. 831.

Where rules of a railroad require trains to be under the control of the conductor, and that no train shall leave a station without a signal from the conductor, the conductor and engineer are not fellow servants as to an injury received by the engineer because of starting his train pursuant to the conductor's orders, notwithstanding both receipted for orders commanding them to hold the train until others had passed, since the rules required all orders to be directed to those who were to execute them. *Galveston, H. & S. A. R. Co. v. Brown* (1900) — Tex. Civ. App. —, 59 S. W. 930. This judgment was reversed in (1901) 95 Tex. 2, 63 S. W. 305, but merely on the ground of contributory negligence in violating a rule.

Railroad employees in charge of a train are not required to use "all reasonable means in their power" to prevent injury to another employee, as it would be exacting too high a degree of care. *Houston, E. & W. T. R. Co. v. Hartnett* (1898) — Tex. Civ. App. —, 48 S. W. 773.

²¹ *Houston & T. C. R. Co. v. Stuart* (1898) — Tex. Civ. App. —, 48 S. W. 799, reversed, but not on this point, in (1899) 92 Tex. 540, 50 S. W. 333.

The question whether or not an engineer is a vice principal of a fireman, so

as to render the company liable for the death of the latter from the negligence of the former, was held to be for the jury upon evidence that a rule of the company provides that the engineers are in charge of their firemen, and shall report them if they refuse to obey their orders, and extrinsic testimony that the engineers under such rule had such control and direction as to change the relation of fellow servants. *Galveston, H. & S. A. R. Co. v. Ford* (1898) — Tex. Civ. App. —, 46 S. W. 77.

²² As respects an engineer. *Texas & P. R. Co. v. Reed* (1895) 88 Tex. 439, 31 S. W. 1058, affirming (1895) — Tex. Civ. App. —, 32 S. W. 118. As respects a brakeman. *International & G. N. R. Co. v. Sipole* (1895) — Tex. Civ. App. —, 29 S. W. 686; *Missouri, K. & T. R. Co. v. Hamilton* (1895) — Tex. Civ. App. —, 30 S. W. 679 (yard master failed to adjust properly a stick to be used to push a derailed car onto the track by force communicated from the engine through another car, the result being that the stick slipped and allowed the cars to come together and crush plaintiff).

²³ *Texas & N. O. R. Co. v. Tatman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333 (switch engine collided with a flat car left standing on the track, possibly by negligence of superintendent, and injured foreman).

²⁴ *Gulf, C. & S. F. R. Co. v. Powell* (1901) 25 Tex. Civ. App. 91, 60 S. W. 979 (switch displaced); *Houston & T. C. R. Co. v. White* (1900) 23 Tex. Civ. App. 280, 56 S. W. 204 (train was started by foreman without notice, catching decedent between a derailed car and a platform, and was then negligently backed while he was in that predicament).

²⁵ *Sweeney v. Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555; *Ft. Worth & D. C. R. Co. v. Peters* (1894) 7 Tex. Civ. App. 78, 25 S. W. 1077, affirmed in (1894) 87 Tex. 222, 27 S. W. 257.

Evidence that defendant company's foreman threw a tie so far from a caboose as to strike a danger post and hit

If the evidence clearly shows that the negligent employees had no actual control over the injured one, the latter cannot recover under the statute.²⁷

A servant who merely gives signals is not considered to be a vice principal merely by reason of his discharge of that function.²⁸ Compare § 1450, *ante*.

plaintiff, an employee, mashing his leg, while he was endeavoring to get out of the way, was sufficient to support a verdict for damages in plaintiff's favor. *Galveston, H. & S. A. R. Co. v. Dehnisch* (1900) — Tex. Civ. App., 57 S. W. 64.

²⁶ *San Antonio & A. P. R. Co. v. McDonald* (1895) — Tex. Civ. App., 31 S. W. 72 (foreman failed to give servant notice of danger from swinging timber).

The neglect, by the foreman of a railway bridge gang, of his special duty to see that the workmen under him performed their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company. *Texas & P. R. Co. v. Carlin* (1903) 189 U. S. 354, 47 L. ed. 849, 23 Sup. Ct. Rep. 585, affirming (1901) 60 L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777.

²⁷ An engineer of a freight train is not a vice principal of a head brakeman where the rules of the company subject all the trainmen, including the engineer, to the order of the conductor, and require the engineer to obey the latter, unless his orders are in violation of the rules of the company or involve risk, although it is customary for head brakemen, as a matter of convenience, to seek information as to their duties from the engineer, who has the same running orders as the conductor. *International & G. N. R. Co. v. Moore* (1897) 16 Tex. Civ. App. 51, 41 S. W. 70.

²⁸ *Texas C. R. Co. v. Frazier* (1896) 90 Tex. 33, 36 S. W. 432, reversing (1896) — Tex. Civ. App., 34 S. W. 664, and holding that a rule of a company, by which an engineer is intrusted with discretion to give signals notifying the brakeman to apply brakes, does not give the former "authority to direct" the latter in the performance of his duties. The court relied upon *Pittsburgh, C. & St. L. R. Co. v. Ranney* (1882) 37 Ohio St. 665, a common-law decision,

and stated its views as follows: "The purpose of the statute was to impute to the master the negligence of an employee upon whom he has conferred authority or power to influence the action or volition of another employee in the performance of his duties. Under the common-law rule, as settled in this state before the statute, the negligence of an employee would not have been imputed to the master unless he had the power to employ and discharge, it being assumed that such power was necessary to subject the will of the latter to that of the former. The statute, however, is based upon the theory that the authority or power in one employee to superintend, control, or command, or direct another employee in the performance of his duties, as effectually influences and subjects to the former the will of the latter as does the power to employ and discharge. But it was not the purpose of the statute to impute to the master the negligence of an employee upon whom he had conferred no such power, but had merely imposed the duty, in certain contingencies arising in the course of his employment, of giving a signal whereby another employee would know that the occasion had arisen for him to perform some duty imposed upon him by the rules governing his employment, leaving such employee free to perform such duty in his own way under such rules. In such a case there is no subjection of the will of one to that of the other. . . . We are of the opinion that the signal given by the engineer for brakes was a mere notice to the brakeman, Frazier, that the occasion had arisen for him to perform a duty imposed upon him by the rules; that the fact that the engineer was intrusted by the company with the discretion of determining when the brakes should be applied, and to signal therefor, did not give him any 'authority of superintendence, control, or command,' or 'authority to direct' Frazier in the performance of his duties; that Frazier, in at-

Where one employee is normally in control of another, so as to be a vice principal under the statute, a rule of the railway company which empowers a subordinate to exercise an independent judgment when certain contingencies arise does not operate so as to render the two employees fellow servants during such period as the subordinate undertakes to act upon his own responsibility in the manner thus authorized.²⁹

A superior employee does not cease to be a vice principal within the meaning of the statute, while he is performing the duties of a mere servant.³⁰

tempting to set brakes in the performance of his duties, was governed and controlled by the direction and command of the rules, and not of the engineer; and that, therefore, under the statute, they were 'in the same grade of employment,' and fellow servants."

An employee who gives the calls which control the movements of the men engaged in unloading rails from hand cars is not, merely because of that, a vice principal of the other men. *Lakey v. Texas & P. R. Co.* (1903) 33 Tex. Civ. App. 44, 75 S. W. 566.

An assistant foreman of a railroad bridge gang is not a vice principal, where his only duty is to lead the men and convey the foreman's orders to them. *Missouri, K. & T. R. Co. v. Day* (1911) — Tex. —, 34 L.R.A. (N.S.) 111, 136 S. W. 435.

²⁹ In *Culpepper v. International & G. N. R. Co.* (1897) 90 Tex. 627, 40 S. W. 386, the court said: "The testimony shows that under the rules of the defendant company the conductor had general superintendence over the movements of the train, and command of all the employees engaged in its operation; but it also tended to show that, when the safety of the train became involved, the engineer was no longer subject to the absolute control of the conductor, but was empowered to act upon his own judgment. The written rule of the company as to the authority of these employees was read in evidence, and is as follows: 'All trains will be run under the direction of conductors, except when their directions conflict with rules, or involve risks, in which case the engineer will be held equally responsible.' The contention seems to be that whenever a risk became involved, and the engineer saw proper to stop his train in

order to avoid it, for the reason that he was not then subject to the control of the conductor, they became fellow servants, and so remained as long as that state of affairs continued to exist. But, as we have previously intimated, we are of the opinion that this position cannot be maintained. Merely because by reason of the engineer's superior technical knowledge and skill in operating the machinery, it was not deemed advisable to empower the conductor to direct the action of the engineer in certain contingencies, it does not follow that the latter was not under the general superintendence and control of the former. The exception emphasizes the rule. Conceding that, in case of danger the engineer has power to stop the train does the conductor cease to have a general superintendence over the train in case he sees proper to exercise that power? The conductor's authority is not abrogated, but merely restricted for the occasion. . . . The mere fact that upon the happening of some contingency the engineer may act independently of the conductor does not, for the occasion, change the general relation of subordination existing between them. The conductor still has the general control, subject, for the time, to the engineer's power to act upon his own judgment during the emergency. As soon as the danger is obviated, the power of the conductor again comes into play. To hold that, because the conductor may temporarily be deprived of the power to control his subordinate, the rule of the statute is not to apply, would be, in our opinion, to confine its operation within limits which the legislature did not intend to prescribe."

³⁰ *Texas & P. R. Co. v. Reed* (1895) 88 Tex. 439, 31 S. W. 1058, affirming

Employees, although not of a rank which would ordinarily constitute them vice principals, will not be held the fellow servants of their helpers who are subject to their orders and control.³¹

The helpers of a hostler in a railroad roundhouse are the fellow servants of the hostler, who cannot recover for injuries due to their negligence.³²

Neither of two servants is a vice principal, where neither is intrusted by the master with the authority of superintendence, control, or command over the other, nor with authority to direct the other in the performance of any duty.³³

c. *Who are fellow servants.*—The general effect of this section has been thus explained by the supreme court: "The distinctive characteristics prescribed by the statute as essential to be found concurring and common to two or more employees in order to constitute them fellow servants are: First, they must be 'engaged in the common service.' As here used, 'service' means the thing or work being performed for the employer at the time of the accident, and out of which it grew, and 'common' means that which pertains equally to the employees sought to be held fellow servants; and therefore 'common service' means the particular thing or work being performed for the employer, at the time of the accident, and out of which it grew, jointly by the employees sought to be held fellow servants. . . . Second, they must be 'in the same grade of employment.' Grade means the rank or relative positions occupied by the employees while 'engaged in the common service.' This definition, however, gives us no certain means of determining whether given employees are in the

(1895) — Tex. Civ. App. —, 32 S. W. 118 (company held liable for the failure of yard master to signal engineer to moderate speed of car which was about to be kicked on to main track, the consequence being that brakeman could not stop it, and was injured by its collision with a stationary car); *Sweeney v. Gulf, C. & S. F. R. Co.* (1892) 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555 (foreman threw switch prematurely, while hand car was passing over it, and the car was derailed).

The foreman of the "rustling" gang in a railroad yard does not cease to be a vice principal because he assists the members of the gang to move a box which he has received orders to move. *Missouri, K. & T. R. Co. v. Dean* (1905) — Tex. Civ. App. —, 89 S. W. 797.

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The same rule prevailed in Texas under the common law. See § 1475, *ante*.

³¹ A boiler maker having power to direct and control his helper in the work they are doing is not the latter's fellow servant. *St. Louis, S. F. & T. R. Co. v. Jenkins* (1911) — Tex. Civ. App. —, 137 S. W. 711.

A foreman in a machine shop, whose orders a helper is bound to obey, is not the latter's fellow servant. *Sherman v. Texas & N. O. R. Co.* (1906) 99 Tex. 571, 91 S. W. 561.

³² *Gulf, C. & S. F. R. Co. v. Howard* (1904) 97 Tex. 513, 80 S. W. 229.

³³ *Galveston, H. & S. A. R. Co. v. Mohrmann* (1906) 42 Tex. Civ. App. 374, 46 Tex. Civ. App. 1, 93 S. W. 1090 (warehouseman and brakeman).

same or different grades, for it furnishes no test by which their respective ranks or relative positions 'in the common service' can be ascertained. In the absence of a statutory test the grade would have depended upon the test which might have been adopted by the courts—such as authority one over another, order of promotion, skill in the service, compensation received, etc. We are of the opinion that the legislature anticipated and settled this difficulty in the construction of the word 'grade' by the use of the clause, 'neither of such persons being intrusted with any superintendence or control over their fellow employees,' etc., as explanatory of what was meant by the clause 'in the same grade,' thus adopting the most natural test of grade in the construction of the statute,—authority one over the other while 'engaged in the common service.' Probably the most serious difficulty in arriving at the conclusion that one clause was intended as merely explanatory of the other is the fact that the explanatory clause does not immediately follow the one it explains; but this objection is removed when we consider that, in the original section, as enacted in 1891, the qualifying clause immediately follows the words 'same grade,' and was evidently intended to explain their meaning. We do not think there was any intention to change the construction of the statute by changing the position of these clauses, and expressing the words 'of employment,' which were clearly implied in said original section. . . . Third, they must be 'working together at the same time and place.' While 'at' indicates nearness in time and place, it does not demand an exact coincidence as to either, but only that it shall be sufficiently so to afford the employees a reasonable opportunity of observing the conduct of each other, with a view of guarding themselves against injury therefrom. . . . Fourth, they must be working 'to a common purpose.' By this is meant that the acts required of each in the performance of his duties at the time of the accident must be in furtherance of 'the common service.' . . . When these four distinguishing characteristics are found concurring and common to two or more employees, they must be held fellow servants under the statute; otherwise, not." ³⁴

³⁴ *Gulf, C. & S. F. R. Co. v. Warner* (1896) 89 Tex. 475, 35 S. W. 364, holding that a switchman is a fellow servant with a switch engineer where the latter has no authority or control over the former and they are members of a switching crew, although they belong to different departments, are employed and discharged by different persons, and

the duties of the engineer require skilled labor while those of the switchman do not.

In *San Antonio & A. P. R. Co. v. Bowles* (1895) — Tex. Civ. App. —, 30 S. W. 89, the court, in holding that an engineer and a brakeman upon a railway train are not engaged in the same grade of service, and for that reason are not

According to the court of appeals, these statutes show an intention on the part of the legislature to adopt substantially the doctrine of those decisions which proceed upon the theory that employees are not in the same department, and in a common employment, unless they are subject to the same immediate supervision and control.³⁵ The same court also considers that the statutes abrogate the common-law rule that all employees of the same grade over the whole line are fellow servants, as a matter of law.³⁶

Servants may be in the same department, according to the system of nomenclature adopted by the railway company itself, and yet in different departments within the meaning of the statute. The company's liability is determined by the relations which the employees actually bear to each other, and not by the mere names that are given by it to the different branches of the service.³⁷

fellow servants, said: "The duties of the former are much more important and are not different from those of the latter, and their successful performance requires special knowledge and training not necessary to perform the services usually rendered by a brakeman. It is true that the second section of the statute above quoted is awkwardly constructed. Nevertheless, we think the words 'of the same grade,' as used in said section, refer to the common service designated in a previous part of the same section. This is the only construction that will give the phrase just quoted a reasonable and practical meaning." This decision was modified on rehearing in (1895) — Tex. Civ. App. —, 30 S. W. 727, but not in respect to the point here ruled.

³⁵ For this reason it was held that an engineer running a train on a railroad under the supervision of the train master at one place is not a fellow servant with a yard engineer in charge of a switch engine under the supervision of the yard master at another place. *San Antonio & A. P. R. Co. v. Harding* (1895) 11 Tex. Civ. App. 497, 33 S. W. 373. The court said: "The servant having control of others is first declared to stand in the relation of master to those under him, and then, in defining the relation of other employees to each other, it is provided that, in order to be fellow servants, they must be in the common service, in the same department, of the same grade, working together at the same time and place, and

to a common purpose. The servants subjected to the control of different superiors are thus treated as being in separate departments and different service. When we consider that many authorities, including some of the later opinions of our supreme court, had expressed the view that sound reason for the existence of the rule as to fellow servants could only be found in cases where the employees were so situated with reference to each other as to be enabled to exercise over the conduct of each other that watchfulness regarded as essential to the efficiency of the service and the safety of the public, we see that the legislature has adopted that view, and intended to enforce it, in the provisions referred to."

³⁶ *Galveston, H. & S. A. R. Co. v. Worthy* (1895) — Tex. Civ. App. —, 32 S. W. 557, reiterating opinion in (1894) — Tex. Civ. App. —, 27 S. W. 426 (reversed on another point by the supreme court), that there was no error in refusing to instruct the jury that the engineer on a through freight train is not, as a matter of law, a fellow servant with the engineer and brakeman of a local freight train operated by the same company, where the evidence showed that the delinquent and injured servants were at no time on the day of the death closer to each other than 20 miles,—the one being in charge of one train, the other of another, the one running a gravel train, the other a local freight.

³⁷ *San Antonio & A. P. R. Co. v. Harding* (1895) 11 Tex. Civ. App. 497, 33 S.

The subjoined rulings will show the construction which has been put upon the statute in actions for the negligence of various employees.³⁸

W. 373, denying that the two engineers concerned (see note 35, *supra*) were co-servants, although they were both in the "motive power department," and so, in a sense, in the same department.

³⁸(a) *Recovery allowed on the ground that there was no coservice.*—A locomotive engineer is not a fellow servant with the train dispatchers and telegraph operators giving orders for the movement of his train. *Hogan v. Missouri, K. & T. R. Co.* (1895) 88 Tex. 679, 32 S. W. 1035.

A brakeman and an engineer belonging to different crews operating different trains on the same division of a railroad are not fellow servants. *Houston & T. C. R. Co. v. Patterson* (1899) 20 Tex. Civ. App. 255, 48 S. W. 747, reiterating opinion in (1897) — Tex. Civ. App. —, 40 S. W. 442.

Where the several men forming a bridge gang are divided into two groups, and are directed to move bales of cotton from one part of a platform to another, each group acting independently of the other, they are not fellow servants, as they are not working together at the same kind of work. *International & G. N. R. Co. v. Still* (1905) 40 Tex. Civ. App. 22, 88 S. W. 257.

An engineer in charge of a road engine in a railroad yard, temporarily, for the purpose of taking out a train, is not a fellow servant of the foreman and members of the yard crew. *Missouri, K. & T. R. Co. v. Whitlock* (1897) 16 Tex. Civ. App. 176, 41 S. W. 407.

A brakeman on a train which has been made up and is about ready to leave the yard and start on its regular trip is not a fellow servant with employees in charge of a switch engine which is not at the time engaged in any service or performing any act in reference to such train. *Patterson v. Houston & T. C. R. Co.* (1897) — Tex. Civ. App. —, 40 S. W. 442.

A night hostler engaged in inspecting a switch engine to see whether it has been properly wiped is not the fellow servant of another employee putting steam into another engine. *Galveston, H. & N. R. Co. v. Cochran* (1908) 49 Tex. Civ. App. 591, 109 S. W. 261.

A switchman on one engine is not a

fellow servant of a switchman on another engine. *Galveston, H. & S. A. Co. v. Masterson* (1899) — Tex. Civ. App. —, 51 S. W. 1091.

An engineer in charge of an engine doing switch work is not a fellow servant with a fireman on another engine also employed in doing switch work the same yard, where the crews of the two engines are not working together. *Masterson v. Galveston, H. & S. A. Co.* (1897) — Tex. Civ. App. —, 42 S. W. 1001, writ of error denied in (1899) 91 Tex. 383, 43 S. W. 875.

Yard crews are not coservants with train crews. *Gulf, C. & S. F. R. Co. v. Williams* (1897) — Tex. Civ. App. —, 39 S. W. 967; *Houston, E. & W. T. & C. Co. v. Powell* (1897) — Tex. Civ. App. —, 41 S. W. 695 (train run at speed exceeding that permitted by ordinance). *International & G. N. R. Co. v. Johnson* (1900) 23 Tex. Civ. App. 160, 55 S. W. 772 (brakeman injured by negligence of switchman).

Employees of a railroad company operating a train are not fellow servants with track repairers. *Southern P. C. & O. R. Co. v. Ryan* (1895) — Tex. Civ. App. —, 19 S. W. 527; *DeWalt v. Houston, E. & W. T. R. Co.* (1900) 22 Tex. Civ. App. 40, 55 S. W. 534.

A car repairer who, at the time of the collision in which he was injured, was on a car, under orders to go to the scene of a wreck to repair cars, is not a fellow servant of either a "hostler" employed to run locomotives to and from a roundhouse, nor of a switchman whose negligence caused the injury. *San Antonio & A. P. R. Co. v. Keller* (1895) — Tex. Civ. App. 569, 32 S. W. 847.

A night crew engaged in loading railroad ties from a stack on cars on a railroad track are not fellow servants with another crew engaged during the daytime in unloading ties from cars on another track on the opposite side of the stack, and placing them on the stack. *Texas & N. O. R. Co. v. Echols* (1897) 17 Tex. Civ. App. 677, 41 S. W. 48 (stack put up by night crew fell).

Trainmen are not fellow servants with laborers engaged in unloading cars. Accordingly, in a case where a servant alleged that a train was backed with suc-

A servant who, after a temporary transfer to another place of work, is injured, after resuming his original duties, by conditions created during his absence by his former associates, and left unremedied

force against a car which he was unloading that he was thrown down and injured, the case is properly submitted to the jury, where, although no witness testified in express terms that the jar or jolt caused by the collision of the two cars was unusual, or that it was caused by imperfect appliances, it was shown that the noise of the impact between the two cars was unusually loud, and that the collision was sufficiently violent to throw plaintiff down upon the floor of the car. *Texas & P. R. Co. v. Abernathy* (1900) — Tex. Civ. App. —, 58 S. W. 175.

An allegation of a pleading that lumber was improperly loaded on a car, or, if properly loaded, was negligently permitted by the servants of the railway to become improperly and unsafely loaded, may authorize the submission of the question of negligence of the railway company in running its train at too high a rate of speed, in a suit to recover for causing the death of a section hand by lumber falling from the car, *Houston & T. C. R. Co. v. Speake* (1899) — Tex. Civ. App. —, 51 S. W. 509.

A yard clerk charged merely with the duty of seeing that the link bills are removed from the cars and deposited in their proper place is not a fellow servant of the employees operating the train. *Galveston, H. & S. A. R. Co. v. McAdams* (1905) 37 Tex. Civ. App. 575, 84 S. W. 1076.

A brakeman is not a fellow servant of an employee of the railroad company engaged in painting a coal house. *Missouri, K. & T. R. Co. v. Collins* (1896) 15 Tex. Civ. App. 21, 39 S. W. 150.

An employee engaged in working about the depot, under the employment and direction of the local agent, is not, within the meaning of the fellow servant act, in the same grade of employment with a porter on a passenger train, under employment from a different source. *Texas & P. R. Co. v. Nichols* (1906) 41 Tex. Civ. App. 119, 92 S. W. 411.

A station agent is not a fellow servant of the members of a train crew employed at the station in coupling cars to their train. *Gulf, C. & S. F. R. Co.*

v. Calvert (1895) 11 Tex. Civ. App. 297, 32 S. W. 246.

A brakeman and a station porter, each under the supervision of a different vice principal, are not fellow servants. *Gulf, C. & S. F. R. Co. v. Elmore* (1904) 35 Tex. Civ. App. 56, 79 S. W. 891.

An engine wiper subject to the control of the foreman of the roundhouse is not a fellow servant of employees of the yard master, although it was in the line of duty of both sets of employees to take coal from the car. *Houston & T. C. R. Co. v. Talley* (1896) 15 Tex. Civ. App. 115, 39 S. W. 206.

A clerk and warehouseman working under the orders of the station agent is not in the same grade as a brakeman working under the control of the conductor, although both may be engaged in unloading a car of cattle at the time of the injury. *Galveston, H. & S. A. R. Co. v. Mohrmann* (1906) 42 Tex. Civ. App. 374, 46 Tex. Civ. App. 1, 93 S. W. 1090.

A car sealer whose duty it is to inspect and hand doors of freight cars is not a fellow servant of a truckman engaged in loading and unloading freight. *Missouri, K. & T. R. Co. v. Hutchens* (1904) 35 Tex. Civ. App. 343, 80 S. W. 415.

A section hand returning from work to the tool house to place his tools therein was not a fellow servant with other section men engaged in carrying tools to the tool house on a hand car, because doing the same character of work, since the means employed in doing the work differentiated its character; nor was he a fellow servant because working at the same piece of work, since he was carrying his tools without their aid. *Long v. Chicago, R. I. & T. R. Co.* (1900) 94 Tex. 53, 57 S. W. 802.

Employees of an inside and of an outside foreman of a roundhouse are not coservants. *Texas & P. R. Co. v. Scruggs* (1900) 23 Tex. Civ. App. 712, 58 S. W. 186.

Carpenters at work in a shop adjoining the defendant's repair track are not the fellow servants of a car repairer while he is at work on a car on the repair track. *Texas & N. O. R. Co. v.*

through their negligence, is precluded by the statute from recovering.³⁹

Barwick (1908) 50 Tex. Civ. App. 544, 110 S. W. 953.

An employee of a logging contractor, whose duties consist of fastening the tongs of a logging cable by means of which logs are drawn from the woods to the vicinity of the pile from which they are to be loaded onto the skidding car, and then of fastening other tongs to the log by means of which it is drawn onto the pile, the motive power being furnished by an engine placed at one end of the skidding car is not the fellow servant of another employee whose duties are similar, but who is connected with an engine placed at the other end of the car and wholly disconnected with the first engine. *Hampton v. Woolsey* (1911) — Tex. Civ. App. —, 139 S. W. 888.

An employee of a railroad company while riding in his employer's car from one place to another in obedience to orders is not a fellow servant with the engineer of the train. *Galveston, H. & S. A. R. Co. v. Norris* (1894) — Tex. Civ. App. —, 29 S. W. 950; *Galveston, H. & S. A. R. Co. v. Crawford* (1894) — Tex. Civ. App. —, 29 S. W. 958; *Galveston, H. & S. A. R. Co. v. Leonard* (1894) — Tex. Civ. App. —, 29 S. W. 955.

Brakeman in the employ of a railway company, who are sent on a train to a certain place, are not fellow servants with the engineer in charge of the engine attached thereto, where they are not operating the train, although they are getting their regular pay and are subject to be ordered to take charge thereof. *Galveston, H. & S. A. R. Co. v. Waldo* (1894) — Tex. Civ. App. —, 26 S. W. 1004.

Members of a bridge gang transported with the material used by them from one point to another as their work demands are not fellow servants of the conductor in charge of the train, where he has nothing to do with the loading and unloading of the cars or the work of building bridges. *Missouri, K. & T. R. Co. v. Hines* (1897) — Tex. Civ. App. —, 40 S. W. 152, holding that the result was not changed by the fact that the conductor was at the time trying to stop one of the gang from injuring the back of the car.

A servant employed by a company operating a sawmill to cut and scale logs is not, while being carried to his work on one of the company's trains, a fellow servant of the train employees. *Key stone Mills Co. v. Chambers* (1909) — Tex. Civ. App. —, 118 S. W. 178.

(b) *Recovery denied on the ground of coservice.*—Railroad employees engaged in switching cars are fellow servants with a car repairer who is injured by the failure of the former to give proper notice before running cars or the repair track on which such repairer is engaged in repairing a car. *Texas & P. R. Co. v. Campbell* (1894) — Tex. Civ. App. —, 39 S. W. 1104; *Campbell v. Texas & P. R. Co.* (1897) 16 Tex. Civ. App. 665, 39 S. W. 1105.

The fact that a train parts into two sections, leaving the conductor upon the rear one, does not create between him and the engineer the same relations as exist between the conductors of different trains, and thus destroy the relation of coservice. *Moore v. Jones* (1897) 15 Tex. Civ. App. 391, 39 S. W. 593.

A boiler washer and a hostler employed by, and working under, a round-house foreman are fellow servants. *Missouri, K. & T. R. Co. v. Whitaker* (1895) 11 Tex. Civ. App. 668, 33 S. W. 716.

A member of a gang engaged in repairing a bridge is a fellow servant with a brakeman of the train which hauls him over the road, partly for the purpose of doing his work. *Austin & N. W. R. Co. v. Beatty* (1894) 6 Tex. Civ. App. 650, 24 S. W. 934. See, however, cases cited at the end of the preceding subdivision of this note.

Persons engaged in cleaning an engine may be working together at the same time and place within the meaning of the statute, although they are not in actual bodily contact with each other, and are not engaged in cleaning the same piston or wheel, and each may not know exactly what the other is doing at the time. *Galveston, H. & S. A. R. Co. v. Cloyd* (1903) — Tex. Civ. App. —, 78 S. W. 43, second appeal (1904) 37 Tex. Civ. App. 506, 84 S. W. 408.

³⁹ *Allen v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 344, 37 S. W. 171 (plaintiff was injured by the slipping of a plank, which had not been

The mere fact that the negligent and the injured servants are both exercising superintendence over other men will not prevent their being fellow servants within the meaning of the statute.⁴⁰

1796. Text of statute.—Tex. Gen. Laws 1909, p. 279, provides as follows:

Sec. 1. That every corporation, receiver, or other person operating any railroad in this state shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad; or, in case of the death of such employee, to his or her personal representative for the benefit

fastened when it was first laid, and was still in that condition when he returned to his former work).

⁴⁰ *Texas & N. O. R. Co. v. Tatman* (1895) 10 Tex. Civ. App. 434, 31 S. W. 333. There it was held that the foremen of two yard engines engaged in the same yard for shifting and switching cars are fellow servants. The court said: "The proper construction of the statute is, we think, that a servant intrusted with superintendence and control over another is not a fellow servant with such other; but he may, nevertheless, be a fellow servant with employees over whom he has no such superintendence or control. Where there is no such superintendence or control by one over the other, the question depends upon other provisions of the act. The first section of the act furnishes the rule, where there is superintendence or command, providing that the superior is not a fellow servant with his subordinate, but is a vice principal of the corporation. He stands in the relation of vice principal of the corporation only to those who are under him. The second section of the act provides affirmatively what employees are to be considered fellow servants, excluding all who do not come within the definition. They are defined to be 'all persons who are engaged in the common service of such railway company, and who, while so engaged, are working together at the same time and place to a common purpose, of same grade.' All not thus defined are declared not to be fellow servants. And of those who might otherwise fall within the definition given, the statute excludes those intrusted with superintendence or control over their fellow employees. As to these the rule is declared by the first section, and the second section does not alter that rule, but sim-

ply excludes those subject to it from the definition given of fellow servants. The second section also excludes from its definition of fellow servants, employees of the railway corporation engaged in different departments or service of such corporation. Tatman and Holzinger were in the same department of service, and the proviso of the statute just referred to does not apply to them. . . . The question then is, whether or not Holzinger and Tatman were working together at the same time and place, and to a common purpose. It is conceded that they were of the same grade. Both were engaged in moving cars about the yards. Holzinger and his crew were making up a train, and were moving the cars from the main line to the switch, when the key of a drawhead broke and the drawhead pulled out, and some of the cars were left standing on the main track, and some of them, with the engine on the switch track. They had thus been standing for two or three minutes when the collision occurred. Holzinger and his crew were waiting for the car repairer to replace the key, which work, the evidence shows, required only a few minutes. Tatman was also moving cars, intending to pass through the switch to the same siding that was being used by Holzinger. We think they come within the definition given by the statute of those to whom the rules established by the courts as to the liability of the master to his servant for negligence of a fellow servant are still to apply. Each of them being required to do the same kind of work, in the same yard, and at all parts of the yard, and it being, therefore, necessary for each to observe and take cognizance of the movements of the other, both the language and reason of the statute make them fellow servants."

of the surviving widow and children, or husband and children, and mother and father of the deceased, and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment: Provided the amount recovered shall not be liable for the debts of deceased, and shall be divided among the persons entitled to the benefit of the action, or such of them as shall be alive, in such shares as the jury, or court trying the case without a jury, shall deem proper; and Provided in case of the death of such employee the action may be brought without administration by all the parties entitled thereto, or by any one or more of them for the benefit of all, and if all parties be not before the court the action may proceed for the benefit of such of said parties as are before the court.

Sec. 2. That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 3. That in any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 5. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees, under "the assumed risk law," enacted by the twenty-ninth legislature, and known as chapter 163, pages 386, of the General Laws of the Twenty-ninth Legislature, or any other act or acts of the legislature of this state, though in case of conflict this law shall prevail, or to affect the prosecution of any pending proceeding or right of action under the laws of this state.

Sec. 6. The fact that a conflict may arise between the Federal courts and the courts of this state in construing the Federal [statutes] and state statutes of this state, in suits against common carriers by employees for damages on account of personal injuries, creates an emergency, and an imperative public

necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage; and it is so enacted.

This statute broadens the earlier act somewhat, and makes it conform with the Federal statute, but it does not repeal the earlier act.¹

The provision as to contributory negligence applies where a railroad section man was thrown from a hand car and injured as the car was being propelled at a high speed over the section, because of a low and defective joint in the track.²

R. WISCONSIN.

1797. [763] Statutory provisions.—In 1875 the following provision was enacted:

Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this state, or when such agent or servant is a resident of, and his contract of employment was made in, this state; and no contract, rule, or regulation between any such corporation and any agent or servant shall impair or diminish such liability.

This act was repealed by Wis. Laws 1880, chap. 232. From that date common-law doctrines were applied until another statute of the following tenor was enacted:

Wis. Laws 1889, chap. 438, § 1816a (Sanborn & B. Anno. Stat. 1898, § 1816a).

Liability for injuries to employees. § 1. Every railroad corporation doing business in this state shall be liable for damages sustained by any employee thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any train despatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employee who has charge or control of any stationary signal, target point, block, or switch.

Sec. 2. This act shall take effect and be in force from and after its publication. Approved April 16, 1889.

The act of 1889 was modified by Laws of 1893, chap. 220, entitled

¹ *St. Louis, S. F. & T. R. Co. v. Jenkins* (1911) — Tex. Civ. App. —, 137 S. W. 711 (holding that a boiler maker having power to direct and control his helper in the work they are doing is not the latter's fellow servant).
² *Missouri, K. & T. R. Co. v. Turner* (1911) — Tex. Civ. App. —, 138 S. W. 1126.

"An Act To Define the Liability of Railroad Companies in Relation to Damages Sustained by Their Employees."

Sec. 1. Every railroad or railway company operating any railroad or railway the line of which shall be, in whole or in part, within this state, shall be liable for all damages sustained within this state by any employee of such company, without contributory negligence on his part: First, when such injury is caused by any defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business of such employment, when such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company; Second, While any such employee is so engaged in operating, running riding upon, or switching passenger, freight, or other trains, engines or cars and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of, or for failure to discharge, his duties as such.

No contract, receipt, rule, or regulation between any employee and a railroad corporation shall exempt such corporation from the full liability imposed by this section.

Sec. 2. Chapter 438 of the Laws of 1889 is hereby repealed.

Sec. 3 No action or cause of action now existing shall be affected by this act

Sec. 4. No contract, receipt, rule, or regulation between any employee and a railroad company shall exempt such corporation from the full liability imposed by this act.

Sec. 5. This act shall take effect and be in force from and after its passage and publication.

1798. [764] Effect of these statutes.—So much of the phraseology in the last two statutes is identical that the decisions relating to both may be conveniently reviewed together.

The word "superintendent" covers a foreman of a switching crew;¹ but not a foreman of a repair shop.²

Negligence of a brakeman when told to accompany a passenger car kicked rapidly into a railroad yard in the dark, in riding on the rear instead of the front of the car, so that he gave no warning to a yard workman who was struck, renders the employer liable.³

A railway company is liable where an engineer is negligent in the management of his engine.⁴

¹ Negligence is predicable where, after being warned that a car is about to be chained on a specified track, such a foreman deliberately orders a train to be backed against the cars standing on such track. *Pier v. Chicago, M. & St. P. R. Co.* (1896) 94 Wis. 357, 68 N. W. 464.

² *Hartford v. Northern P. R. Co.* (1895) 91 Wis. 374, 64 N. W. 1033.

³ *Pomer v. Milwaukee, L. S. & W. R. Co.* (1895) 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90.

⁴ As, where a brakeman, while making a coupling, is injured by the engineer's negligently and without notice

One employed as yardmaster, though not to be regarded as in that capacity when switching cars in or out of a spur track leading to a quarry, was in "charge or control" of the "switch" to the spur track where it was his duty to open and close switches and follow the switch engine from yard to yard, taking cars in and out from the quarry, and he had a key for the purpose of opening and closing switches.⁵

The provision for the benefit of employees "engaged in operating," etc., "trains," etc., covers a case where a freight handler, while assisting to separate by hand one freight car from others, was injured by the negligence of other employees in running a train against such freight cars;⁶ but not a case where a warehouseman in the employ of a railway company was injured, while engaged in sealing a car, by the negligence of the trainmen in suddenly moving it without warning;⁷ nor a case where an injury was sustained by a car repairer through the negligence of a switchman in causing a car to be kicked against the stationary car under repair;⁸ nor a case where a railway

increasing the speed of the train when the brakemen has given no signal and is in a position of extreme danger. *Kruse v. Chicago, M. & St. P. R. Co.* (1892) 82 Wis. 568, 52 N. W. 755.

Where it is conceded that an engineer was not guilty of negligence in understanding a conductor's signal to mean that all the cars were to be cut off, he cannot be found guilty of negligence in giving his attention to the brakeman at the tender, who was cutting off all the cars, and in failing to see the signals of plaintiff, who was injured by the speed of the train being increased while he was endeavoring to cut off one car at the other end. *Despins v. Chicago, M. & St. P. R. Co.* (1899) 105 Wis. 69, 81 N. W. 493.

A railway engineer who, without receiving any notice from his fireman of his intention to go under the engine to clean out the ash pan, such as the well-understood custom among engineers and fireman requires shall be given, blows off the engine while the fireman is so at work under it and scalds him, is not guilty of negligence in so doing. *Crane v. Chicago, M. & St. P. R. Co.* (1896) 93 Wis. 487, 67 N. W. 1132.

⁵ *Albrecht v. Milwaukee & S. R. Co.* (1896) 94 Wis. 397, 69 N. W. 63.

⁶ *Ean v. Chicago, M. & St. P. R. Co.* (1897) 95 Wis. 69, 69 N. W. 997. The court said: "The test in any given case is, Was the person injured employed in

one of the branches of the railway service covered by the act, at the time of the injury? If so, he is entitled to its benefits, whether such service was the principal kind of work to be performed by him under his contract of employment, or a mere incident to his general duties. As in cases where an employee is injured by the negligence of another whose general employment is that of a vice principal, and such other is temporarily doing the work of an employee, the right of the injured party is governed by the nature of the service in which such other is engaged at the time of such injury; so here, whether the deceased, had he lived, would have been entitled to the benefits of the act in question, depends wholly upon whether he was doing the kind of service specified in the act, at the time of the injury. If he was, whether such service required him to assist in running the car at a distance of three car lengths or a greater distance, or whether by the power of a locomotive, or by some other means, makes no difference. While actually engaged in moving the car, he was within the extraordinary perils which the act was designed to protect employees against."

⁷ *Hibbard v. Chicago, St. P. M. & O. R. Co.* (1897) 96 Wis. 443, 71 N. W. 807.

⁸ *Smith v. Chicago, M. & St. P. R. Co.* (1895) 91 Wis. 503, 63 N. W. 183. The

conductor, standing by a car for the purpose of watching a switch and closing the car door when it was unloaded, was struck and injured by a bundle negligently thrown from the car by coemployees.⁹

Track repairers, while riding on hand cars from the place where they are working to their boarding cars, are not "engaged in the discharge of their duties" within the meaning of the statute.¹⁰

An action may be maintained, under this statute, by the administrator of a deceased railroad employee who was killed while operating cars, etc., through the negligence of another employee or agent of the company, provided the circumstances were such that the deceased, if he had lived, could have maintained an action for his injuries under the statute.¹¹

1799. [764a] Later legislation.—The liability of railway companies was still further enlarged by the following provision in Laws of 1898, § 1816:

Liability for injuries to employees. Every railroad company operating any railroad which is, in whole or in part, within this state, shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part:

1. When such injury is caused by a defect in any locomotive, engine, car, rail track, machinery, or appliance required by said company to be used by its employees in and about the business of their employment, if such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company.

1800. [765] Effect of this provision.—Where the wages of workmen in a railway bridge gang cover the whole time during which they are absent from the place where they reside, they are "engaged in the performance of their duties" during the time spent in travel.

court considered it quite clear that, whether the intent of the legislature should be ascertained by the principle that statutes in derogation of the common law are to be strictly construed, or by the principle that remedial laws are to be liberally construed, the words, "while engaged in the performance of his duties as such employee," referred to the words, "while operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars," and that the object of this part of the law was plainly to give a right of action to the class of employees engaged in operating and moving trains, engines, and cars, while actually so engaged.

⁹ *Medberry v. Chicago, M. & St. P. R. Co.* (1900) 106 Wis. 191, 81 N. W. 659. Two judges dissented, mainly on the ground that the conductor was engaged in watching the switch, and was therefore operating the train.

¹⁰ *Benson v. Chicago, St. P. M. & O. R. Co.* (1899) 78 Minn. 303, 80 N. W. 1050 (hand cars collided). Contrast common-law cases in § 1555, *ante*, and the decision cited in the following section.

¹¹ *Ean v. Chicago, M. & St. P. R. Co.* (1897) 95 Wis. 69, 69 N. W. 997.

ing to and from the place of work by train and hand car.¹ Compare, generally, the decisions cited under §§ 1555, 1556, *ante*, and § 1806, *post*.

A railroad construction company employed to do certain grading in straightening out a railroad track, and using for that purpose cars and engines loaned by the railroad company, is within the Wisconsin act.²

A wiper in a roundhouse required from time to time to go out with engines to help supply them with water is within the statute while climbing down from the engine after raising the water spout.³

The failure of employees to keep a lookout while cars are being backed in a yard renders the master liable for resulting injuries.⁴

1801. Text of statute.—The provision of the law as amended by Laws of 1903, chap. 448 (Sanborn & B. Anno. Stat. 1899–1906, § 1816), is as follows:

Liability for injuries to employees. Sec. 1816, as amended by chap. 448, 1903. Every railroad company operating any railroad which is in whole or in part within this state shall be liable for all damages sustained within the same by any of its employees without contributory negligence on his part:

1. When any such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employees in and about the business of their employment, if such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company.

2. When such injury is sustained by any officer, agent, servant, or employee of such company while engaged in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other officer, agent, servant, or employee while in the discharge of, or for failure to discharge, his duty as such: Provided, that such injury shall arise from a risk or hazard peculiar to the operation of railroads.

No contract, receipt, rule, or regulation between any employee and a railroad corporation shall exempt such corporation from the full liability imposed by this section.

Section 1816, Stat. 1898, as amended by Laws 1907, p. 495, chap. 254, provides as follows:

Every railroad company shall be liable for damages for all injuries, whether

¹ *Wallin v. Eastern R. Co.* (1901) 83 Minn. 149, 54 L.R.A. 481, 86 N. W. 76. See, however, the *Benson Case* (1899) 78 Minn. 303, 80 N. W. 1050, cited in § 1798, note 10, *ante*.

³ *Gaffney v. Chicago, M. & St. P. R. Co.* (1906) 127 Wis. 113, 106 N. W. 810.

⁴ *Sparks v. Wisconsin C. R. Co.* (1909) 139 Wis. 108, 120 N. W. 538.

² *Roe v. Winston* (1902) 86 Minn. 77, 90 N. W. 122.

resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee:

(1) When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery, or appliance used by its employees in and about the business of their employment.

(2) When such injury shall have been sustained by any officer, agent, servant, or employee of such company while engaged in the line of his duty as such, and when such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant, or employee of such company in the discharge of, or by reason of failure to discharge, his duty as such."

(3) In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, servant or employee other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant, or employee other than the person so injured; and such other questions as may be necessary.

(4) In all cases where the jury shall find that the negligence of the company, or any officer, agent, or employee of such company, was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employee so injured, shall be no bar to such recovery.

(5) In all cases under this act the question of negligence and contributory negligence shall be for the jury.

(6) No contract or receipt between any employee and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule, or regulation in regard to any notice to be given by such employee, shall exempt such corporation from the full liability imposed by this act.

(7) The phrase "railroad company," as used in this act, shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this state, whether as owner, contractor, lessee, mortgagee, trustee, assignee, or receiver.

(8) In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover damages in accordance with this act, where the employee of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

(9) The provisions of this act shall not apply to employees working in shops and offices.

The provision exempting the shop and office employees has been held valid.¹

Other provisions of the statute of 1907 are that all questions of negligence and contributory negligence shall be for the jury, and that if the jury shall find that the employee was guilty of negligence that directly contributed to the injury, there may nevertheless be a recovery if the jury shall find that the negligence of the company was greater than that of the employee.²

1801a. Effect of statute.—The act does not apply to private roads.¹

The crew of an engine moving slag cars in the yards of a steel company, from the blast furnace to its dumping grounds, is not within the statute.²

Removing a hand car from the track is peculiar to the "operation of railroads" under this act.³ So is the removal of rails from a hand car.⁴

The members of a switch crew are exposed to railroad hazards under the Wisconsin statute.⁵ For other cases involving the same question arising under other statutes, see §§ 1660, 1778, 1780, 1782, 1784, *b*, 1790, 1795, *a*.

S. WYOMING.

1802. [765a] Statutory provisions.—The territorial act of 1869 (Wyo. Comp. Laws, p. 512, chap. 97, § 1) which has since been repealed, ran as follows:

Where any person in the employment of any railroad company in this territory may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be

¹ *Kiley v. Chicago, M. & St. P. R. Co.* (1909) 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

² See *Boucher v. Wisconsin C. R. Co.* (1909) 141 Wis. 160, 123 N. W. 913; *Zeratsky v. Chicago, M. & St. P. R. Co.* (1909) 141 Wis. 423, 123 N. W. 904; *Jensen v. Wisconsin C. R. Co.* (1910) 145 Wis. 326, 128 N. W. 982; *Dohr v. Wisconsin C. R. Co.* (1911) 144 Wis. 545, 129 N. W. 252; *Haring v. Great Northern R. Co.* (1909) 137 Wis. 367, 119 N. W. 325.

¹ *McKivergan v. Alexander & E. Lumber Co.* (1905) 124 Wis. 60, 102 N. W. 332.

² *Knitter v. Chicago, L. S. & E. R. Co.* (1910) 103 C. C. A. 74, 179 Fed. 494.

³ *Hardt v. Chicago, M. & St. P. R. Co.* (1907) 130 Wis. 512, 110 N. W. 427.

⁴ *Meo v. Chicago & N. W. R. Co.* (1909) 138 Wis. 340, 120 N. W. 344.

⁵ *Pope v. Great Northern R. Co.* (1905) 94 Minn. 429, 103 N. W. 331.

admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company, who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company.

The Wyoming Constitution provides (art. 10, § 4) that "any contract or agreement with any employee, waiving any right to recover damages for causing death or injury of any employee, shall be void."

T. SASKATCHEWAN.

1802a. Text of ordinance.—The Saskatchewan workmen's compensation ordinance, chap. 13 of 1900 (N. W. T.), provides as follows:

(2) It shall not be a good defense in law to any action against an employer or the successor or legal representative of an employer, for damages for the injury or death of an employee of such employer, that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, any contract or agreement to the contrary notwithstanding.¹

¹ The defense of common employment nance of 1900. *Lindsay v. Davidson* is completely abrogated by the Saskatchewan (1911) 4 Sask. L. R. 351. workmen's compensation ordinance.

CHAPTER LXXVII.

ACTS IMPOSING AN ABSOLUTE LIABILITY UPON THE MASTER.—ENGLISH WORKMEN'S COMPENSATION ACT AND STATUTES FRAMED ON SIMILAR LINES.

1803. Purpose and effect of the acts; generally.

A. ENGLISH AND COLONIAL ACTS; CIRCUMSTANCES UNDER WHICH COMPENSATION IS RECOVERABLE.

1804. Text of section 1.

1805. "Accident" (sec. 1, subs. 1).

1806. "Out of and in the course of the employment" (sec. 1, subs. 1).

1807. Period of disablement (sec. 1, subs. 2, a).

1808. Alternative remedies open to workmen (sec. 1, subs. 2, b).

1809. "Serious and wilful misconduct" (sec. 1, subs. 2, c).

1810. Arbitration (sec. 1, subs. 3).

1811. Recovery in cases where nonliability apart from the act is established (sec. 1, subs. 4).

1812. Text of section 2.

1813. Notice of the accident (sec. 2).

a. "Proceedings."

b. Form and contents of notice.

c. To whom notice must be given.

d. "Claim for compensation."

e. Times within which claim must be made;—how measured.

f. "Employer is not prejudiced."

g. Excuses for not serving notice or making claim in time.

1814. Text of section 3.

1814a. Proceedings under this section.

1815. Text of section 4.

1815a. Liability to servants of contractors (sec. 4).

a. Generally.

b. "In the course of or for the purposes of his trade or business."

c. Work "undertaken by the principal."

1816. Text of section 5.

- 1817. Proceedings under this section.
- 1818. Text of section 6.
- 1819. Proceedings under section 6.
- 1820. Text of section 7.
- 1820a. Proceedings under this section.
 - a. Generally.
 - b. Persons excluded from the provisions of section 7 (sec. 7, subs. 2).
- 1821. Text of section 8.
- 1821a. Proceedings under this section.
- 1822. Text of sections 9, 10, 11, 12, and 13.
- 1823. Meaning of "employer."
- 1824. "Contract of service."
- 1825. Who are entitled to compensation; workmen.
 - a. Who are "workmen."
 - b. Employment of a "casual nature."
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B. COMPENSATION RECOVERABLE.

- 1828. Text of statutory provisions.
- 1829. "Where death results from the injury" (par. 1, a).
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- 1833. Average weekly earnings.
 - a. Generally.
 - b. Period of employment necessary to furnish basis for computation of average weekly earnings.
 - c. Trade and calendar weeks.
 - d. Continuity of the employment.
 - e. Deductions.
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- 1834. Medical examination after accident (par. 4).
- 1835. Payment to dependents (par. 5).
- 1835a. Determination of question who are dependents (par. 8).
- 1836. Medical examination after receiving compensation (par. 14, 15 [5]).

1837. Review of weekly payments (par. 16).

1837a. Payment of lump sum (par. 17).

1837b. Set-off against weekly payments (par. 19).

C. **ARBITRATION.**

1838. Text of statutory provisions.

1838a. Effect of these provisions; generally.

D. **INDUSTRIAL DISEASES.**

1839. Text of third schedule.

E. **EMPLOYMENTS TO WHICH THE ACT OF 1897 IS APPLICABLE.**

1840. Text of sections 7-10.

1841. —Scope and effect of these provisions; generally.

1842. Meaning of the phrase "on or in or about," when used in connection with various kinds of concerns.

1843. "On or in or about a building" which exceeds 30 feet in height.

a. Height of building.

b. "Being constructed or repaired."

c. What is a "scaffolding."

d. What is a "building."

1844. "On or in or about a building in which machinery driven by steam," etc.

1845. Meaning of "railway."

1846. —of "factory."

1847. —of "engineering work."

1848. —of "mine."

1849. —of "undertakers."

a. In the case of a factory.

b. In the case of engineering work.

1850. "Shipbuilding yard" (sec. 7, subs. 3).

F. **ACT OF 1900.**

1851. Text of the act.

1851a. Effect of this statute.

G. **AMERICAN STATUTES.**

1852. Text of the statutes.

1803. [766] Purpose and effect of the acts; generally.—The essential operation of the statutes discussed in this chapter is, broadly speaking, that, irrespective of any negligence or misconduct on the master's part, the classes of servants to whom they are applicable are, in a certain sense, insured against any accident that takes place in the course of their employment.¹ They represent, therefore, an entirely new departure in the law of employers' liability.

It was expected by the framers of the original English act of 1897,

¹ *Cooper v. Wright* [1902] A. C. 302, 12, 86 L. T. N. S. 776, 18 Times L. R. 71 L. J. K. B. N. S. 642, 51 Week. Rep. 622, per Lord Halsbury.

that the special procedure which it provided for the enforcement of claims would be found so simple and inexpensive that a resort to the courts of law would seldom be necessary. The expectation had not been by any means fulfilled when the first edition of this treatise was compiled; and a longer experience of the working of the statute has merely lent additional emphasis to the remark of Lord Brampton that it is "so framed as to provoke rather than minimize litigation." It bristles with obscurities, and is so extremely ill drawn that during the few years of its existence it has been a target for more censure and even ridicule, than has ever been levied against any enactment within the same space of time.³ Some of the possible sources of controversy have been removed by the amending act of 1906. But the number of cases with which courts of review have to deal is still deplorably large.

For a more detailed analysis of the act than it is possible or proper to furnish in a general work, and a discussion of the procedure applicable to its administration, the reader is referred to the treatises compiled by Mr. Beven, by Mr. Minton-Senhouse, and by Messrs Parsons and Bertram.

Statutes modeled upon the English acts have been passed in some of the British Colonies. Under all of them the "serious or wilful misconduct" of the servant constitutes a bar to his claim. A brief summary of the colonial acts is included here, and the decisions under these acts will be discussed in connection with the English decisions.

² *Ibid.*

³ It is noteworthy that several members of the House of Lords have been especially severe in their comments upon the act, and that they have thus placed themselves in the curious predicament of criticizing, as judges, a measure for which they are, as lawmakers, presumptively responsible. In the situation thus disclosed there is a touch of comedy which carries the thoughts to that amusing scene in the "Mikado," where Mr. Gilbert's official pluralist describes the embarrassing conflict of duties which results from the discharge of his manifold functions.

In *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 K. B. 639, Lord Vaughan Williams said: "The act is not very easy to construe. It is an act as to which I think I may properly say that the difficulties of construction are

so great that it is not desirable that judges should decide more than is absolutely necessary for the decision of the particular case before them."

In 11 Journ. of Soc. of Comparative Legislation, p. 55, will be found an interesting and instructive criticism of the unsatisfactory features of this act. The learned contributor, Sir J. G. Hill, also gives much useful information concerning similar legislation in the countries of Continental Europe and elsewhere. He remarks that "the justification put forward for these new laws is that it is expedient in the public interest to throw the risk of accidents upon the trade in which they occur, and that the employer can recoup himself for the cost incurred by him by raising the price of his productions and by reducing wages."

British Columbia.—Workmen's compensation act, Stat. 1902, p. 313 (2 Edw. VII. chap. 74). Applicable, like the English statute of 1897, only to certain dangerous employments.

Quebec.—Workmen's compensation act, Stat. 1909, chap. 66. Applicable to certain specified occupations. Agricultural industries and navigation by sails specially excepted. No compensation is to be granted if the accident was brought about intentionally by the person injured. Compensation may be reduced if the accident was due to the inexcusable fault of the workman.⁴

Manitoba.—Workmen's compensation act, Stat. 1910, chap. 81. This enactment is general in its scope, being applicable to all employments except domestic and agricultural work.

Alberta.—Workmen's compensation act, Stat. 1908, chap. 12. Employers in certain specified occupations declared to be absolutely liable for injuries to workmen. "Serious and wilful misconduct" is a bar to recovery unless injury results in death or permanent disablement. Not applicable to domestic or agricultural servants.

New Zealand.—Workers' compensation act 1908, No. 248 (superceding act of same title, 64 Vict. No. 43). This is an enactment of which the substantial purport is to render all employers liable for accidents to servants, but differing considerably, as regards some of its details, from the English statutes.

By § 62 (1), the defense of common employment is entirely abolished. This provision is presumably applicable to common-law actions for damages, the servant's remedial rights in respect to such actions being expressly preserved by § 43 (1) of the statute.

New South Wales.—Workmen's compensation act 1910 (No. 10). Applicable to workmen in certain specified occupations, and any others that may be declared by proclamation of the executive to be dangerous. Workman may claim compensation under the act, or take such proceedings as may be open to him independently of it.

Queensland.—Workers' compensation act 1905 (5 Edw. VII. No. 26). Applicable to all classes of workmen without distinction.

Western Australia.—Workers' compensation act 1902, 1 & 2 Edw.

⁴ As to the reduction of compensation for injuries by the fault of the workman, see *Croteau v. Victoriaville Furniture Co.* (1911) Rap. Jud. Quebec 40 C. S. 44; and see § 1990, *post*, for the rule prevailing in this province before the passage of this act.

Accidents received in lumbering op-

erations are not within the provisions of the workmen's compensation act of Quebec. *Provost v. St. Gabriel Lumber Co.* (1910) 12 Quebec Pr. Rep. 285; *Duquette v. Lake Megantic Pulp Co.* (1911) 12 Quebec Pr. Rep. 359; *Novico v. E. B. Eddy Co.* (1911) 12 Quebec Pr. Rep. 319.

VII. No. 5. Applicable, like the English act of 1897, only to certain dangerous employments.

In the first edition of the work, attention was drawn to the constitutional limitations which in the United States might be a barrier to the enactment of statutes similar to the English act of 1897. But the opinion was expressed that, in view of the unsatisfactory relations between capital and labor, strong efforts would undoubtedly be made to secure the passage of such legislation. A number of statutes of this type have come into force since that edition was compiled and the difficulty of framing them so as to satisfy constitutional test has been strikingly manifested. The text of the various American acts will be found in § 1852, *post*, with a statement as to whether they have been pronounced valid or invalid.

A. ENGLISH AND COLONIAL ACTS; CIRCUMSTANCES UNDER WHICH
COMPENSATION IS RECOVERABLE.

The complete text of the English act of 1906 is given below, with such references to the act of 1897 as will indicate to the reader the material changes made. Of course, the most essential change was the extension of the remedy to all employments, instead of to certain designated employments. Wherever there has been a change of sufficient importance to be noted, brackets have been used to show the change, and bracketed matter without further explanation indicates parts of the original act which were omitted in the act of 1906. Where the provisions of the two acts are the same, no attempt has been made to separate the cases. The colonial cases are also included under the corresponding sections of the English acts.

1804. [766a, 774] Text of section 1.—Sec. 1 (1). If in any employment [to which this act applies] personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this act.

(2) Provided that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least one [two, in the original act] week from earning full wages at the work at which he was employed:

(b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this act or take proceedings independently of this act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of

and in the course of the employment, both independently of and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid:

(c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed [the exception as to injuries resulting in death or serious and permanent disablement was not in the original act].

(3) If any question arises in any proceedings under this act as to the liability to pay compensation under this act (including any question as to whether the person injured is a workman to whom this act applies), or as to the amount or duration of compensation under this act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this act, be settled by arbitration, in accordance with the second schedule to this act.

(4) If, within the time hereinafter in this act limited for taking proceedings, an action is brought to recover damages independently of this act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this act. In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this act.

(5) Nothing in this act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine [but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this act].¹

1805. [767] "Accident" (sec. 1, subs. 1).—This word involves the idea of something fortuitous and unexpected.¹

¹The enactments here referred to are the coal mines regulation act 1887, the metalliferous mines regulation act 1872, and the factory and workshop act 1901.

¹*Hensey v. White* [1900] 1 Q. B. 481, 81 L. T. N. S. 767, 48 Week. Rep. 257, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 16 Times L. R. 64.

An examination of the cases cited below will show that it is difficult, if not impossible, to reconcile all the decisions upon this very important question.

(a) *Compensation allowed.*—"If a workman in the reasonable performance of his duties sustains a physiological in-

jury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute." *Stewart v. Wilsons & Co. Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 120, per Lord McLaren. In this case a workman strained his back in replacing a derailed coal hutch on the rails.

A rupture caused by overexertion in attempting to turn the wheel of a machine is an "accident" within the meaning of the act. *Fenton v. Thorley* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684.

A rupture caused by the effort of

Where a workman suffers injury while doing his ordinary work in his ordinary way, and the primary and efficient cause of the injury is his diseased or impaired physical condition at the time, the injury is not caused by an "accident." ²

separating a plank from one to which it was struck by ice formed during the preceding night may properly be found to have been caused by an "accident." *Timmins v. Leeds Forge Co.* (1900) 16 Times L. R. (C. A.) 521, 83 L. T. N. S. 120.

A workman in normal health was engaged in the course of his duty in removing a beam from a loom. He was in the act of lifting the beam on to his shoulder, when, finding that it was not evenly balanced, he gave it an extra lift, or hitch up, and in so doing ruptured several fibres of the muscles of his back, which incapacitated him for work. Held, that he had sustained personal injury by "accident." *Boardman v. Scott* [1902] 1 K. B. (C. A.) 43, 71 L. J. K. B. N. S. 3, 66 J. P. 260, 50 Week. Rep. 184.

Prostration by sunstroke is an "accident." *Morgan v. The Zenaida* (1909) 25 Times L. R. 446.

A nervous shock caused by a fatal injury to a fellow workman is an "accident." *Yates v. South Kirkby, F. & H. Collieries* [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1035, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B. W. Comp. Cas. 418.

Although the injury was caused by a stone wilfully thrown by a boy, it may be said to be an "accident" from the standpoint of the one who suffered the injury. *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486.

A workman who contracts pneumonia from the inhalation of gas generated by an explosion suffers from "accident." *Kelly v. Auchenlea Coal Co.* [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. Comp. Cas. 417.

Where a workman unloading coal from a ship is seized with an epileptic fit and falls down the hatchway into the hold, it is an accident. *Wicks v. Dowell* [1905] 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732.

It may be found that the death of

an engine driver resulted from injury by accident, where he was last seen alive at work upon his engine, and was subsequently found by the side of the engine with his legs doubled up, and died shortly thereafter, notwithstanding he had, on at least three previous occasions collapsed in a faint and lain unconscious for some minutes, when upon the medical evidence it appeared that he had a sound heart, and a few days before the occurrence he was examined by the physician of the company, and was presumably passed as physically fit for his position. *Fennah v. Midland G. W. R. Co.* (1911) 45 Ir. Law Times, 192 4 B. W. Comp. Cas. 440.

(b) *Compensation refused.*—Internal injuries resulting from an unusual strain in lifting heavier articles than those which the employee had previously been handling do not arise from an "accident." *Roper v. Greenwood* [1901] 83 L. T. N. S. 471.

Death from erysipelas of the face nearly three months after an injury to the hand, which had healed, cannot be said to be by "accident." *Hugo v. Larkins* (1910) 3 B. W. Comp. Cas. 228.

A stroke of apoplexy which may or may not have been brought on by a strain or overexertion is not an injury suffered by "accident," where there is no evidence that the work subjected the workman to any serious strain. *Barnabas v. Bersham Colliery Co.* (1910) 103 L. T. N. S. 513, 55 Sol. Jo. 63.

² *Hensey v. White* [1900] 1 Q. B. (C. A.) 481, 48 Week. Rep. 257, 69 L. J. Q. B. N. S. 188, 63 J. P. 804, 81 L. T. N. S. 767, 16 Times L. R. 64, denying the right of recovery in a case where a workman who was inherently weak internally ruptured a blood vessel when making an effort to start the wheel of a gas engine, which had become stiff from disuse.

A workman employed to make a steam pipe joint, who suffers injury through the red lead coming in contact with a finger which had previously been in a blistered condition, does not suffer injury by "accident." *Walker v. Lilleshall Coal Co.* [1900] 1 Q. B. (C. A.)

On the other hand, it is considered that an injury was caused by an "accident" whenever it was the result of some fortuitous and external event, although the consequences of the injury may be aggravated by plaintiff's physical condition at the time when he was hurt.³

488, 81 L. T. N. S. 769, 69 L. J. Q. B. N. S. 192, 64 J. P. 85, 48 Week. Rep. 257, 16 Times L. R. 108. But see *Dotzauer v. Strand Palace Hotel*, note 3, *infra*.

A death cannot be attributed to "accident" where the deceased had suffered from progressive heart disease for some years, and was liable to die at any moment, and death came while he was doing his normal work. *O'Hara v. Hayes* (1910) 41 Ir. Law Times, 71, 3 B. W. Comp. Cas. 586.

Where the cause of a miner's incapacity was cardiac breakdown, due to the fact that the work in which he had for some days been engaged was too heavy for him, the repeated excessive exertion having strained his heart unduly, and he was not injured by any sudden jerk, it may be found that the injury was not an "injury by accident" within the meaning of the act. *Coe v. Fife Coal Co.* [1909] S. C. 393, 46 Scot L. R. 328.

³ Where a workman in handling a hammer makes a mis-hit and strikes a "flatter" held by another workman, thus jarring his arm and producing a severe swelling, there is an "accident," although the swollen condition is declared by a doctor to have been due to gout brought on by the jar. *Lloyd v. Sugg* [1900] 1 Q. B. 486, 69 L. J. Q. B. N. S. 190, 81 L. T. N. S. 768, 16 Times L. R. 65.

The fact that a man who has died from a heat stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. *Ismay v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713. See also *Golder v. Caledonian R. Co.* (1902) 5 Sc. Sess. Cas. 5th series, 123 (workman affected by nephritis; accident lowered his vitality and accelerated death).

A man who, suffering from a disease of the skin, incurs injury by putting his hands into water with soda and soft soap in it, is injured by accident. *Dotzauer v. Strand Palace Hotel* (1910)

3 B. W. Comp. Cas. 387. Cozens-Hardy, M.R., observed: "The mere circumstance that a particular man, in doing work arising out of and in the course of his employment, meets with an accident which a perfectly healthy man would not have met with, is no answer at all." But see *Walker v. Lilleshall Coal Co.* note 2, *supra*.

In *Federal Gold Mines v. Ennor* (1910) 12 West Australia L. R. 60, the court refused to set aside an award of compensation made to a dependent of a miner who, while suffering from diseased arteries due to lead-poisoning contracted some years previously, fell from a ladder, and was found shortly afterwards with one side paralyzed, and subsequently died from cerebral hemorrhage. The mere fact that a man in the physical condition of the decedent might have died even in the absence of any strain was not deemed to be a sufficient ground for ordering a new trial.

A cerebral hemorrhage caused by exertion is an injury caused by accident although at the time of the first attack the arteries were in a degenerate condition, which rendered such an attack more likely to occur. *M'Innes v. Duns-muir* [1908] S. C. 1021.

Where a workman dies from the rupture of an aneurism, and "the death is caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal," he suffers an injury by "accident" within the meaning of the act. *Hughes v. Clover* [1909] 2 K. B. 798, 78 L. J. K. B. N. S. 1057, 101 L. T. N. S. 475, 25 Times L. R. 760, 53 Sol. Jo. 763, affirmed in [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. Comp. Cas. 275, 47 Scot. L. R. 885.

In *Warnock v. Glasgow Iron & Steel Co.*, (1904) 6 Sc. Sess. Cas. 5th Series, 474, it was held to be a question of fact for the jury whether the death of a miner seventy-nine years old, who died after having been injured by the fall of a stone from the roof of a pit was caused by the injury or by apoplexy.

Where the injury is the gradual result of doing a particular kind of work, so that it would be impossible to refer the happening of the injury to any particular day, and it is what might naturally be expected if work of that character is pursued, it is not an "accident."

On the other hand, where a disease is the direct result of unusual circumstances connected with the work, and is not the necessary result of pursuing the work, it is to be considered as caused by accident.⁵

Injuries resulting from an assault by third persons upon a workman while he is acting strictly within the scope of his employment in defending the property of his employer is an "accident."⁶

The burden of proving that the injury was caused by accident arising out of and in the course of the employment is upon the applicant.

⁴ *Steel v. Cammell* [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142 (gradual lead-poisoning contracted by a ship-caulker); *Marshall v. East Holywell Coal Co.* (1905) 93 L. T. N. S. 360, 21 Times L. R. 494 (gradual formation of abscesses, one in the hand caused by continual use of the pick, the other in the knee caused by continual kneeling while at work).

Enteritis contracted by inhaling sewer gas while working in a sewer is not an "injury by accident." *Broderick v. London County Council* [1908] 2 K. B. 307, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885.

Except in the case of the industrial or scheduled diseases, unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the act, and does not entitle the workman or his dependents to compensation. *Elke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. Comp. Cas. 482.

⁵ A disease which is a consequence of an accident, although not the natural result, is within § 1 of the act. *Ystradowen Colliery Co. v. Griffiths* [1909] 2 K. B. 533, 78 L. J. K. B. N. S. 1044, 100 L. T. N. S. 869, 25 Times L. R. 622.

Inflammation of the kidneys, caused by being obliged to work in water for

a fortnight, is injury by accident. *Sheerin v. Clayton* [1910] 2 I. R. 105 44 Ir. Law Times, 23, 3 B. W. Comp. Cas. 583.

An infection with anthrax while sorting wool is an "accident." *Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 9; L. T. N. S. 578, 21 Times L. R. 444. It is to be noted that this case was decided prior to the enactment of the third schedule of the act of 1906.

Where a miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in and caused his death, there was an injury resulting from an "accident." *Thompson v. Ashington Coal Co.* (1901) 84 L. T. N. S. (C. A.) 412, 17 Times L. R. 345.

⁶ A gamekeeper who is beaten by poachers suffers an injury by "accident" within the act. *Anderson v. Bal four* [1910] 2 I. R. 497, 44 Ir. Law Times, 168, 3 B. W. Comp. Cas. 588.

The murder of a cashier for the sake of robbery was an "accident" within the statute. *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 5 Sol. Jo. 719, 3 B. W. Comp. Cas. 507.

But an employee taking the place of strikers, who is assaulted by the latter is not injured by accident. *Murray v. Denholm & Co.* [1911] S. C. 1087, 41 Scot. L. R. 896.

⁷ *McDonald v. The Banana* [1908] 1 K. B. 926, 24 Times L. R. 887, 52 Sol. Jo. 741, 78 L. J. K. B. N. S. 26, 91 L. T. N. S. 671; *Honor v. Painter*

1806. [768] "Out of and in the course of the employment" (sec. 1, subs. 1).—This phrase embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake, and which is calculated to further, directly or indirectly, the master's business.¹

(1911) 4 B. W. Comp. Cas. 188; *Browne v. Kidman* (1911) 4 B. W. Comp. Cas. 199; *Powers v. Smith* (1910) 3 B. W. Comp. Cas. 470; *Walker v. Murray* [1911] S. C. 825, 48 Scot. L. R. 741, 4 B. W. Comp. Cas. 409; *Hawkins v. Powells Tillery Steam Coal Co.* [1911] 1 K. B. 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. Comp. Cas. 178 (an aged workman in colliery died from angina pectoris); *Marshall v. The Wild Rose* [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. Comp. Cas. 514, 11 Asp. Mar. L. Cas. 409, 48 Scot. L. R. 701 (sailor left his berth on a hot night to cool himself on deck; body found next morning under gunwale where members of crew sometimes sat down).

"A workman is bound clearly to show the nature of the accident which happened to him, and that it occurred in the course of his employment." *Durocher v. Kinsella* (1911) Rap. Jud. Quebec 40 C. S. 459.

¹ (a) *Compensation allowed.*—Where a carter in the employment of a railway company was injured while he was endeavoring to stop a horse which had suddenly started off, from some unexplained cause, with the cart. *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

Where a miner, believing that a shot had missed fire, went forward to examine it, and was injured by the explosion of the charge. *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 423, 6 Scot. L. T. 353.

Where a workman undertook to ascend by a hoist to a platform for the purpose of obtaining a certain article which he required for his work. *Logue v. Fullerton* (1901) 3 Sc. Sess. Cas. 5th series, 1006, 38 Scot. L. R. 738, 9 Scot. L. T. 152.

Where an engineer was run down, when recrossing a track to reach his en-

gine which he had left in order to ask a traffic regulator why he had been ordered to take it to a certain place. *Goodlet v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 986, 39 Scot. L. R. 759, 10 Scot. L. T. 203.

Where an engineer who, after being relieved of duty when his engine was on a siding, walked along the track to a station, where he had to report himself as being off duty. *Todd v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Scot. L. R. 784, 7 Scot. L. T. 85.

Where the injury was received by a servant who was sitting near a fire warming himself, while he was waiting for the arrival of some trucks, the wheels of which it was his duty to oil. *Harrison v. Whittaker* (1899) 16 Times L. R. (C. A.) 108, 64 J. P. 54.

Where the workman's injury was caused by a rock which fell while he was shoveling ore in a chute. *Cervio v. Granby Consol. Min. Smelting & Power Co.* (1910) 15 B. C. 192.

Where an officer of a vessel suffered a sunstroke while doing duty on the unsheltered steel deck of his vessel, in a West Indian port. *Davies v. Gillespie* (1911) 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11.

Where an officer of a vessel who had previously complained of feeling dizzy disappeared in broad daylight and calm weather from the deck, where he had been on duty. *The Swansea Vale v. Rice* (1911) 104 L. T. N. S. 658, 27 Times L. R. 440, 55 Sol. Jo. 497, 4 B. W. Comp. Cas. 298, 48 Scot. L. R. 1095 (there was no suggestion of murder or suicide).

Where a cashier who was traveling with a large sum of money was set upon and killed by robbers. *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. Comp. Cas. 507.

Where an insurance agent whose duty it was to go from door to door to collect premiums for his company fell

If the act which caused the injury was within the scope of the servant's employment, the mere fact that he had been expressly forbid-

down a stairway while at his work. *Refuge Assur. Co. v. Millar* (1911) 49 Scot. L. R. 67.

Where a salesman and collector while riding a bicycle in pursuit of his employment was kicked in the knee by a passing horse. *M'Neice v. Singer Sewing Mach. Co.* [1911] S. C. 13, 43 Scot. L. R. 15, 4 B. W. Comp. Cas. 351.

Where a canvasser and collector who with the knowledge of his employer, but not at his direction, rode a bicycle, and was struck and killed by a tram car. *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. Comp. Cas. 242.

Where a brakeman fell while trying to climb from a wagon to a brakes-van, with a view to using the steps on the van to descend to the ground, while the train was slowly passing a set of points. *Evans v. Astley* [1911] A. C. 674, 80 L. J. K. B. N. S. 1177, 105 L. T. N. S. 385, 27 Times L. R. 557, 4 B. W. Comp. Cas. 319.

Where a miner, in descending, left the cage by mistake before it reached the level at which he was working, and, on finding that the cage had resumed its descent, went down to the next level, and for some unexplained reason proceeded 600 or 700 feet along a road leading in the opposite direction from the road leading to his work, and there met his death by scalding from the exhaust steam from a pump. *Sneddon v. Greenfield Coal & Brick Co.* [1909-10] S. C. 362, 47 Scot. L. R. 337, 3 B. W. Comp. Cas. 557 (unavoidable inference was that he had lost his way, and blundered into the place where he was injured).

Where a workman employed by a lion tamer was injured while attempting to get a lion back into its cage. *Hapelman v. Poole* (1908) 25 Times L. R. 155.

Where a workman employed in a stable was bitten by the stable cat while eating his dinner. *Rowland v. Wright* (1908) 77 L. J. K. B. N. S. 1071, 24 Times L. R. 852 [1909] 1 K. B. 963, 99 L. T. N. S. 758.

Where a collier in leaving the pit tried to get under some trucks standing

over the route which the colliers or dinarily took in leaving the pit. *Gan v. Norton Hill Colliery Co.* [1909] 1 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640.

Where a commercial traveler while going to the station to take a train, home fell into a canal and was drowned. *Dickinson v. Barmack* (1908) 124 L. T. J. 403.

Where a collier awaiting transportation to his home, which was part of the implied term of the contract, was knocked down and injured. *Cremens v. Guest* [1908] 1 K. B. 469, 77 L. J. K. B. N. S. 326, 98 L. T. N. S. 335, 24 Times L. R. 189.

Where a collier was injured by the slamming of an iron gate on the employer's premises, which he was obliged to pass through. *Hoskins v. Lancaster* (1910) 26 Times L. R. 612, 3 B. W. Comp. Cas. 476.

Where a workman feeling thirsty at his work goes for a drink of water to a place close at hand on his master's premises, and is injured before returning to his place of work. *Keenan v. Flemington Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 164, 40 Scot. L. R. 144, 10 Scot. L. T. 409.

Where a workman employed to watch trawlers on a quay, whose watch continued for twenty-five hours, and who was to furnish his own food and drink, left his place of duty for a short time to get a drink, and was injured on returning to the quay. *Low v. General Steam Fishing Co.* [1909] A. C. 523, 78 L. J. P. C. N. S. 148, 101 L. T. N. S. 401, 25 Times L. R. 787, 53 Sol. Jo. 763.

Where a workman who, in the course of his employment, was sitting on a wagon which was being drawn by a traction engine, fell from the wagon in an attempt to recover his pipe which he had dropped. *M'Lauchlan v. Anderson* [1911] S. C. 529. The lord president said: "He had a right to be at the place, riding on or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man while working

may reasonably do,—a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again.”

Where a workman while engaged in chipping the burs from a steel plate with a cold chisel was injured by a piece of the steel so chipped off, which struck him in the eye. *Neville v. Kelly Bros.* (1907) 13 B. C. 125. The somewhat singular contention rejected by the court was that the occurrence in question was an expected liability naturally resulting from the occupation in which the workman was engaged, and therefore did not involve the element of the fortuitous, apart from which an “accident” is not predicable.

Where a workman employed by an undertaker and funeral contractor left home in the morning uninjured, and returned bearing injuries which were consistent with his having been bruised while carrying a coffin, the recorder may find that he suffered from accident arising out of and in the course of his employment. *Wright v. Kerrigan* [1911] 2 I. R. 301. Concerning the decision in *Mitchell v. Glamorgan Coal Co.* (1907) 23 Times L. R. 588. Cherry, L. J., said: “Practically all that was proved there was that the man went out to his work uninjured, and that he came back with a crushed finger. But from that one fact the court of appeal held that the county court judge was at liberty to infer, first, that the injury was caused by an accident; secondly, that the accident arose in the course of the employment; and, thirdly, that it arose out of the employment.”

A boy employed in a boot factory, who was directed to take an insole down stairs to have it remolded, and in the absence of the operator of the molding machine attempted to remold it himself, and was injured, is entitled to compensation where he had not been expressly forbidden to touch the molding machine. *Tobin v. Hearn* [1910] 2 I. R. 639, 44 Ir. Law. Times 197.

Injury to a bricklayer on a scaffolding 23 feet high, by lightning, may be said to be caused by an accident arising out of the employment. *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429.

An engine driver who was struck by a stone wilfully let drop by a boy

from an overhead bridge suffered an injury by accident arising out of and in the course of his employment. *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486.

Where a workman in the employment of ship builders was oiling a machine at which he was working with a brush which was not the one belonging to the machine, and another workman came up, and, claiming the brush as his, pulled it away from the claimant, and in so doing injured the latter's hand, the injury was caused by accident arising out of and in the course of the employment. *M'Intyre v. Rodger* (1903) 6 Sc. Sess. Cas. 5th series, 176, 41 Scot. L. R. 107, 11 Scot. L. T. 467.

An arbiter is justified in finding that the death of an engineer of a steam tug was due to an accident arising out of the employment, where he was seen at 5 A. M. in his bunk, and one hour afterwards his bunk was empty and his work clothes were beside it, and some days after his body was found clad in his night clothes, and death was caused by drowning, there being no suggestion of suicide. *Mackinnon v. Miller* [1909] S. C. 373, 46 Scot. L. R. 299.

In *Brown v. Scott* (1899) 2 W. C. C. 11, Times Newspaper, June 12, 1899, the court of appeals (Williams, L. J., dissenting) allowed recovery to be had for an injury received by a boy who undertook to oil a machine while in motion, in compliance with the order of a fellow workman, who had no authority over him, but told him falsely that his foreman had given the direction thus conveyed to him. But this decision can scarcely be intended to embody any general principle.

(b) *Compensation refused.*—Where an injury was received by a ticket collector while riding on the footboard of a train for his own pleasure, and not for any object of his employment. *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. (C. A.) 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64. The court emphasized the point that, to render an employer liable to pay compensation, the accident must arise, not only “out of,” but also “in the course of,” the employment.

Where an engine driver got down from his engine, and crossed a siding

to receive a book from a friend, and was struck by some trucks being shunted on the siding. *Reed v. Great Western R. Co.* [1908] W. N. 212, affirmed in [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31.

Where a workman went, for purposes of his own, into a dangerous place, when the places provided by the employer were in good order and close at hand. *Thomson v. Flemington Coal Co.* [1911] S. C. 823, 48 Scot. L. R. 740, 4 B. W. Comp. Cas. 406.

Where a workman deliberately went into a dangerous place for purposes of his own. *Rose v. Morrison* (1911) 80 L. J. K. B. N. S. 1103, 105 L. T. N. S. 2, 4 B. W. Comp. Cas. 277.

Where a collier who was employed to hew coal in a particular part of a mine deliberately and for his own advantage went to a different part of the mine. *Weighill v. South Hetton Coal Co.* [1911] 2 K. B. 757, note.

Where a workman ignored warnings and attempted to climb onto a moving traction engine. *McKeown v. McMurray* (1911) 45 Ir. Law Times 190.

Where a brusher in a mine, in violation of a known rule, jumped in a hutch that was being taken to the bottom of the mine. *Kane v. Merry* [1911] S. C. 533, 48 Scot. L. R. 430, 4 B. W. Comp. Cas. 379.

Where a dock employee jumped on to railway wagon for a lift home. *Morrison v. Clyde Navigation* [1909] S. C. 59, 46 Scot. L. R. 40.

Where a workman was injured while mounting an empty cart to ride from one of his employer's farms to another, it being his duty to go, but he having no duty in connection with the cart. *Parker v. Pout* (1911) 105 L. T. N. S. 493.

Where a workman in the employ of a railroad took a short cut along the railway line, instead of going around by the road. *McLaren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885.

Where the applicant was employed as a cook in a hotel wherein the kitchen and the bar were on the same level, and a drunken customer came out of the bar into the kitchen, where he had no business to be, and made a rush at the cook, who, in trying to avoid him, put her arm through a glass door. *Murphy v. Berwick* (1909) 43 Ir. Law. Times (C. A.) 126. Walker, L. C., said that

the employer is not liable for the tortious act of a third party, where such act is not a risk reasonably to be contemplated by the employee in taking the employment.

Where an accident happened to a workman while engaged at his work through a tortious act of a fellow workman, which had no relation whatever to their employment. *Armitage v. Lancashire & Y. R. Co.* [1902] 2 K. B. (C. A.) 178, 71 L. J. K. B. N. S. 778, 64 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; *Fitzgerald v. Clarke* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101.

Where a foreman of sewage works was stabbed by a drunken man during a fight on the street where the pipes were being laid. *Collins v. Collins* [1907] 2 I. R. 104.

Where a lad set to clean a machine at rest, was injured by the starting of the machine, caused by him and another lad who were playing around it. *Cole v. Evans* (1911) 4 B. W. Comp. Cas. 138.

Where a drawer in a coal pit was injured while attempting to take his hutch away from another drawer who had attempted to take possession of it. *Burley v. Baird & Co.* [1908] S. C. 545.

Where the injury was caused by the plaintiff's fellow workmen, who at the time were not engaged in their work, but were indulging in horse play. *Falconer v. London & G. Engineering Co.* (1901) 3 Sc. Sess. Cas. 5th series, 564, 38 Scot. L. R. 381, 8 Scot. L. T. 430.

Where a domestic servant, while in the course of her duties, was struck on the eye and blinded by an indiarubber ball thrown at her in play by a fellow servant. *Wilson v. Laing* [1909] S. C. 1230, 46 Scot. L. R. 843.

Where a miner attempted to fire a shot in a mine which it was not his duty to fire. *Kerr v. Baird* [1911] S. C. 701, 48 Scot. L. R. 646, 4 B. W. Comp. Cas. 397.

Where a workman's foot was pierced by the spikes on top of a railing which he undertook to scale in order to enter a church through a window, after finding that the door was locked. *Gibson v. Wilson* (1901) 3 Sc. Sess. Cas. 5th series, 661, 38 Scot. L. R. 450, 8 Scot. L. T. 497.

Where a domestic servant who was drying her hair outside the door of her employer's house was directed to come

to do that act will not necessarily be fatal to his claim.² It is other-

in and take charge of a baby in a cradle close to a fire, and, while performing this duty, continued the operation of drying her hair, and was fatally injured through her sleeve catching fire. *Clifford v. Joy* (1909) 43 Ir. Law. Times (C. A.) 192. Fitzgibbon, L. J., said: "The risk of taking fire while engaged in drying her hair was one not within the scope of her employment."

Where the hand and arm of a journeyman baker were frostbitten while he was on his rounds in his employer's cart. *Warner v. Couchman* [1911] 1 K. B. (C. A.) 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693 [1910] W. N. 266, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. Comp. Cas. 32, affirmed in H. L. [1911] W. N. 220, 81 L. J. K. B. N. S. 45, 28 Times L. R. 58, 56 Sol. Jo. 70.

Where a workman while driving an engine on his employer's farm was stung by a wasp, and died from blood poisoning. *Amys v. Barton* [1912] 1 K. B. 40 [1911] W. N. 205, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29.

The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity, and it is altogether impossible to say that the alarm caused to the applicant by the flight of the cockchafer, followed by her putting her thumb into her eye, was something which arose out of her employment. *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560.

A workman who had been engaged to load a van, and was promised employment in unloading it if he was at the place of unloading in time, was not in the employment while riding on his bicycle from one place to the other. *Perry v. Anglo-American Decorating Co.* (1910) 3 B. W. Comp. Cas. 310.

If it was no part of the applicant's duty to start an engine, she was not entitled to compensation for injuries received while attempting to start it. *Losh v. Evans* (1903) 51 Week. Rep. 243, 19 Times L. R. 142.

A roadman in the employment of a country road authority, whose employment was solely to sweep and put "blinding" on the road, was not injured by accident arising "out of and in the

course of" his employment, where he was injured when stepping down from a steam road roller belonging to the employers, upon which he had gone for the purpose of breaking up the boiler fire so as to get up steam by 7 A. M., under an arrangement with the engine-man to break up the fire so as to save the engineman and fireman, who had gone to their homes for the night, from returning before 7 A. M. *M'Allan v. Perthshire County Council* (1906) 8 Sc. Sess. Cas. 5th series, 783.

Where a fish porter in the employment of a fish stevedore who had a contract with a railway company for the portorage of fish delivered at one of their stations left the siding where the trucks were customarily discharged, and went along the line of railway for a purpose not connected with his employment, and was run down and killed by a railway engine, he was not killed through an accident arising "out of and in the course of" his employment. *Hendry v. Caledonian R. Co.* (1906-07) S. C. 732.

A collier was not injured by accident arising "out of and in the course of" his employment, where he went, on the day following the receipt of his pay-note, to protest against the amount thereof, with the intention of quitting the employment unless it was adjusted, and, on failing to receive satisfaction, was injured while leaving the place. *Phillips v. Williams* (1911) 4 B. W. Comp. Cas. 143.

² Recovery has been allowed where a carpenter, part of whose duty was to sharpen his tools on a grindstone rotated by machinery, had been forbidden to touch the machinery, and was injured while endeavoring to replace the belt, which started the grindstone after it had slipped. *Whitehead v. Reader* [1901] 2 K. B. (C. A.) 48, 84 L. T. N. S. 514, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 17 Times. L. R. 387.

And where a workman employed by the defendants to attend to a steam engine within a shed, and to a mortar pan outside the shed, worked by the steam engine and used to grind mortar for a building, was caught in a revolving shaft, as a result of his entering the shed by a door which he had been forbidden to use. *McNicholas v. Dawson*.

wise where the prohibited act was one which lay entirely outside the range of his functions.³

[1891] 1 Q. B. 773, 68 L. J. Q. B. N. S. 470, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242.

And where a collier leaving a mine induced a boy by a truck to wind him up by a shaft which was used only for pulling up tools, and by which the men were prohibited to ascend, the boy being so startled when the collier reached the top that he let go. *Douglas v. United Mineral Min. Co.* (C. A.) Times Newspaper, February 20, 1900, 2 W. C. C. 15.

Where the second engineer lit a fire in his cabin during the night in violation of orders, but it was found that as matter of fact some fire was necessary owing to the intense cold. *Edmunds v. The Peterston* (1911) 28 Times L. R. 18.

The fact that a miner goes into a forbidden area to get a pick needed by him in his work does not take him out of his employment. *Conway v. Pumpherson Oil Co.* [1911] S. C. 660, 48 Scot. L. R. 632, 4 B. W. Comp. Cas. 392.

Although a collier in going into a dangerous working in disobedience to the colliery special rules, and against the warnings of a fireman or overlooker, was guilty of "serious and wilful" misconduct, yet if he did so in an honest attempt to further that which he was instructed to effect, his dependents may secure compensation for his death, which resulted from such act. *Harding v. Brynadu Colliery Co.* [1911] 2 K. B. 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. Comp. Cas. 269 (decision under act of 1906; serious and wilful misconduct not a defense where death ensues).

³ Where a person employed in a factory to do purely unskilled labor, and expressly forbidden to touch any of the machinery, was injured while attempting, in violation of such orders, to clean a machine. *Love v. Pearson* [1899] 1 Q. B. (C. A.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124.

Where a driver of a canal boat violated the orders of his employer, and attempted to steer the boat, and was drowned while steering. *Whelan v.*

Moore (1909) 43 Ir. Law. Times (C. A.) 205 (the desertion of another boat man created no emergency justifying the disobedience).

Where a workman tried to get on a moving train contrary to orders. *Pop v. Hill's Plymouth Co.* (1910) 102 L. T. N. S. 632, 3 B. W. Comp. Cas. 339.

Where a boy at work in a colliery in disobedience to orders got in a tub that was being hauled on an endless chain. *Barnes v. Nunnery Colliery Co.* [1910] W. N. 248, 45 L. J. N. C. 757.

Where a brakeman was injured by jumping off the seat of a lorry, where he had been expressly forbidden to go and where he had no duty to perform. *Revie v. Cumming* [1911] S. C. 1032, 41 Scot. L. R. 831.

Where a workman climbed onto a tank to eat his dinner, contrary to orders. *Brice v. Lloyd* [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744.

Where a miner's body was found among the debris after a shot had been fired in a place where he had been forbidden to go, and no reason was shown for his being there. *Traynor v. Addi* (1911) 48 Scot. L. R. 820, 4 B. W. Comp. Cas. 357.

Where a girl engaged in passing sheaves undertook, in disobedience to an express prohibition, to step across the opening through which they were fed merely for the purpose of speaking to a friend, and without any necessity arising out of the work. *Callaghan v. Maxwell* (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Scot. L. R. 313, 7 Scot. L. T. 339.

A miner who, after he had been suspended, was directed to go to a certain part of the mine, is not entitled to compensation for injuries while remaining in the place which he had been told to leave. *Smith v. South Normanton Colliery Co.* [1903] 1 K. B. 204, 72 L. J. K. B. N. S. 76, 67 J. P. 381, 51 Week. Rep. 209, 88 L. T. N. S. 5, 19 Times L. R. 128.

A message boy who, in using a hoist to carry him to the third floor of a building where it was his duty to go instead of walking up the stairs, knowingly violates his orders, is outside the course of his employment. *McDaid v.*

A workman's employment begins, in the ordinary course, only when the time for work has arrived and the locality has been reached at which the work is to be performed.⁴ But recovery may be had for an accident occurring before the place of work was reached, if, during the antecedent period within which it occurred, the servant was, as a matter of fact, under the master's control.⁵

Steel [1911] S. C. 859, 48 Scot. L. R. 765, 4 B. W. Comp. Cas. 412.

An accident caused by a workman going into place where he has been forbidden to go does not "arise out of" the employment. *Powell v. Lanarkshire Steel Co.* (1904) 6 Sc. Sess. Cas. 5th series, 1039.

⁴ No compensation is allowable for injuries to a workman on his way to his work and on the employer's premises, but before his duties began. *Anderson v. Fife Coal Co.* (1910) 47 Scot. L. R. 3 [1910] S. C. 8, 3 B. W. Comp. Cas. 539; nor where a newly engaged shepherd, while being transported with his family and chattels to the cottage that he was to occupy on the farm, fell from the wagon and was killed. *Whitbread v. Arnold* (1908) 99 L. T. N. S. 103.

Where an employee of railroad contractors engaged in ballasting a railroad siding was run over by a train about seven minutes before the hour for commencing work, at a point several hundred yards from the work, as he was proceeding, in accordance with his employer's directions, along the main track, for the purpose of going to work, this was not an accident arising out of, and in the course of, his employment. *Holness v. Mackay* [1899] 2 Q. B. (C. A.) 319, 68 L. J. Q. B. N. S. 724, 47 Week. Rep. 531, 80 L. T. N. S. 831, 15 L. T. N. S. 831, 15 Times L. R. 351 (Romer, L. J., dissenting).

A workman employed at a coal mine, injured while going from his house to his work by the usual road and while crossing a railway belonging to his employers, is not within the protection of the act, although the place of the accident was part of the mine within the meaning of the coal mines regulation act 1887, and the workman might have been required to work there under his contract of service, when, in point of fact, his only duties at the time were those of a miner underground, and did not actually commence until he arrived

at the lamp cabin, 360 yards distant from the scene of the accident. *Anderson v. Fife Coal Co.* [1909-10] S. C. 8, 47 Scot. L. R. 3, 3 B. W. Comp. Cas. 539.

An accident to a workman, caused by slipping on some ice at a point a quarter of a mile from his place of work, does not arise out of and in the course of his employment, although he was on the employer's premises at the time. *Gilmour v. Dorman* (1911) 105 L. T. N. S. 54, 4 B. W. Comp. Cas. 279. To the same effect, *Walters v. Staveley Coal & I. Co.* (1911) 105 L. T. N. S. 119, 55 Sol. Jo. 579, 4 B. W. Comp. Cas. 303 (workman fell while making short cut over employer's land, which the latter permitted him to use but did not agree to furnish).

⁵ As, where an engine cleaner who had been conveyed free of charge in his employer's train to the place where he was to do his work was run over while crossing the line to reach the shed where the engines were standing. *Holmes v. Great Northern R. Co.* [1900] 2 Q. B. (C. A.) 409, 83 L. T. N. S. 44, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 16 Times L. R. 412, distinguishing between the beginning of the employment and the beginning of work. Compare cases cited in § 1555, ante.

The accident arose "out of and in the course of his employment," where a miner, while proceeding above ground to his work, slipped and broke his leg upon rails belonging to the mine, leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between 9 and 13 feet from the doorway. *Mackenzie v. Coltness Iron Co.* (1903) 6 Sc. Sess. Cas. 5th series, 8. Lord McLaren said: "I think the words 'in the course of his employment' cover any part of the undertaking in which the man may legally be for the purposes of his employment and in the pursuance of his employment."

Whether a servant whose active duties are finished, but who is still on his employer's premises, is entitled to recover under the act, probably depends on the circumstances of the case. There seems to be no reason why a more rigorous standard should be applied under this act than under the common law, which, as has been shown in § 1556 *ante*, treats a servant in many situations as being still within the protection of his master, although he may not be actually at work.⁶

Where a sailor has been on shore on leave, and is injured while returning to the vessel, a somewhat arbitrary rule has apparently been formulated that if his injury occurs before he has reached the gangway leading to the vessel, no compensation is allowed; but if he has reached it, then compensation is allowed on the ground that the injury is an accident arising "out of and in the course of" his employment.⁷

See also *Sharp v. Johnson* [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482 (servant injured on employer's premises after his arrival on train, but some time before actual work began).

⁶ In a Scotch case recovery was denied where a workman who, after the conclusion of his day's work, was walking home along a private railway track belonging to his employer, was run over at a point about 230 yards from the place where he worked. *Caton v. Summerlee & M. Iron & Steel Co.* (1902) 4 Sc. Sess. Cas. 5th series, 989, 39 Scot. L. R. 762, 10 Scot. L. T. 204.

A servant who is paid by the hour for the number of hours which he actually works during the week is entitled to compensation for injuries received by a wall falling on him while eating his dinner. *Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105. And see *Cremens v. Guest* (1907) 24 Times L. R. 189 (collier waiting at station platform for employer's train to take him home).

Injury to a night watchman, caused by the falling of a shanty into which he went to cook some food, as it was raining, may, in the absence of any prohibition against the use of the shanty, be considered as arising out of and in the course of his employment. *Morris v. Lambeth Borough Council* (1905) 22 Times L. R. 22.

An injury to a servant who, several hours after he had left work, went to the pay office, as he was required, to get his wages, was occasioned "in the course of his employment." *Lowry v. Sheffield Coal Co.* (1907) 24 Times L. R. 142.

In *Riley v. Holland* [1911] 1 K. B. 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. Comp. Cas. 155, where the applicant, who had been discharged from a mill, went to the mill two days afterwards upon the regular pay day to get her pay, and was injured by slipping on her way down the stairs from the pay office, it was held that the accident arose out of and in the course of her appointment. Cozens-Hardy, M. R., referred to the observations of Vaughan Williams, L. J., in *Holness v. Mackay*, [1899] 2 Q. B. 319, where the latter said: "Though the employment is at an end in the sense that the workman (whether rightly or wrongly) has ceased to work under the contract, yet the employment may continue because of an obligation of the employer to the workman arising out of the course of the employment and continuing at the time of the occurrence of the accident."

⁷ (a) *Compensation refused*.—Where a sailor returning to his ship from a week-end at his son's house slipped on some public steps leading to the river. *Kelly v. The Foam Queen* (1910) 3 B. W. Comp. Cas. 113.

Where the master of a vessel who goes ashore for his own purposes, as

A servant does not cease to be in the course of his employment, merely because he is not actually engaged in doing what is specially prescribed to him, if, in the course of his employment, an emergency arises, and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master.⁸

he has a right to, falls off the pier as he is waiting for a boat from his vessel. *Fletcher v. The Duchess* [1911] A. C. 671, 81 L. J. K. B. N. S. 33, 55 Sol. Jo. 598, 4 B. W. Comp. Cas. 317, 105 L. T. N. S. 121.

Where there is no proof that a sailor who had been on shore on leave, and was drowned while returning to the vessel, had reached the gangway when he fell. *Kitchenham v. The Johannesburg* [1911] A. C. 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. Comp. Cas. 311 (accident arose in the course of his employment, but not out of it).

The act of a workman on a vessel in passing the gangway, and going further than he was required to do in order to go on board by the proper means provided, and in trying to jump on board, which he had been warned not to do, is not in the course of his employment. *Martin v. Fullerton & Co.* [1908] S. C. 1030.

The death of a ship's engineer did not arise out of and in the course of his employment, where in attempting to reach his ship, about 100 yards from the shore, where he had been on a legitimate purpose, he entered a life boat usually manned by six men, and tried alone to reach the ship by paddling with the rudder, but was carried out to sea and was drowned. *Halvorsen v. Salvesen* (1911) 49 Scot. L. R. 27.

The injury to a sailor who fell into the water while returning to his ship from a trip on shore, which was not connected with his employment, does not arise out of and in the course of his employment. *Hyndman v. Craig* (1911) 45 Ir. Law. Times 11, 4 B. W. Comp. Cas. 438.

(b) *Compensation allowed.*—Where a sailor who had been on shore on leave, and was drowned while returning to the vessel, fell after he had reached the gangway and was crossing it. *Leach v. Oakley* [1911] 1 K. B. 523, 80 L. J. K. B. N. S. 313, 103 L. T. N. S. 778, 27

Times L. R. 124, 55 Sol. Jo. 124, 4 B. W. Comp. Cas. 91.

Where a fireman on a ship fell from a ladder as he was returning from shore, whence he had gone to make certain purchases for himself. *Moore v. Manchester Liners* [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. Comp. Cas. 527, reversing [1909] 1 K. B. 417, 100 L. T. N. S. 164, 78 L. J. K. B. N. S. 463, 25 Times L. R. 202.

Where a ship steward fell down an unguarded hatch while returning to the ship, during the time when he had the right to go on shore. *Robertson v. Allan Bros.* (1908) 77 L. J. K. B. N. S. 1072, 98 L. T. N. S. 821.

A sailor returning to his ship from shore leave, who fell from the gangway supplied for him to return to ship by. *Leach v. Oakley* [1910] W. N. 275, 27 Times L. R. 124, 55 Sol. Jo. 124.

A sailor returning to his vessel from the shore where he had been on leave, on business of his own, is entitled to compensation for injuries received in jumping from the pier to the vessel, there being no other means of getting on board. *Kearon v. Kearon* (1911) 45 Ir. Law. Times 96, 4 B. W. Comp. Cas. 435.

⁸ *Durham v. Brown Bros.* (1898) 1 Sc. Sess. Cas. 5th series, 279, 36 Scot. L. R. 190, 6 Scot. L. T. 239.

Where a clerk employed at engineering works, whose duty was confined to weighing and recording all articles sent out from the works, met with an accident which resulted in his death while helping workmen to carry a heavy article to the weighing machine, the accident arose out of and in the course of the clerk's employment, in the sense of the act. *Goslan v. Gillies* [1906-07] S. C. 68.

A laborer injured while giving assistance to a machine man, in replacing some loose belting while the machine was in motion, was held entitled to re-

In a number of decisions it has been held that a workman who goes to the rescue of his master or of another workman, and is thereby injured, is not entitled to compensation.⁹ But see the last case cited in the preceding note.

A servant does not cease to be in the course of his employment because he takes a wrong or dangerous method of doing what might be done safely.¹⁰ But he is out of the course of his employment, where

cover in *Menzies v. McQuibban* (1900) 2 Sc. Sess. Cas. 5th series, 732, 37 Scot. L. R. 526, 7 Scot. L. T. 432.

In *Rees v. Thomas* [1899] 1 Q. B. (C. A.) 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301, recovery was allowed where a fireman employed in a coal mine was, in the course of his duty, carrying a report of the state of the mine from the pit's mouth to the office, and the horse drawing the tramway truck in which he was riding ran away, and in endeavoring to stop it he fell and was killed. *Lowe v. Pearson* [1899] 1 Q. B. (C. A.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124 (see note 3, *supra*), was distinguished on the ground that the act there which was done outside the scope of the servant's employment was not done in any emergency.

A laborer whose duties in unloading a vessel do not require him to go upon it does not go out of his employment in volunteering to go in the hold to rescue another laborer who has been overcome by gas. *London & E. Shipping Co. v. Brown* (1905) 7 Sc. Sess. Cas. 5th series, 488. The Lord Justice Clerk said: "I cannot doubt that, in a sudden emergency where there is danger, a workman does not go out of his employment if he endeavors to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that, if the man did his best to stop the horse, and met with an injury, he suffered that injury in the course of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and therefore in the interests of his master. The same would apply to the endeavor to sprag a runaway wagon, which might cause loss of life. No doubt this case is somewhat unusual, and the endeavor was made to liken it to the case of per-

sons arriving on the scene of a disaster such as a coal-pit explosion, and deliberately volunteering to join a rescue party, and who therefore could be held not to be acting as employees, but solely as individuals. I can conceive such a case, where it would be very difficult to make the act apply; but, in my view any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him, engaged in work on the quay, come suddenly into danger, and he had instantly endeavored to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory."

⁹ An employee who goes to the rescue of his employer who is being attacked by a gang of rowdies, and is stabbed to death, is not injured by an accident arising out of and in the course of his employment. *Collins v. Collins* [1907] 2 I. R. 104.

A workman is not injured by accident arising out of his employment, where the injury is incurred in attempting to rescue a fellow workman who, while engaged in hauling a bogie across a public street, negligently became in danger of injury by the bogie. *Mullen v. Stewart* [1908] S. C. 991.

¹⁰ *Durham v. Brown Bros.* (1898) 1 Sc. Sess. Cas. 5th series, 279, 36 Scot. L. R. 190, 6 Scot. L. T. 239, per Lord McLaren.

A fatal accident to a workman will be deemed to have occurred in the course of his employment, notwithstanding that at the time when it occurred he was going from one place of his employment to another by a forbidden route, which was more dangerous than another route which was available to him. *McNicholas v. Dawson* [1899] 1

upon leaving his place of work, he chooses a dangerous exit from the premises when there are two safe ways provided.¹¹

The burden of proving that an accident arose out of and in the course of the workman's employment lies on the plaintiff.¹²

Q. B. (C. A.) 773, 68 L. J. Q. B. N. S. 470, 47 Week. Rep. 500.

¹¹ Where a miner took an obviously dangerous and unused path from the pit. *Hendry v. United Collieries* [1910] S. C. 709, 41 Scot. L. R. 635, 3 B. W. Comp. Cas. 567.

Where a miner leaves his work by an unauthorized route. *Hendry v. United Collieries* (1909-10) S. C. 709. Lord Dunedin said: "Where there is a perfectly proper and recognized road out of premises, it is impossible to say that a man is in the course of his employment if he neglects that road and goes by some other means of exit which in point of fact is really no road at all."

An engine driver who goes across the rails for his own purposes, when his proper path does not cross the rails at all, is not in the course of his employment. *Benson v. Lancashire & Y. R. Co.* [1904] 1 K. B. 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 243, 89 L. T. N. S. 715, 20 Times L. R. 139.

Where a workman employed at a coal mine, proposing to go home by crossing a railway siding on the premises of the mine owners, and by trespassing along a railway, was injured while crossing the siding, and there were two exits provided for leaving the mine, neither of which crossed the siding, the accident did not arise "out of and in the course of the employment" of the workman. *Haley v. United Collieries* (1906-07) S. C. 214.

¹² *McNicholas v. Dawson* (1899) 68 L. J. Q. B. N. S. 470 [1899] 1 Q. B. 773, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242; *Pomfret v. Lancashire & Y. R. Co.* [1903] 2 K. B. 718, 72 L. J. K. B. N. S. 729, 52 Week. Rep. 66, 89 L. T. N. S. 176, 19 Times L. R. 649; *McDonald v. The Banana* [1908] 2 K. B. 926, 78 L. J. K. B. N. S. 26, 99 L. T. N. S. 671, 24 Times L. R. 887, 52 Sol. Jo. 741; *Charles v. Walker* (1909) 25 Times L. R. 609; *Hewitt v. The Duchess* [1910] 1 K. B. 772, 79 L. J. K. B. N. S. 867, 102 L. T. N. S. 204, 26 Times L. R. 300, 54 Sol. Jo. 325, 3 B. W. Comp. Cas. 239; *Jenkins v. Stand-*

ard Colliery Co. (1911) 28 Times L. R. 7 (death caused by blood poisoning following an abrasion of the skin; nothing to show that the abrasion was received in the employment); *Karemaker v. The Corsican* (1911) 4 B. W. Comp. Cas. 295 (sailor suffering from frost-bite did not prove that it was due to any particular circumstance of the employment); *O'Brien v. Star Line* [1908] S. C. 1258; *Carrick v. North British Locomotive Co.* [1909] S. C. 698; *M'Adam v. Harvey* [1903] 2 I. R. (C. A.) 511; *Gatton v. Limerick S. S. Co.* (1910) 44 Ir. Law. Times 141 [1910] 2 I. R. (C. A.) 561.

The inference may be drawn that the injury arose out of and in the course of the employment, where a night workman in a colliery went to his home one morning at the regular time, with a broken finger, and there was nothing to suggest that the accident happened on his way home. *Mitchell v. Glamorgan Coal Co.* (1907) 23 Times L. R. 588.

Where the deceased, a station policeman, might legitimately have been at the spot where he was injured in the course of his duties, the presumption is that he had been injured by accident arising out of and in course of his employment, and in the absence of evidence to the contrary this must be taken to be the fact. *Grant v. Glasgow & S. W. R. Co.* [1908] S. C. 187.

The unexplained drowning of a seaman not in the discharge of his actual duties furnishes no ground for drawing the inference that this accident arose not merely in the course of but out of his employment. *Marshall v. The Wild Rose* [1909] 2 K. B. 46, 78 L. J. K. B. N. S. 536, 100 L. T. N. S. 739, 25 Times L. R. 452, 53 Sol. Jo. 448, affirmed in [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26 Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. Comp. Cas. 514. And see *Bender v. The Zent* [1909] 2 K. B. 41, 78 L. J. K. B. N. S. 533, 100 L. T. N. S. 639, and *Gilbert v. The Nizam* [1910] 2 K. B. 555, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. Comp. Cas. 455.

If the claimant shows that the injury was one that might naturally follow an accident suffered in the employment, the onus is upon the employer to show that the injury was due to some other cause.¹

The cases cited in this section should be compared with those considered in chapter LXVI., *ante*.

1807. [769] Period of disablement (sec. 1, subs. 2, a).—A workman whose work consisted partly of superintendence and partly of the adjustment of certain machines was held to have been disabled from "earning full wages at the work at which he was employed," within the meaning of this subsection, where, although it was shown that after the accident he continued to work for the same employer at the same wages, it was also proved that he was unable to attend to the adjustment of machines; that he could do no work except that of superintendence; and that he would have been unable to earn the same wages if he had had to take service under another employer.¹

1808. [770] Alternative remedies open to workmen (sec. 1, subs. 2 b).—This provision has been held not to prevent a workman from maintaining a common-law suit, after it has been determined that his case was not one which came within the purview of the act.¹ And it has been held not to prevent a workman from withdrawing a claim

Where there was no evidence that a sailor who had been on shore and was returning to the ship had ever reached the gangway at all, and no evidence to negative the possibility that he had gone to the wharveside for his own purposes and slipped over, it cannot be said that the accident was one arising out of and in the course of his employment. *Kitchenham v. The Johannesburg* [1910] W. N. 275, 27 Times L. R. 127, 55 Sol. Jo. 124.

But where a sailor falls overboard in some unexplained way while discharging his duty, the inference may be drawn that the accident arose not only in the course of the employment but also out of the employment. *Rice v. The Swansea Vale* (1910) 102 L. T. N. S. 270, 26 Times L. R. 276, 3 B. W. Comp. Cas. 152.

¹³ *Borland v. Watson, G. & Co.* (1911) 49 Scot. L. R. 10 (workman felt pain in knee on rising from kneeling position; had sustained a wrench to the knee three years before).

¹ *Chandler v. Smith* [1899] 2 Q. B. (C. A.) 506, 68 L. J. Q. B. N. S. 909, 81 L. T. N. S. 317, 47 Week. Rep. 677, 15 Times L. R. 480, followed in *Free-*

land v. Macfarlane (1900) 2 Sc. Sess Cas. 5th series, 832, 37 Scot. L. R. 599 7 Scot. L. T. 456; *Great North of Scotland R. Co. v. Fraser* (1900) 3 Sc. Sess Cas. 5th series, 908, 38 Scot. L. R. 653 9 Scot. L. T. 96.

¹ *Beckley v. Scott* [1902] 2 I. R. 504 (workman held not to be precluded from maintaining action at common law after it had been determined that his case was not one within the act because he had not been employed two weeks)

A claimant who has been refused compensation on the ground that she was not a "dependent" of the deceased workman is not thereby barred from raising an action of reparation at common law or under the employers' liability act 1880, against the deceased's employer *M'Donald v. Dunlop* (1905) 7 Sc. Sess Cas. 5th series, 533.

A son who had claimed compensation under the act on account of the death of his father, but was found to have no title to insist on the claim, because he had been only partially dependent on his father, while there were others who had been wholly dependent on the father, is not, by reason of his unsuccessful claim, barred from insisting or

made under the act, before there has been any decision upon it.² But where compensation has been refused upon the merits of the case, the workman is then not entitled to bring an action independently of the statute.³

But the broad view has been taken by the court of appeal in a later case, that if the workman takes proceedings under the act, he has exercised his option regardless of the outcome of such proceedings.⁴

The personal representatives of a workman who had accepted a scheme certified by the registrar of a friendly society under § 3, subs. 1 of the act, cannot take advantage of the rights which they otherwise would have had under the common law or the employers' liability act. The workman had exercised the option provided for in § 1, subs. 2 (b).⁵

An election under the act is shown by proof that the workman accepted payments for a considerable period of time.⁶ But an election

an action for damages on account of the death of his father. *Blain v. Greenock Foundry Co.* (1903) 5 Sc. Sess. Cas. 5th series, 893, 40 Scot. L. R. 639, 11 Scot. L. T. 92.

An injured employee who has accepted a certain sum of money as compensation under the act, is not debarred thereby from recovering at common law, where he has no cause of action under the act. *Harris v. Ford* (1909) 28 New Zealand L. R. 426.

² *Rouse v. Dixon* [1904] 2 K. B. 628, 73 L. J. K. B. N. S. 662, 68 J. P. 407, 91 L. T. N. S. 436, 20 Times L. R. 553, 53 Week. Rep. 237.

³ A workman who has claimed compensation under the act, and whose claim has been disallowed by the arbitrator on the ground of his serious and wilful misconduct, must be held to have exercised the option given to him, and he is not entitled thereafter to bring an action of damages at common law. *Burton v. Chapel Coal Co.* [1909] S. C. 430. Lord McLaren said: "Upon an equitable view of the meaning of the proviso, it has been held that if the claimant has not a title to claim compensation, because he is not within the class of persons who are described as dependents, his failure to show a title does not preclude him from setting up his claim at common law. In such a case there is no real option, because the party has only one claim. The case is therefore not within the proviso we are

considering, which presupposes two claims, one of which is to be heard and determined. But in the present case the claim under the compensation act was tried and decided against the claimant on its merits, and he is now attempting to follow out, by action at law, the alternative claim, which is founded on the alleged fault of the employer. This proceeding, as I think, is contrary to the letter and the spirit of the statutory provision against double liability."

⁴ *Cribb v. Kynoch* [1908] 2 K. B. 551, 77 L. J. K. B. N. S. 1001, 99 L. T. N. S. 216, 24 Times L. R. 736, 52 Sol. Jo. 581. *Beckley v. Scott* and *Rouse v. Dixon*, supra, were disapproved. It is to be noted, however, that the actual decision in this case was that a workman could not give the required notice in due time, and have it serve as a foundation for future proceedings in the event that an action at law subsequently commenced should prove unsuccessful.

⁵ *Taylor v. Hamstead Colliery Co.* [1904] 1 K. B. 838, 73 L. J. K. B. N. S. 469, 68 J. P. 300, 52 Week. Rep. 417, 90 L. T. N. S. 363, 20 Times L. R. 338.

⁶ Where it appeared that at the end of the week in which he was injured a workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but after that he would be paid half wages, and subsequently, for a period of about

may be disproved by showing that, although the workman had accepted payments, he was excusably ignorant of the effect of his act.⁷

1809. [771] "Serious and wilful misconduct" (sec. 1, subs. 2, c).—The question whether the servant is or is not debarred from recovery on the ground of "serious and wilful misconduct" ceases to be of any importance, when it is apparent from the circumstances that the accident did not arise out of, or in the course of, his employment.¹ But if the workman brings himself within the act by showing that the ac-

six months, received each week a sum amounting to slightly more than half his average weekly wage, it was held that the pursuer had elected to accept, and had accepted, compensation under the workmen's compensation act, and was therefore barred from raising a common-law action. *Mackay v. Rosie* [1908] S. C. 174.

An election to take under the act is evidenced by receipts for weekly payments, some of which were worded, "in full satisfaction of amount due to me under the act." *Little v. MacLellen* (1900) 2 Sc. Sess. Cas. 5th series, 387, 37 Scot. L. R. 287, 7 Scot. L. T. 313.

⁷In *Fowler v. Hughes* (1903) 5 Sc. Sess. Cas. 5th series, 394, 40 Scot. L. R. 321, 10 Scot. L. T. 583, the court held that a receipt for 12 s. 6 d. for injuries due to the loss of an eye, secured by an agent of the employer while the injured employee was lying in bed in great suffering, and without giving him any explanation, and without reading it over to him, could not be considered as an agreement by him to take his compensation under the act.

A workman cannot be said to have elected to take compensation under the act because he had applied for money for his injuries, and accepted two sums consisting of the amount due him under the act, and had with his mark authenticated two receipts therefor, and knew of his right to half wages during incapacity, where it appears that he was imperfectly acquainted with the English language, and unable to read or write it, and did not know of the act by name, or of his rights apart from the act, and the receipts were not read over or explained to him. *Valenti v. Dixon* [1906-07] S. C. 695.

The signing of a receipt which purports to be a "final discharge" does not bar the workman's claim to compensation as long as he is incapacitated,

where the workman was ignorant of what the paper contained, and it was without consideration. *Macandrew v. Gilhooley* [1911] S. C. 448, 48 Scot. L. R. 511, 4 B. W. Comp. Cas. 370.

While a release or an agreement to accept a lump sum in full satisfaction of all claims is not prohibited by the act, a receipt for the amount to which an injured workman is entitled under the act, although expressed to be in full satisfaction and liquidation of any claim he had or might have in respect to the accident, does not amount to a release, being without consideration. *Great Fingall v. Sheehan* (1906) 3 Austr. L. R. 176.

It is for the jury to say whether an injured workman understood the nature of several receipts which he signed, acknowledging the receipt of compensation under the act, where he subsequently returned the money, and claimed that he did not understand the nature of the receipts. *Huckle v. London County Council* (1910) 27 Times L. R. 112, 4 B. W. Comp. Cas. 113.

A workman cannot be held to have taken proceedings independently of the act, where he signed a receipt in full of claims "under the employers' liability act of 1880" where he claimed compensation under the act of 1906, and no previous mention of employers' liability act had been made. *Hawkes v. Coles* (1910) 3 B. W. Comp. Cas. 163.

¹*Louie v. Pearson* [1899] 1 Q. B. (C. A.) 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124.

See also cases cited in § 1806, note 3, *ante*, in which there was a disobedience of orders which might be considered serious and wilful misconduct, but the decisions are based upon the ground that the injury did not arise out of the employment.

cident arose out of, and in the course of, his employment, his case can only be met by the employer by showing that the injury to the workman is attributable to his serious and wilful misconduct.²

The phrase "serious and wilful misconduct" implies, apparently, something nearly, if not quite, the same as that "wilful misconduct" which was explained by the court of appeals in a case involving the liability of a carrier for damage to goods. "There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning, or without care, regardless whether it will or will not cause injury."³

It is to be noted that under the act of 1906 serious and wilful mis-

² *McNicholas v. Dawson* [1899] 1 Q. B. 773, 68 L. J. Q. B. N. S. 470, 80 L. T. N. S. 317, 47 Week. Rep. 500, 15 Times L. R. 242, per Collins, L. J.; *Johnson v. Marshall* [1906] A. C. 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times L. R. 565, 5 Ann. Cas. 630.

The burden of proving that the accident was due to the serious and wilful misconduct of the workman is upon the employer. *British Columbia Sugar Ref. Co. v. Granick* (1910) 44 Can. S. C. 105, affirming (1910) 15 B. C. 198.

A breach of a statutory rule as to mines is "serious and wilful misconduct," but such breach is not a bar to recovery, unless it is the cause of the accident. *Praties v. Broxburn Oil Co.* [1906-07] S. C. 581.

In order that a breach of a statutory rule as to mines shall amount to "serious and wilful misconduct," it must be shown to have been the cause of the accident. *Allan v. Glenborg Union Fire Clay Co.* [1906-07] S. C. 967.

The death of a miner killed while riding on top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, by the fall of a stone from the roof of the tunnel in which the hutch was running, is not "attributable" to his serious and wilful misconduct. *Glasgow Coal Co. v. Sneddon* (1905) 7 Sc. Sess. Cas. 5th series, 485. Lord McLaren observed: "What is included under the word 'attributable'? I think that under that word there must be some causal relation between the misconduct of a workman and the injury which he suffers. . . . It is enough that it is a material cause that in some

way contributes to the unfortunate result. Therefore I think that the question to be considered under the word 'attributable' is very much the same as we have to consider in cases at common law where there is fault on the part of employer or his servant, and the meaning is that the injury was either caused solely by the workman's own fault, or was contributed to materially by his act or fault."

³ Cotton, L. J., in *Lewis v. Great Western R. Co.* (1877) L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131, 37 L. T. N. S. 774, 26 Week. Rep. 255. The language used by the other lords justices is to a similar effect.

Serious misconduct means misconduct which in itself is serious, and not serious only when looked at in the light of the actual consequences of it. *Hill v. Granby Consol. Mines* (1905) 12 B. C. 118.

"Serious and wilful misconduct" is not predicable except in respect of actions to which "moral blame" attaches. Lord McLaren in *Praties v. Broxburn Oil Co.* [1906-07] S. C. 581.

It will be seen that the decisions are not entirely consistent.

(a) *Compensation allowed.*—A finding in favor of a servant will not be pronounced erroneous, as a matter of law, where a rule made under the coal mines regulation act of 1887 was violated by a workman employed in a coal mine. *Rumboll v. Nunnery Colliery Co.* (1899) 80 L. T. N. S. (C. A.) 42, 63 J. P. 132.

Nor where a miner failed to inform himself as to the contents of a rule,—especially where the evidence shows that

conduct is not a bar to compensation where the injury results in death or serious and permanent disablement. Even if, however, serious and wilful misconduct will not bar compensation, there yet remains to be decided the important question whether such misconduct was

it was not generally observed. *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353.

Nor where an engineer, after leaving his engine, walked along the track to a station where he had to report himself off duty. *Todd v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1047, 36 Scot. L. R. 784, 7 Scot. L. T. 85.

Nor where a watchman, stationed at a certain point to warn approaching trains of a landslide, went along the line for about 300 yards. *Glasgow & S. W. R. Co. v. Laidlaw* (1900) 2 Sc. Sess. Cas. 5th series, 708, 37 Scot. L. R. 503, 7 Scot. L. T. 420.

Nor where a boy of nineteen, in contravention of an express order, put his hand across a circular saw to pick up an uncut screw which had fallen from its place. *Reeks v. Kynoch* (1901) 18 Times L. R. (C. A.) 34, 50 Week. Rep. 113.

Nor where a servant used a hoist to ascend to a platform, in contravention of a prohibitory notice, but the trial judge did not find that he knew of the prohibition. *McArthur v. McQueen* (1901) 3 Sc. Sess. Cas. 5th series, 1010, 38 Scot. L. R. 732, 9 Scot. L. T. 114.

Nor where a miner failed to get into a manhole in the main haulage road of the mine, after he had been warned by a fellow workman that a train of cars was approaching. *John v. Albion Coal Co.* (1901) 18 Times L. R. (C. A.) 27, 65 J. P. 788.

The making of a false representation by an infant that he is of full age, in order to secure employment, is not "serious and wilful misconduct or serious neglect." *Darnley v. Canadian P. R. Co.* (1908) 14 B. C. 15.

A breach of a rule as to mines, unknown to the servant, where his ignorance is due to mere negligence, is not "serious or wilful misconduct." *M'Nicol v. Spiers* (1899) 1 Sc. Sess. Cas. 5th series, 604, 36 Scot. L. R. 428, 6 Scot. L. T. 353.

(b) *Compensation refused*.—No recovery can be had where a girl engaged in passing sheaves on a threshing machine

undertook, in disobedience to an express prohibition, to step across the opening through which they were fed to the machine, merely for the purpose of speaking to a friend, and without any necessity arising out of the work. *Callaghan v. Maxwell* (1900) 2 Sc. Sess. Cas. 5th series, 420, 37 Scot. L. R. 313, 7 Scot. L. T. 339.

Nor where a miner infringed a rule forbidding him to carry a naked light on his cap while carrying cartridges not inclosed in a case. *Dailly v. Watson* (1900) 2 Sc. Sess. Cas. 5th series, 1044 37 Scot. L. R. 782, 7 Scot. L. T. 73.

Nor where miners contravene a special rule framed under the coal mine regulation act. *United Collieries v. M'Ghie* (1904) 6 Sc. Sess. Cas. 5th series, 808, 41 Scot. L. R. 705, 12 Scot. L. T. 650; *Lynch v. Baird* (1904) 6 Sc. Sess. Cas. 5th series, 271, 41 Scot. L. R. 214, 11 Scot. L. T. 597 (facts, however, did not show contravention).

Nor where a miner violated a rule requiring the erection of props at specified intervals. *O'Hara v. Cadzow Coal Co.* (1903) 5 Sc. Sess. Cas. 5th series 439. The Lord Justice Clerk said "The rule is an imperative one, and is plainly meant to insure the safety of the worker, and the failure to carry it out is plainly 'serious misconduct,' adding greatly to danger. That it was wilful is also plain, for there is no suggestion of an excuse for the disobedience."

Nor where a bottomer in a collier pushed a hutch into the shaft without seeing whether the cage was there or not. *George v. Glasgow Coal Co.* [1908 S. C. 846, affirmed in [1909] A. C. 12; 78 L. J. P. C. N. S. 47, 99 L. T. N. S. 782, 25 Times L. R. 57 [1909] S. C. (H. L.) 1, 46 Scot. L. R. 28.

Nor where the servant cleaned machinery in motion, such an act being forbidden by a rule known to him. *Guthrie v. Boase Spinning Co.* (1901 3 Sc. Sess. Cas. 5th series, 769, 38 Scot. L. R. 483.

Nor where an engine-driver left the foot plate of the engine while in motion, contrary to rules. *Bist v. Londo*

not outside the scope of the employment. Under the earlier act a workman who deliberately violated known rules of the employer would undoubtedly be barred from compensation on the ground of serious and wilful misconduct; under the act of 1906, where death or

de S. W. R. Co. [1907] A. C. 209, 76 L. J. K. B. N. S. 703, 96 L. T. N. S. 750, 23 Times L. R. 471, 8 Ann. Cas. 1.

Nor where the workman failed to use a guard to a saw. *Brooker v. Warren* (1907) 23 Times L. R. 201.

Being drunk and unfit to work is serious and wilful misconduct. *M'Groarty v. Brown* (1906) 8 Sc. Sess. Cas. 5th series, 809.

The disobedience by boys of positive directions not to go to a certain dangerous place is "serious and wilful misconduct." *Powell v. Lanarkshire Steel Co.* (1904) 6 Sc. Sess. Cas. 5th series, 1039.

A deliberate breach of a regulation forbidding the use of a freight elevator to reach another floor, committed by an inexperienced workman after two warnings, is serious and wilful misconduct. *Granick v. British Columbia Sugar Ref. Co.* (1909) 14 B. C. 251.

A roadman may be found guilty of serious and wilful misconduct in crossing working shaft to fetch a tool in order that he might help to repair a breakdown in another shaft, where a bypass round the shaft was provided for the workmen, and, though it was also used for the hutches, it was never so crowded as to prevent a man passing, and the route taken by him was recognized by the miners to be dangerous. *Leishman v. Dixon* [1909-10] S. C. 498, 47 Scot. L. R. 410, 3 B. W. Comp. Cas. 560.

A miner's injury must be held attributable to his own serious and wilful misconduct, where the injury was received while he was attempting to cross two sets of rails in a mine while the hutches were running, with full knowledge that it was dangerous so to do, and the danger could have been avoided by waiting a short time until the hutches had ceased running. *Condron v. Paul* (1903) 6 Sc. Sess. Cas. 5th series, 29, 41 Scot. L. R. 33, 11 Scot. L. T. 383.

A workman employed in a mine, who, despite warnings and in violation of the orders of the manager, rides upon a truck of ore at point where it will travel about 6 miles an hour by gravitation and where the track is curving and

only temporary, is guilty of serious and wilful misconduct. *Rowe v. Reynolds* (1910) 12 West Austr. L. R. 75.

Where a workman, except for some dominant reason, is in breach of a duly published statutory rule, and an injury results therefrom, his *de facto* ignorance of the rule can in no circumstances prevent the injury from being attributable to his "serious and wilful" misconduct. *Dobson v. United Collieries* (1905) 8 Sc. Sess. Cas. 5th series, 241 (miner carrying cartridge not in a case, with naked light in his cap).

A collier who permits his naked light to remain in such a position that it ignites gunpowder, and thereby commits a breach of a special rule, is guilty of wilful and serious misconduct which precludes a recovery. *Donnachie v. United Collieries* [1910] S. C. 503, 47 Scot. L. R. 412.

The violation of a rule forbidding the opening of the gate fencing to a shaft before the cage is stopped is "serious and wilful" misconduct. *George v. Glasgow Coal Co.* [1909] A. C. 123, 78 L. J. P. C. N. S. 47, 99 L. T. N. S. 782, 25 Times L. R. 57 [1909] S. C. (H. L.) 1, 46 Scot. L. R. 28.

The act of a farm servant who, in driving a lorry, ties the reins to a small wheel which worked a brake on the front of the lorry, instead of keeping them in his hand, thereby causing the horse's head to be pulled round so as to make it run back and upset the lorry, amounts to "serious and wilful misconduct." *Vaughan v. Nicoll* (1906) 8 Sc. Sess. Cas. 5th series, 464.

In *Hill v. Granby Consol. Mines* (1906) 12 B. C. 118, where a brakeman stood on the platform of a car in such a position that when it entered a shed projecting from the mouth of a tunnel he would inevitably be killed, Duff, J. said: "Any neglect is 'serious neglect' within the meaning of the act, which, in the view of reasonable persons, . . . exposes anybody (including the person guilty of it) to the risks of serious injury. . . . The test is the apprehended, as distinguished from the actual, consequences."

permanent disablement results, the question is whether such misconduct, admittedly serious and wilful, is not outside the course of the workman's employment.⁴

Where a workman does a dangerous act contrary to the express orders of his superior, and is injured, the accident is one intention ally produced within the meaning of the Quebec act.⁵

Whether or not a workman is guilty of serious or wilful misconduct is a question of fact.⁶

1810. [772] Arbitration (sec. 1, subs. 3).—In order that this subsection may apply, it must be shown that a question has arisen and that it has not been settled by agreement.¹ Where a question as to the amount or duration of compensation has been settled by agreement,

⁴ In *Weighill v. South Hetton Coal Co.* [1911] 2 K. B. 757, in discussing the effect of the provision of the act of 1906, which provides that serious and wilful misconduct is not a bar to compensation where the injury results in "death or serious and permanent disablement," Cozens-Hardy, M. R., said: "Serious and wilful misconduct within the sphere of the employment does not prevent the workman's dependents from claiming compensation: serious and wilful misconduct outside the sphere of his employment is entirely different. Serious and wilful misconduct outside the sphere of his employment does not bring within the sphere of the employment that which but for the serious and wilful misconduct would be outside of it."

A workman who has lost two fingers of his right hand is seriously and permanently disabled, and is entitled to compensation notwithstanding the injury was occasioned by his "serious and wilful" misconduct. *Hopwood v. Olive* (1910) 102 L. T. N. S. 790, 3 B. W. Comp. Cas. 357.

Although a collier in going into a dangerous working in disobedience to the colliery special rules, and against the warnings of a fireman or overlooker, was guilty of "serious and wilful" misconduct, yet if he did so in an honest attempt to further that which he was instructed to effect, his dependents may secure compensation for his death, which resulted from such act. *Harding v. Brynddu Colliery Co.* [1911] 2 K. B. 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. Comp. Cas. 269.

⁵ *Jetté v. Grand Trunk R. Co.* (1911)

Rap. Jud. Quebec 40 C. S. 204 (brake-man jumped on a moving train).

⁶ Whether the fact that a farm servant fastened the reins to the breeching, instead of holding them in his hand, in violation of the general turnpike act, amounts to serious and wilful misconduct, is a question of fact, and the finding by the sheriff-substitute that it did not will not be reviewed on appeal. *Mitchell v. Whitton* [1906-07] S. C. 1267.

Whether or not a workman is guilty of serious and wilful misconduct is a question of fact, and the court will not interfere with the finding of the arbitrator. *Leishmann v. Dixon* [1910] S. C. 498, 47 Scot. L. R. 410, 3 B. W. Comp. Cas. 560.

¹ *Field v. Longden* [1902] 1 K. B. 47, 71 L. J. K. B. N. S. 120, 66 J. P. 291, 50 Week. Rep. 212, 85 L. T. N. S. 571, 18 Times L. R. 65. There a workman, having been incapacitated for work by an accident arising out of, and in the course of, his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in schedule L., § 1 (b) (see subtitle B. *post*), and promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbitration in the county court, and the county court judge made an award for compensation in his favor. It was held, that, under the subsection it was a condition precedent to the jurisdiction of the county court judge that a question should have arisen as to the liability to pay, or as to the amount or duration

there is no room for arbitration. The workman's proper course is to get a memorandum of agreement recorded.²

The arbitrator is acting within his jurisdiction in determining the question whether an applicant signed a discharge under the mistaken belief that it was merely a receipt for past-due compensation.³

A district court judge acting as arbitrator under the act has no power to grant an order directing evidence to be taken abroad.⁴

The British Columbia arbitration act (B. C. Rev. Stat. 1897, chap. 9) applies to an award under the workmen's compensation act 1902; and a motion to set aside the award may be made under the former act.⁵

1811. [773] Recovery in cases where nonliability apart from the act is established (sec. 1, subs. 4).—This subsection is applicable where it is found that no cause of action at common law and under the act of 1880 was stated by the averments of the complaint.¹

Where a workman who has failed in an action to recover damages is desirous of having compensation for his injury assessed under the

of compensation under the act, and that, no such question having arisen, the county court judge had no jurisdiction to make an award.

The petition for arbitration is incompetent where, at the date when the petition was presented, no dispute had arisen between the parties as to compensation, and the compensation was not in arrears. *Caledon Shipbuilding & Engineering Co. v. Kennedy* (1906) 8 Sc. Sess. Cas. 5th series, 960.

A petition for arbitration is incompetent where, at the date when the petition was presented, no question had arisen between the parties as to the duration of the compensation; and the mere fact that there was no agreement between the parties capable of registration does not show that a question had arisen between them, so as to entitle the workman to present a petition for arbitration. *Gourlay Bros. v. Sweeney* (1906) 8 Sc. Sess. Cas. 5th series, 965.

The refusal of the employer, who had been voluntarily paying compensation to a workman, to sign an agreement, does not give the county court judge jurisdiction to make an award, since it does not present a question as to the liability to pay compensation, or as to the amount or duration of compensation. *Mercer v. Hilton* (1909) 3 B. W. Comp. Cas. 6.

It is the duty of the county judge as

arbitrator to determine whether the workman is able to do the work offered him by the employer. *Cowan v. Simpson* (1909) 3 B. W. Comp. Cas. 4.

² *Dunlop v. Rankin* (1901) 4 Sc. Sess. Cas. 5th series, 203, 39 Scot. L. R. 146.

³ *Ellis v. Lockgelly Iron & Coal Co.* [1909] S. C. 1278, 46 Scot. L. R. 960.

⁴ *Re Bodner & W. C. Collieries* (1911; Alberta) 19 West. L. Rep. (Can.) 222.

⁵ *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 241 (writ of prohibition refused).

Subsection 3 of section 2 of the workmen's compensation act expressly confers upon an arbitrator jurisdiction to settle "any question as to whether the employment is one to which this act applies;" and the only way to review the arbitrator's finding thereon is by means of a case submitted under § 4 of the second schedule. *Basanta v. Canadian P. R. Co.* (1911) 16 B. C. 304.

¹ *Henderson v. Glasgow* (1900) 2 Sc. Sess. Cas. 5th series, 1127, 37 Scot. L. R. 857, 8 Scot. L. T. 118.

In *Ivanhoe Gold Corp. v. Symonds* (1907) 4 Austr. Comm. L. R. 642, it was held that the section was applicable to all cases in which the plaintiff's action failed provided he was otherwise entitled to recover under the statute and consequently applied to a case where the successful defense was a confession and avoidance.

act, he must follow the procedure prescribed by this subsection, and must apply, then and there, to the judge trying the action, for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the act.² But the fact that a workman whose action under the employers' liability act has been wrongfully dismissed applies for an assessment of compensation under the act does not estop him from prosecuting an appeal from the order dismissing the action.³

If, however, the claim has ripened into an award of compensation, the workman is estopped from proceeding further in the action.⁴ It was argued in this case that as the workman was an infant he was not bound by the award, and that the court should proceed upon the assumption that the option had not been exercised for the benefit of the infant, but it was held that the court had no jurisdiction to inquire into that question, and it must treat the award as valid since no steps had been taken to impeach it. No mention is made of a former decision of the same court, where it was held that the compensation act by including apprentices in the general word "workmen" did not in any respect alter the law applicable to contracts made by infants, and consequently the fact that an infant who had been injured made a claim under the compensation act, and the employers had agreed to pay him, and he had received from them the maximum amount payable under the act during his incapacity, did not preclude him from thereafter bringing an action against the employers for negligence.⁵ The only way apparent of reconciling the two decisions is upon the extremely unsatisfactory ground that the court of appeal in each case sustained the findings of the county court judge, the latter finding in the second case that the contract had not in fact been for the benefit of the infant.

If a workman fails in an action to recover damages for the injury, the county court judge is the proper tribunal to assess compensation.⁶

² *Edwards v. Godfrey* [1899] 2 Q. B. 333, 68 L. J. Q. B. N. S. 666, 80 L. T. N. S. 672, 47 Week. Rep. 551, 15 Times L. R. 365. See *Quinn v. Brown* (1906) 8 Sc. Sess. Cas. 5th series, 855; *M'Gowan v. Smith* [1906-07] S. C. 548.

³ *Isaacson v. New Grand* (Clapham Junction) [1903] 1 K. B. 539, 72 L. J. K. B. N. S. 227, 88 L. T. N. S. 291, 19 Times L. R. 150.

⁴ *Neale v. Electric & Ordinance Accesories Co* [1906] 2 K. B. 558, 75 L. J.

K. B. N. S. 974, 95 L. T. N. S. 592, 22 Times L. R. 732.

⁵ *Stephens v. Dudbridge Ironworks Co.* [1904] 2 K. B. 225, 73 L. J. K. B. N. S. 739, 68 J. P. 437, 52 Week. Rep. 644, 90 L. T. N. S. 838, 20 Times L. R. 492.

⁶ *Greenwood v. Greenwood* (1907) 97 L. T. N. S. 771, 24 Times L. R. 24.

Upon the failure of an action under the employer's liability act of 1880, for an injury compensation for which has been assessed under the compensation

From the few cases which have discussed the allowance of costs where the workman failed in his common-law action and was subsequently allowed compensation, it is impossible to formulate any definite rule.⁷

1812. [774a] Text of section 2.— Sec. 2. (1) Proceedings for the recovery under this act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided always that (a) The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defense by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

(b) The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings, if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

(2) Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served.

act, the court before whom the action was tried has power to deal with the costs of the action including the proceedings for the assessment of compensation. *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. 204, 50 Week. Rep. 129, 85 L. T. N. S. 513, 18 Times L. R. 102, 71 L. J. K. B. N. S. 173, 66 J. P. 4.

⁷ The costs of bringing a common-law action, in which the jury found for the defendants, is to be deducted from the amount awarded the workman under the act. *Cohen v. Seabrook Bros.* (1908) 25 Times L. R. 176.

Costs may be allowed when compensation is awarded under the act after an action independent of it has failed. *Wilson v. Kelly* (1909) 14 B. C. 436.

It is discretionary with the court whether the expenses of an unsuccessful

trial in an action for damages are to be deducted from a subsequent award of compensation. *M'Kenna v. United Collieries* (1906) 8 Sc. Sess. Cas. 5th series, 969.

In *Black v. Fife Coal Co.* (1909) S. C. 152, 46 Scot L. R. 191, it was held that where an action had been brought for the death of a miner against his employers at common law and alternatively for a certain sum under the employers' liability act, and the defenders denied liability but tendered the amount claimed as the amount to which the pursuers were entitled under the compensation act, and upon the tender being refused the defenders were assuizied at common law and found liable under the employers' liability act in the sum tendered, the pursuers were liable in expenses.

(4) Where the employer is a body of persons, corporate or unincorporated, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body.

[The changes in § 2 are matters of detail rather than of essential difference. The provisions in subs. 1, in respect to the giving of an amended notice, and the postponing of the hearing, the making of an absence from the United Kingdom as a sufficient ground for failure to give notice, and the provisions in respect to entire failure to give notice, are new. The earlier act by a subsection omitted from the act of 1906 provided as follows:

(4) The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.]

1813. [775] Notice of the accident (sec. 2).— a. “Proceedings.”—This word is used in a “sense different from that which would describe legal procedure ordinarily.”¹ It signifies a claim for compensation, and a refusal of such compensation.² A notice of injury not followed by a claim for compensation, is not a “proceeding.”³

b. Form and contents of notice.—Whether or not the notice of the accident must be in writing does not seem to be definitely settled.⁴

c. To whom notice must be given.—It is not necessary that notice be given to the employer personally.⁵

¹ Lord Halsbury in *Powell v. Main Colliery Co.* [1900] A. C. 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100.

² *Powell v. Main Colliery Co.* [1900] 2 Q. B. 145, 69 L. J. Q. B. N. S. 542, 64 J. P. 323, 48 Week. Rep. 534, 82 L. T. N. S. 340, 16 Times L. R. 282.

³ *Perry v. Clements* (1901) 17 Times L. R. 525, 49 Week Rep. 669.

⁴ In *Thompson v. Gould* [1910] A. C. 409, 79 L. J. K. B. N. S. 905, 103 L. T. N. S. 81, 26 Times L. R. 526, 54 Sol. Jo. 599, 3 B. W. Comp. Cas. 392, it appears that only a verbal notice was given, and compensation was allowed, but the point decided was that the claim for compensation need not be for a stated amount.

But in *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. 957, 78 L. J. K. B. N. S. 539, 100 L. T. N. S. 555, it was held that the notice of the accident must be in writing.

⁵ Where the overman of a level writes down the facts of the injury to a boy in a mine in the presence of the boy and his father, it is a sufficient notice. *Stevens v. Insoles* [1912] 1 K. B. 36, [1911] W. N. 205, 81 L. J. K. B. N. S. 47, 101 L. T. N. S. 617.

Notice of the accident to the cashier of the employer, whose duty it was to find a substitute for the workman and to determine the amount he should be paid, is notice to the company. *Butt v. Gellyceidrim Colliery Co.* (1909) 3 B. W. Comp. Cas. 44.

d. "*Claim for compensation.*"—This phrase means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation, sent to the workman's employer.⁶ A request for arbitration is a sufficient "claim for compensation."⁷

The claim need not be for a definite sum.⁸ The rule is firmly established that a claim for compensation under the act need not be in writing.⁹

e. *Time within which claim must be made;—how measured.*—The six months are to be reckoned from day to day without reference to the particular moment of the day at which the injury occurs or the notice is given.¹⁰

⁶ *Powell v. Main Colliery Co.* [1900] A. C. 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100, holding that the proceedings were in time where a workman sent to his employers, within six months, a notice of the accident, and also a notice stating that he claimed a certain amount as compensation for the injury, and then, more than six months after the accident, filed a request for arbitration in the county court. The decision of the court of appeal ([1900] 2 Q. B. 145, 69 L. J. Q. B. N. S. 542; 64 J. P. 323, 48 Week. Rep. 534, 82 L. T. N. S. 340, 16 Times L. R. 282) was reversed.

A letter was written by the agent of a deceased servant's father to the employer to the following effect: "I am instructed by his father to intimate that he holds you liable for compensation. This notice is given in terms of the statute." Held, that the letter was not a claim for compensation, but merely notice of an intention to make a claim. *Bennett v. Wordie* (1899) 1 Sc. Sess. Cas. 5th series, 855, 36 Scot. L. R. 643, 7 Scot. L. T. 10.

⁷ *Wright v. Bagnall* [1900] 2 Q. B. 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327; *Fraser v. Great North of Scotland R. Co.* (1901) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

But a request on the part of an agent for the insurance company which has insured the employer, to accept compensation, does not do away with the necessity of filing a claim. *Devons v. An-*

derston [1911] S. C. 181, 48 Scot. L. R. 187, 4 B. W. Comp. Cas. 354.

⁸ In making a claim for compensation it is not necessary to state a fixed amount. *Thompson v. Goold* [1910] A. C. 409, 79 L. J. K. B. N. S. 905, 103 L. T. N. S. 81, 26 Times L. R. 526, 54 Sol. Jo. 599, 3 B. W. Comp. Cas. 392, overruling former authorities and *dicta* to the contrary. To the same effect: *Fraser v. Great North of Scotland R. Co.* (1901) 3 F. 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

Among the cases that are to be considered as overruled are the following: *Kilpatrick v. Wemyss Coal Co.* [1906-07] S. C. 320; *Maver v. Park* (1905) 8 Sc. Sess. Cas. 5th series, 250; *Bennett v. Wordie* (1899) 1 F. 855, 36 Scot. L. R. 643, 7 Scot. L. T. 10; *Powell v. Main Colliery Co.* [1900] A. C. 366, 69 L. J. Q. B. N. S. 758, 49 Week. Rep. 49, 83 L. T. N. S. 85, 16 Times L. R. 466, 65 J. P. 100 (*dicta*).

⁹ *Lowe v. Myers* [1906] 2 K. B. 265, 75 L. J. K. B. N. S. 651, 95 L. T. N. S. 35, 22 Times L. R. 614. See also *Thompson v. Goold*, *supra*.

A formal claim is unnecessary. *Devons v. Anderson* [1911] S. C. 181, 48 Scot. L. R. 187, 4 B. W. Comp. Cas. 354.

The applicant who properly describes the nature of the accident does not fail merely because the injury is not accurately described from a medical point of view. *Sidney v. Collins* (1910) 3 B. W. Comp. Cas. 433.

¹⁰ Where the accident occurred at 11:30 A. M. on November 24th, 1908, a claim for compensation lodged at 5:30 P. M. on May 24th, 1909, is within six months from the occurrence of the acci-

f. "*Employer is not prejudiced.*"—The onus lies on the workman to show that the employer has not been prejudiced by the former's failure to give due notice of the accident.¹¹

g. *Excuses for not serving notice or making claim in time.*—The provision which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury is not necessarily an absolute bar to proceedings for the assessment of compensation, commenced after six months by an injured workman, and the county court judge or other arbitrator has jurisdiction to inquire whether there are any circumstances in the case to debar the employer from raising that defense.¹²

dent. *Peggie v. Wemyss Coal Co.* [1909-10] S. C. 93, 47 Scot. L. R. 149 (contention was that claim was not "timeous," because it was not put in until a later hour of the day on which the six months expired).

¹¹ *Shearer v. Miller* (1899) 2 Sc. Sess. Cas. 5th series, 114, 37 Scot. L. R. 80, 7 Scot. L. T. 231; *Hancock v. British Westinghouse Electric Co.* (1910) 3 B. W. Comp. Cas. 210; *Hughes v. Coed Talon Colliery Co.* [1909] 1 K. B. 957, 78 L. J. K. B. N. S. 539, 100 L. T. N. S. 555.

The applicant must prove that he gave notice of the claim within six months of the occurrence of the accident, or that his failure to do so was occasioned by mistake, absence from the United Kingdom, or other reasonable cause. *Roberts v. Crystal Palace Football Club* (1909) 3 B. W. Comp. Cas. 51.

A failure to give notice for four months is unreasonable, and may be found prejudicial to the employer. *Stronge v. Hazlett* (1910) 44 Ir. Law Times, 10, 3 B. W. Comp. Cas. 581.

The employers will presumably be prejudiced by a failure to give notice of an accident for upwards of five months. *Shannon v. Bainbridge Weaving Co.* (1911) 45 Ir. Law Times, 74.

The county court judge is not justified in finding that the employer was not prejudiced by the failure of the workman to give notice of his injury until two months after, where the job was finished on the day of the accident, and the men were all paid off. *Burrell v. Holloway Bros.* (1911) 4 B. W. Comp. Cas. 239.

¹² An agreement arrived at between the parties shortly after the accident,

that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defense that the request for arbitration was not filed within six months of the accident. Having allowed the six months to expire while the negotiations were still proceeding, the employer cannot then turn round and say that the time for claiming compensation has gone by. *Wright v. Bag-nall* [1900] 2 Q. B. 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327.

Where an employee did not regard his injury as so serious as his doctor's advice should have led him to suppose, and he did not intend to make any claim under the act if his recovery had been as satisfactory as he expected, he is not barred from obtaining compensation, although he failed to give notice for five months after his injuries, and the employers were prejudiced by his failure to give timely notice, since the want of notice was occasioned by mistake for which there was reasonable cause. *Rankine v. Alloo Coal Co.* (1904) 6 Sc. Sess. Cas. 5th series, 375, 41 Scot. L. R. 306, 11 Scot. L. T. 670.

Where an injured workman intentionally did not give notice of his accident at the time, believing that his injuries would not keep him from work, but after going to the hospital realized that his injuries were serious, and gave written notice of the accident to his employers about three months after the accident, his delay in giving notice is due to mistake or other reasonable cause within

the meaning of § 2. *Brown v. Lochgelly Iron & Coal Co.* [1907] S. C. 198.

There is reasonable cause for failing to give a formal notice of the injury, where the claimant believes that his injuries are not serious, and a day after the accident, and again a month after, he gives a verbal notice of it. *Refuge Assur. Co. v. Millar* (1911) 49 Scot. L. R. 67.

The fact that the applicant had been eight weeks in the hospital is a reasonable excuse for not giving notice within six weeks. *Ex parte Dunn* (1911) 28 W. N. New So. Wales 9.

It is a sufficient excuse for failure to give notice for several months, that neither the workman nor his physicians knew what ailed him. *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. Comp. Cas. 482.

A trial judge is in error if he dismisses the proceeding, when he has determined that there was no good excuse for the want of notice. He is still bound to inquire whether the defendant was, as a matter of fact, prejudiced. *McLean v. Carse* (1899) 1 Sc. Sess. Cas. 5th series, 878, 36 Scot. L. R. 678, 7 Scot. L. T. 26.

But the mere fact that the employer has made weekly payments to a workman is not such evidence of an admission of liability and of an agreement to pay compensation as will enable the workman to commence proceedings under the act after the expiration of six months from the accident, where the employer took a receipt which stated that the money was received on account of compensation which might be or become due to the workman under the act. *Rendall v. Hill's Dry Docks & Engineering Co.* [1900] 2 Q. B. 245, 69 L. J. Q. B. N. S. 554, 64 J. P. 451, 48 Week. Rep. 530, 82 L. T. N. S. 521, 16 Times L. R. 368, distinguishing *Wright v. Bagnall* [1900] 2 Q. B. 240, 82 L. T. N. S. 346, 69 L. J. Q. B. N. S. 551, 64 J. P. 420, 48 Week. Rep. 533, 16 Times L. R. 327, *supra*.

The fact that an employer for a period of about six months voluntarily paid an injured workman a sum in excess of what he would have had to pay under the act does not bar him from pleading the omission to begin proceedings within the prescribed six months, where nothing at all had been said between

the parties as to the act. *O'Neill v. Motherwell* [1906-07] S. C. 1076.

A county court judge may find that notice was not given as soon as practical after the accident, where it was not given until one month after, although the claimant had seen his employer twice in the meantime. *Leach v. Hickson* (1911) 4 B. W. Comp. Cas. 153.

Where a father of a deceased workman, having failed to recover damages in an action against the employer, and requested compensation to be assessed under the act, died more than six months after the accident, the mother and sisters of the deceased cannot secure compensation as dependents. *McGinty v. Kyle* [1911] S. C. 589. The lord president observed: "I cannot see that other people who have allowed the statutory time to pass can take to themselves the benefits of proceedings which during the six months allowed to them might never have been turned into a claim for compensation at all, and which only become proceedings for compensation because another person over whose volition they have no control has chosen to exercise a personal privilege."

A workman who accepts light employment for seven years, his average weekly earnings being less than before his injury, but more than the maximum compensation he had received for a period during which he had been totally incapacitated, bars himself *personali exceptione* from claiming any compensation in respect of his partial incapacity during the seven years. *Dempster v. Baird* [1909] S. C. 127, 46 Scot. L. R. 119, previous appeal, [1908] S. C. 722.

Employers are not estopped from claiming that the act is inapplicable by the fact that shortly after the accident they wrote to the workman's daughter that if she would forward them a certificate of the doctor attending him, stating the nature of the injuries and the probable period of injury, they would pay him whatever was due him under the act during his illness, dating one week from the day of the accident, and that they did not so pay him for a period of about six months. *Ross v. Smith* (1909) So. Austr. L. R. 128.

Ignorance on the part of an injured workman of the existence of the act does not excuse the failure to give notice. *Roles v. Pascall* [1911] 1 K. B. 982, 80 L. J. K. B. N. S. 728, 104 L. T. N. S. 298, 4 B. W. Comp. Cas. 148.

1814. Text of section 3.—Sec. 3. (1) If the registrar of friendly societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favor of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act, and thereupon the employer shall be liable only in accordance with the scheme; but, save as aforesaid, this act shall apply notwithstanding any contract to the contrary made after the commencement of this act.

(2) The registrar may give a certificate, to expire at the end of a limited period of not less than five years, and may from time to time renew, with or without modifications, such a certificate, to expire at the end of the period for which it is renewed.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

(4) If complaint is made to the registrar of friendly societies, by or on behalf of the workmen of any employer, that the benefits conferred by any scheme no longer conform to the conditions stated in subsection (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exist for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the registrar of friendly societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the registrar of friendly societies.

(7) The chief registrar of friendly societies shall include in his annual report the particulars of the proceedings of the registrar under this act.

(8) The chief registrar of friendly societies may make regulations for the purpose of carrying this section into effect.

The changes in § 3 are for the most part mere matters of detail.

1814a. Proceedings under this section.—This section has received but little attention from the courts.¹

1815. [775a] Text of section 4.—Sec. 4. (1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution, by or under the contractor, of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed: Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery by mechanical power for the purpose of such work, he and he alone shall be liable under this act to pay compensation to any workman employed by him on such work.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such indemnity shall in default of agreement, be settled by arbitration under this act.

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this act from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on or in or about premises on which the principal has undertaken to execute the work, or which are otherwise under his control or management.

[Section 4 of the original act provided as follows:

Sec. 4. Where, in an employment to which this act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this act to those workmen in respect of any accident arising out of, and in the course of, their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which

¹ A workman who has signed an agreement to accept compensation certified by the chief registrar of friendly societies is outside the provisions of the act altogether. *Horn v. Lords Comrs. of Admiralty* [1911] 1 K. B. 24, 80 L. J. K. B. N. S. 278, 103 L. T. N. S. 614, 27 Times L. R. 84, 4 B. W. Comp. Cas. 1.

A penal clause in an agreement, whereby a workman is to lose all right to compensation unless he assists in an application for examination by a medical referee under certain circumstances, is void under § 3, subs. 1, of the act. *British & S. A. Steam Nav. Co. v. Neil* (1910) 3 B. W. Comp. Cas. 413.

is payable to the workmen (whether under this act, or in respect of persona negligence or wilful act independently of this act) by such contractor, or would be so payable if such contractor were an employer to whom this act applies. Provided, that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

The most notable change in § 4 was the elimination of the second paragraph, which provided that the act was not applicable to any work "which is merely ancillary or incidental to" the trade or business carried on by the undertaker. The decisions as to the scope of the phrase quoted are not consistent.¹

The meaning of the phrase undertakers as used in this section is discussed in § 1849, *post*.]

¹ The following operations have been held to be "merely ancillary" to the business of the defendant:

The erection of a station building for a railway company by a contractor. *Pearce v. London & S. W. R. Co.* [1900] 2 Q. B. (C. A.) 100, 69 L. J. Q. B. N. S. 683, 48 Week. Rep. 599, 82 L. T. N. S. 473, 16 Times L. R. 336.

The work of putting a new driving wheel into a steam engine belonging to a cotton factory, where such work is done under contract by a firm of engineers. *Wrigley v. Bagley* [1901] 1 K. B. (C. A.) 780, 84 L. T. N. S. 415, 70 L. J. K. B. N. S. 538, 65 J. P. 372, 49 Week. Rep. 472, affirmed in [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

The fixing of an iron roof by a subcontractor for a builder, the evidence showing that this was no part of the latter's business. *Bush v. Hawes* [1902] 1 K. B. (C. A.) 216, 71 L. J. K. B. N. S. 68, 85 L. T. N. S. 507, 66 J. P. 260, 50 Week. Rep. 311.

The erection by a contractor of coal-hauling machinery at the power station of an electric railway company. *Brennan v. Dublin United Tramways Co.* [1900] 2 I. R. 241.

The erection by a contractor of a retaining wall to protect the track of a railway. *Dundee & A. Joint R. Co. v. Carlin* (1901) 3 Sc. Sess. Cas. 5th se-

ries, 843, 38 Scot. L. R. 635, 9 Scot. L. T. 55 (servant run over by train).

The work of a man employed by a window cleaning company, who was injured while cleaning the windows of the defendant, a firm of tailors. *Dempster v. Hunter* (1902) 4 Sc. Sess. Cas. 5th series, 580, 39 Scot. L. R. 395, 9 Scot. L. T. 450.

Work done by a subcontractor for a firm of building contractors, who habitually made contracts for the demolition of old buildings on the site of which new ones were to be constructed. *Knight v. Cubitt* [1902] 1 K. B. 31, 50 Week. Rep. 113, 18 Times L. R. 26, 71 L. J. K. B. N. S. 65, 66 J. P. 52, 85 L. T. N. S. 526.

The following operations have been held not to be "merely ancillary" to the business of the defendant:

The erection of signals for a new railway siding by a contractor. *Burns v. North British R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 629, 37 Scot. L. R. 448, 7 Scot. L. T. 408 (workman was run over).

Work done in the course of his employment by a servant of a contractor for the collection and delivery of goods conveyed by a railway for a through rate. *Greenhill v. Caledonian R. Co.* (1900) 2 Sc. Sess. Cas. 5th series, 736, 37 Scot. L. R. 524, 7 Scot. L. T. 458 (servant injured while transferring a barrel from a lorry to a goods train).

Carting work done by the servant of

1815a. [776] Liability to servants of contractors (sec. 4),— a. Generally.—It is stated in respect to § 4 of the earlier act, and the statement applies equally well to this section of the present act, that it “contemplates the case of persons who, being undertakers in respect to a particular class of business, substitute for themselves a contractor to do some part of that business, and provides that the workmen of such a contractor shall have the same rights against such persons as they would have if they were employed by them.”¹

The act does not impose any joint liability.²

b. “In the course of or for the purposes of his trade or business.”—The scope of this phrase is discussed in the cases below.³

c. Work “undertaken by the principal.”—A few cases have turned on the meaning of this phrase.⁴

a firm of contractor, who were under contract to do all the carting work in connection with a factory. *Bee v. Owens* (1900) 2 Sc. Sess. Cas. 5th series, 439, 37 Scot. L. R. 328, 7 Scot. L. T. 362 (factory owner held liable).

Work done by a carter in the employ of a railway company, while he was engaged in transporting the goods of the defendants, a firm of sausage makers, to a station on the railway. *M’Govern v. Cooper* (1902) 4 Sc. Sess. Cas. 5th series, 249, 39 Scot. L. R. 102, 9 Scot. L. T. 270. This decision is almost certainly erroneous.

¹ Collins, L. J. in *Wrigley v. Bagley* [1901] 1 K. B. 780.

But the principal will not be held liable for compensation to a man who has no claim against the contractor, his true employer. *Marks v. Carne* [1909] 2 K. B. 516, 78 L. J. K. B. N. S. 853, 100 L. T. N. S. 950, 25 Times L. R. 620, 53 Sol. Jo. 561 (workman was member of contractor’s family).

² The widow and children of a workman who was killed while working in the employment of a glass merchant, on the roof of a building occupied by a firm of wool manufacturers, cannot claim compensation from both, and an application for compensation from both will be dismissed. *Herd v. Summers* (1905) 7 Sc. Sess. Cas. 5th series, 870.

³ The work of cleaning the boilers of one of their ships which is lying in a harbor is not work undertaken by the shipowners in the course of or for the purposes of their trade or business. *Spiers v. Elderslie S. S. Co.* [1909] S. C. 1259, 46 Scot. L. R. 893 (not one of the

normal operations which form the ordinary business of a ship owner).

A firm of chemical manufacturers is not liable to pay compensation to a workman of a person who had contracted to tar the outside of tanks used by them in their business. *Zugg v. Cunningham* [1908] S. C. 827. Lord M’Laren observed: “In the present circumstances I am unable to see that the work of tarring the building in question was work undertaken by the appellants, whose business is not the erection or repair of structures, but the manufacture of chemicals.”

The dependents of a laborer engaged to repair a roof of a house in which drapery, grocery, and hardware business is carried on, and who was killed while so employed, are entitled to compensation, since he was employed for the purpose of the trade. *Johnston v. Monasterevan General Store Co.* [1909] 2 I. R. 108, 42 Ir. Law Times, 268.

A workman employed by a subcontractor to cart rubbish away from where a street is being paved is not injured “on or in or about premises,” where he falls from his cart, 2 miles from the scene of the paving operations. *Andrews v. Andrews* [1908] 2 K. B. 567, 77 L. J. K. B. N. S. 974, 99 L. T. N. S. 214, 24 Times L. R. 709.

⁴ Where a farmer arranged with the applicant, a young lad, for the services of a threshing machine belonging to the latter’s father, who was to be paid 20 s. out of 25 s., and in the course of the work the applicant was injured, he is not entitled to compensation, there being no “work undertaken by the princi-

1816. [776a] Text of section 5.—Sec. 5. (1) Where any employer has entered into a contract with any insurers in respect of any liability under this act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation.

(3) There shall be included among the debts which, under § 1 of the preferential payments in bankruptcy act 1888, and § 4 of the preferential payments in bankruptcy (Ireland) act, 1889, are, in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up, to be paid in priority to all other debts, the amount, not exceeding in any individual case £100, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the date of the commencement of the winding up; and those acts and the preferential payments in bankruptcy amendment act, 1897 shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the first schedule to this act.

(4) In the case of the winding up of a company within the meaning of the stannaries act 1887, such an amount as aforesaid, if the compensation is payable to a miner or the dependents of a miner, shall have the like priority as is conferred on wages of miners by § 9 of that act, and that section shall have effect accordingly.

pal." *Walsh v. Hayes* (1909) 43 Ir. Law Times (C. A.) 114.

Where the respondents, who were green grocers, entered into a joint venture with a billiards saloon keeper for the erection of a skating rink as a speculation, and employed a contractor to do the part of the work, and the servant of the contractor was injured, it cannot be said that the work on which the applicant was employed was work "undertaken" by the respondents as principals within the meaning of § 4 of the act. *Skates v. Jones* [1910] 2 K. B. 903, 79 L. J. K. B. N. S. 1168, 103 L. T. N. S. 408, 26 Times L. R. 643, 3 B. W. Comp. Cas. 460.

A municipal corporation which purchased land for the extension of its mar-

ket, and sold an old mill on the premises, to be torn down and carried away, is liable as undertaker to a workman employed by the purchaser of the mill, who was injured in the work of demolition. *Mulrooney v. Todd* (1909) 1 K. B. 165, 78 L. J. K. B. N. S. 145, 100 L. T. N. S. 99, 73 J. P. 73, 25 Times L. R. 103, 53 Sol. Jo. 99 (1908) W. N. 242.

A company who purchased a lighter in England, and engaged a man to navigate it to Cape Verd for them and to provide and pay for the crew, is liable for injuries to one of the latter during the voyage. *Dittmar v. The V. 593* [1909] 1 K. B. 389, 78 L. J. K. B. N. S. 523, 100 L. T. N. S. 212, 25 Times L. R. 188.

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid.

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

This section is merely an elaboration of § 5 of the original act.

1817. [777] Proceedings under this section.—In the case of the winding up or bankruptcy of an employer who is insured, § 5 of the act gives the workman only the same right against the company that the employer had.¹

In the cases cited in the subjoined note, all of which arose out of the same transaction, the court discusses a number of questions involving § 6 of the British Columbia workmen's compensation act of 1902, which is the same as § 5 of the English act of 1897, with the exception that jurisdiction is given to a judge of the supreme court, instead of to the judge of the county court.²

¹ In *King v. Phoenix Assur. Co.* [1910] 2 K. B. 666, 80 L. J. K. B. N. S. 44, 103 L. T. N. S. 53, 3 B. W. Comp. Cas. 442, where the policy of insurance contained a clause requiring disputes between the insurers and the employer to be submitted to arbitration, and there was a genuine dispute, it was held that an injured employee could not take proceedings in the county court to have compensation awarded from the company until the dispute had been submitted to arbitration and an award had been made.

An appeal lies to a divisional court from an order of a county judge giving a workman a charge upon moneys due from an insurer to the employer. *Kniveton v. Northern Employers' Mut. Indemnity Co.* [1902] 1 K. B. 880, 18 Times L. R. 504, 71 L. J. K. B. N. S. 588, 50 Week Rep. 704, 86 L. T. N. S. 721; *Morris v. Northern Employers' Mut. Indemnity Co.* [1902] 2 K. B. 165, 71 L. J. K. B. N. S. 733, 66 J. P. 644, 50 Week Rep. 545, 86 L. T. N. S. 748, 18 Times L. R. 635 (act of 1897). In those cases the applications were held not to be maintainable; the reasons assigned being that the workmen were merely subrogated by the statute to the rights of the employers, and that, having regard to the circumstances involved and the terms of the contracts between the employers and the insurers, it was

clear that, at the time when the applications were made, there was no fund in respect of which the insurers were liable to the employers.

² In *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 256, it is held that this provision of the act cannot be invoked, unless the insurer has admitted his liability, or has been found by a competent tribunal to be liable. In this case the insurer was proposing to contest his liability.

In *Disourdi v. Sullivan Group Min. Co.* (1909) 14 B. C. 273, the application of the workman for an order that the employer and the insurers proceed to the trial of an issue with him was refused on the ground that any right which he might have against the insurers must be decided in an action commenced in the ordinary way.

In *Disourdi v. Sullivan Group Min. Co.* (1910) 15 B. C. 305, on the ground that there was no privity of contract between the workman and the insurer of the employing company, it was held, after the company had become insolvent, that he could not, by any proceedings taken in his own name, establish the liability of the insurer to the company, and that the liability must be ascertained by the liquidator of the company. The decision of Macdonald, C. J. A., proceeded upon the ground that the liability of the insurer could not be as-

1818. [777a] Text of section 6.—Sec. 6. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

(1) The workman may take proceedings both against that person to recover damages, and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and

(2) If the workman has recovered compensation under this act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this act.

[Section 6 of the original act provided as follows:

Sec. 6. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof, the workman may, at his option proceed, either at law against that person to recover damages, or against his employer for compensation under this act, but not against both; and if compensation be paid under this act, the employer shall be entitled to be indemnified by the said other person.] ¹

1819. [778] Proceedings under section 6.—The employer is entitled to be indemnified by a fellow workman whose negligence caused the injury.¹ The employer cannot maintain an action for indemnity

certained in such an action as he was maintaining. "The creation of the charges alone, without reference to that part of the section which gives a remedy for enforcing it, effects the subrogation mentioned in the English cases." The view expressed by Irving, J. A., was that the liability of the insurers could be determined only in an action in which the liquidator of the insolvent company should be plaintiff. Martin, J. A., was of opinion that an action in the supreme court could not be deemed an application to a "judge of the supreme court," in the sense of the statutory provision.

In the same cases an action to obtain a declaration that the workman was entitled to a first charge on the moneys to which his employer was entitled, and for an order for payment, was held to have been rightly dismissed. The dismissal by the trial judge was rested on the ground that there was no

privity of contract between the workman and the insurers.

¹ Where both the undertakers and contractor with them are made respondents to a claim for compensation under the act, and the contractor is found liable to pay compensation, a claim for indemnity cannot be made in the arbitration by the undertakers against the contractor under rule 23 (2) of the workmen's compensation rules 1898, unless the notice prescribed by rule 19 has been given. *Appleby v. Horsey & Co* [1899] 2 Q. B. 521, 80 L. T. N. S. 85; 68 L. J. Q. B. N. S. 892, 47 Week. Ref. 614, 15 Times L. R. 410.

¹ Fellow workmen through whose negligence another workman is injured are included in the words "some person other than the employer," and are liable for the indemnity provided for in § 6 *Lees v. Dunkerley Bros.* (1910) 10 L. T. N. S. 467, 55 Sol. Jo. 44.

against third persons whose negligence combined with that of his own servants to produce the injury.²

Compensation paid by the employer after receiving notice of the accident and of the claim, but before any other proceedings had been taken, may be recovered by the employer from the "other person."³

No indemnity is recoverable from a third person, where such person is in no wise liable to the workman.⁴

The acceptance of payments by the injured workman from a person other than the employer, who was alleged to be liable for negligence, although such liability is not admitted, precludes the workman, under § 6, subs. 1, from obtaining compensation from the employer.⁵

² *Cory v. France* [1911] 1 K. B. 114, 80 L. J. K. B. N. S. 341, 103 L. T. N. S. 649, 27 Times L. R. 18, 55 Sol. Jo. 10, 11 Asp. Mar. L. Cas. 499.

³ *Thompson v. North Eastern Marine Engineering Co.* [1903] 1 K. B. 428, 72 L. J. K. B. N. S. 222, 88 L. T. N. S. 239, 19 Times L. R. 206.

⁴ A firm of stevedores is not entitled to be indemnified by a colliery company for the compensation which they are compelled to pay to one of their workmen on account of injuries received by him, caused by the brakes on one of the company's wagons being insufficient to control the wagon as it was returned down a gradient up which it had been drawn in order to be emptied in the vessel, the company not being responsible for the unusual strain to which the brakes were put in descending the gradient, which was greater than the wagons were subjected to while employed on the company's own business. *Kemp v. Darngavil Coal Co.* [1909] S. C. 1314, 46 Scot. L. R. 939; *Caledonian R. Co. v. Warwick* (1897) 25 R. (H. L.) 1, 35 Scot. L. R. 54, followed. *Elliott v. Hall* (1885) L. R. 15 Q. B. Div. 315, 54 L. J. Q. B. N. S. 518, 34 Week. Rep. 16, distinguished. Lord Pearson observed: "The accident happened during the time when the haulage contract was suspended, and during the fulfilment of the contract of loading, to which the defendants were not parties, and with which they have no concern."

⁵ A workman is precluded from obtaining compensation from his employer under the act, when he has made a

claim for compensation against a person other than his employer, alleged to be liable for negligence, and has received various payments in satisfaction of his claim, although he has not resorted to legal proceedings and no legal liability is admitted. *Page v. Burtwell* (1908) 2 K. B. 758, 77 L. J. K. B. N. S. 1061, 99 L. T. N. S. 542.

Where an injured workman has made a claim for damages at common law against a person other than his employers, and, without having taken legal proceedings, has received a payment in settlement of his claim, he is barred from claiming compensation against his employers; and this result is not prevented by a clause in the receipt given by him, reserving a right to claim compensation from his employers. *Mulligan v. Dick* (1903) 6 Sc. Sess. Cas. 5th series, 126, 41 Scot. L. R. 77, 11 Scot. L. T. 433.

A workman in the employment of carting contractors, who was injured while employed under a contract between the contractors and a railway company, and who, under reservation of all claims he might have for compensation against other parties, asked for and accepted from the contractors a payment in full of all claims against them, under any statute or at common law, in respect of the injury, is barred by the terms of § 6 from thereafter claiming compensation under the act from the undertakers. *Murray v. North British R. Co.* (1904) 6 Sc. Sess. Cas. 5th series, 540, 41 Scot. L. R. 383, 11 Scot. L. T. 746.

A servant who, having received one payment under the act with out qualification, which payment was offered voluntarily by the employer, refused to sign any other receipt except subject to the reservation "without prejudice," subject to which other payments were received, has not exercised the option referred to in § 6 so as to preclude him from proceeding against the other person liable for the injury.⁶

An employer is entitled to recover as indemnity the costs of the compensation proceedings, as well as the compensation awarded.⁷

1820. Text of section 7.—Sec. 7 (1) This act shall apply to masters, sea men, and apprentices to the sea service and apprentices in the sea-fishing service provided that such persons are workmen within the meaning of this act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications:—

(a) The notice of accident and claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident;

(b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant;

(c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, deposition respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the board of trade, and such depositions or certified copies thereof shall, in any proceedings for enforcing the claim, be admissible in evidence as provided by §§ 691 and 695 of the merchant shipping act 1894, and those sections shall apply accordingly;

(d) In the case of the death of a master, seaman, or apprentice, leaving no dependents, no compensation shall be payable, if the owner of the ship is, under the merchant shipping act 1894, liable to pay the expenses of burial;

(e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the merchant shipping act 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice;

(f) Any sum payable by way of compensation by the owner of a ship under

⁶ *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 K. B. 639, 72 L. J. K. B. N. S. 857, 89 L. T. N. S. 318, 19 Times L. R. 697, 52 Week. Rep. 200, 9 Asp. Mar. L. Cas. 436.

⁷ *Great Northern R. Co. v. Whitehead* (1902) 18 Times L. R. 816.

this act shall be paid in full, notwithstanding anything in § 503 of the merchant shipping act 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this act relating to remedies both against employer and stranger, as if the indemnity were damages for loss of life or personal injury;

(g) Subsections (2) and (3) of § 174 of the merchant shipping act 1894 (which relates to the recovery of wages of seamen lost with their ship) shall apply as respects proceedings for the recovery of compensation by dependents of masters, seamen, and apprentices lost with their ships as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands:

(2) This act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

(3) This section shall extend to pilots to whom part X. of the merchant shipping act 1894 applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

This section is entirely new.

1820a. Proceedings under this section.—a. Generally.—A few cases may be noted which have touched upon some phases of this section.¹

b. Persons excluded from the provisions of section 7 (sec. 7, subs. 2).—It is clear that all members of the crew of a fishing vessel who receive as their remuneration a share of the profits of the catch are excluded from the provisions of the act.²

¹The act has no application outside of the territorial limits of the United Kingdom, except as it is expressly given in § 7. *Tomalin v. Pearson* [1909] 2 K. B. 61, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477.

No deduction ought to be made from the amount of compensation to an injured seaman, in respect to the cost of maintenance in a foreign hospital, for which the shipowners are liable under the merchant shipping acts. *McDermott v. The Tintoretto* [1910] W. N. 274, 55 Sol. Jo. 124 [1911] A. C. 35, 80 L. J. K. B. N. S. 161, 103 L. T. N. S. 769, 27 Times L. R. 149, 11 Asp. Mar. L. Cas. 515, 4 B. W. Comp. Cas. 123, 48 Scot. L. R. 728.

The lapse of twelve months during which a ship has not been heard of (after which, under § 174 of the merchant shipping act 1894, she is deemed

to have been lost with all hands) is not a condition precedent to a claim for compensation under the workmen's compensation act, where by the ordinary rules of evidence a seaman would be deemed to have been lost at sea with his ship. *Maginn v. Carlingford Lough S. S. Co.* (1909) 43 Ir. Law Times (C. A.) 123.

²The mate or first fisherman of a steam-trawler, whose sole remuneration was a certain proportion of the net balance of the gross price of the fish caught on a trip after deducting certain specified expenses, which did not include the wages of other members of the crew, is within the exception of § 7, subs. 2. *Gill v. Aberdeen Steam Trawling & Fishing Co.* [1908] S. C. 328.

An engineer upon a steam fishing boat, who was paid by a share in the profits upon a guaranty that they should

1821. Text of section 8.—Sec. 8 (1) Where—

(i) the certifying surgeon appointed under the factory and workshop act 1901 for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the third schedule to this act, and is thereby disabled from earning full wages at the work at which he was employed; or—

(ii) A workman is, in pursuance of any special rules or regulations made under the factory and workshop act 1901, suspended from his usual employment on account of having contracted any such disease; or—

(iii) The death of a workman is caused by any such disease; and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependents shall be entitled to compensation under this act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

(a) The disablement or suspension shall be treated as the happening of the accident;

(b) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable;

(c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

Provided that—

(i) The workman or his dependents, if so required, shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation; and—

(ii) If that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration; and if the allegation is proved, that other employer shall be the employer from whom the compensation is to be recoverable; and—

(iii) If the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be

never amount to less than a certain sum, is excepted from the provisions of the act. *Admiral Fishing Co. v. Robinson* [1910] 1 K. B. 540, 79 L. J. K. B. N. S. 551, 102 L. T. N. S. 203, 26 Times L. R. 299, 54 Sol. Jo. 305, 3 B. W. Comp. Cas. 247.

A "share-hand" on a trawler is not entitled to compensation for injuries, although he was at the time engaged in work on one of the employer's steam cutters for which he received a fixed sum. *Whelan v. Great Northern Steam Shipping Co.* [1909] W. N. 135, 78 L. J. K. B. N. S. 860, 100 L. T. N. S. 913, 25 Times L. R. 619.

liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this act for settling the amount of the compensation;

(d) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable;

(e) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment.

(f) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final.

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the third schedule to this act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

(3) The Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section.

(4) For the purpose of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—

(a) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine:

(b) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under this section, and this section shall be construed accordingly.

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order, not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.

(7) Where, after inquiry held on the application of any employers or workmen engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or

society, and that the company or society consents, the Secretary of State may by provisional order, require all employers in that industry to insure in the company or society upon such terms and under such conditions and subject to such exceptions as may be set forth in the order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry.

(8) A provisional order made under this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the bill confirming any such order is pending in either House of Parliament, a petition is presented against the order, the bill may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private bills and any act confirming any provisional order under this section may be repealed, altered, or amended by a provisional order made and confirmed in like manner.

(9) Any expenses incurred by the Secretary of State in respect of any such order, provisional order, or confirming bill shall be defrayed out of moneys provided by Parliament.

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this act.

This section is new, and enlarges materially the scope of the act. See subdivision D. of this chapter.

1821a. Proceedings under this section.—Section 8 does not have a retroactive effect.¹

Subscription 1 (i), (ii), and (iii), of § 8 do not apply to seamen.²

Under § 8, subs. 1, it must be established that a disease mentioned in the third schedule was the cause of workman's death or disability; it is not sufficient that the death or disability was caused by something which may in some cases be the sequela of one of those diseases but which might have been the sequela of some disease not mentioned.³

The certificate of a certifying surgeon that a workman is suffering from an industrial disease does not require to be obtained before

¹ In *Greenhill v. The Daily Record* (1909) 46 Scot. L. R. (Ct. of Sess.) 483, the court refused to entertain a claim made by the widow of a workman who had left his employment before the date when the act came into force, and had died after it took effect, from an "industrial disease" to which it was applicable.

² *Curtis v. Black* [1909] 2 K. B. 529, 78 L. J. K. B. N. S. 1022, 100 L. T. N. S. 977, 25 Times L. R. 621, 53 Sol. Jo. 576.

³ *Haylett v. Vigor* [1908] 2 K. B. 837, 77 L. J. K. B. N. S. 1132, 24 Times L. R. 885, 72 Sol. Jo. 741, 99 L. T. N. S. 74.

fore the initiation of proceedings, but may be obtained and produced in the course of the proceedings.⁴

The mere fact that a workman claiming compensation for lead poisoning added a false statement that he had not used white lead while employed with the other employers, a correct list of whom he gave as required by § 8, will not bar him from procuring compensation.⁵

The sole function of the certifying surgeon, and of the medical referee on appeal, is to determine whether the workman is suffering from a scheduled disease, and is thereby disabled from earning full wages in his employment, and, subject to the provisions of § 8, subs. 4, to fix the date on which disablement commenced.⁶

1822. Text of sections 9, 10, 11, 12, and 13.—Sec. 9 (1) This act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this act would apply if the employer were a private person:

Provided, that in the case of a person employed in the private service of the Crown, the head of that department of the Royal Household in which he was employed at the time of the accident shall be deemed to be his employer.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this act their warrant made under § 1 of the superannuation act 1887, and, notwithstanding anything in that act, or any such warrant, may frame schemes with a view to their being certified by the registrar of friendly societies under this act.

This section is only an elaboration of § 8 of the original act.

Sec. 10 (1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purpose of this act as he may, with the sanction of the Treasury, determine, and the remuneration of, and other expenses incurred by, medical referees under this act shall, subject to regulations made by the Treasury, be paid out of moneys provided by Parliament.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman, or by any insurers interested, he shall not act as medical referee in that case.

(2) The remuneration of an arbitrator appointed by a judge of county courts

⁴ *Taylor v. Burnham* [1909] S. C. 704, 46 Scot. L. R. 482.

⁵ *Taylor v. Burnham* [1909–10] S. C. 705, 47 Scot. L. R. 643, 3 B. W. Comp. Cas. 569.

⁶ The sheriff as arbitrator should refuse to accept the report of a medical referee to whom the matter was referred under § 8 (1) (f), where the latter, subject to a note appended, dismissed the appeal. *Winters v. Addie & Sons' Collieries* [1911] S. C. 1174, 48 Scot. L. R. 940.

A medical referee to whom a case is referred under § 8 (1) (f) of the act has no power to dismiss an appeal with the restriction that the applicant "is now able to resume his ordinary work." *Garrett v. Waddell* [1911] S. C. 1168, 48 Scot. L. R. 937.

under the second schedule to this act shall be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury.

Sec. 11 (1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this act, and at any time that ship is found in any port or river of England or Ireland, or within 3 miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him, by any person applying in accordance with the rules of the court, that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge, requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings they may be instituted to recover such compensation, and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3) Sec. 692 of the merchant shipping act 1894 shall apply to the detention of a ship under this act as it applies to the detention of a ship under that act and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.¹

Sec. 12 (1) Every employer in any industry to which the Secretary of State may direct that this section shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as the Secretary of State may direct, and in default of complying with this section shall be liable, on conviction under the summary jurisdiction acts, to a fine not exceeding £5.

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made.

Sections 10, 11, and 12 are new.

Sec. 13. In this act, unless the context otherwise requires,—

“Employer” includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer, and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or ap-

¹ An appeal from an order of the county court judge detaining a vessel under § 11 lies to the provisional court, and not to the court of appeal. *Panagotis v. The Pontiac* [1912] 1 K. B. 74 [1911] W. N. 221, 28 Times L. R. 63, 56 Sol. Jo. 71.

prenticeship, the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person;

"Workman" does not include any person employed otherwise than by way of manual labor whose remuneration exceeds £250 a year, or a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labor, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing;

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom or for whose benefit compensation is payable;

"Dependents" means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively;

"Member of a family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister;

"Ship," "vessel," "seaman," and "port" have the same meanings as in the merchant shipping act 1894;

"Manager," in relation to a ship, means the ship's husband or other person to whom the management of the ship is intrusted by or on behalf of the owner;

"Police force" means a police force to which the police act 1890, or the police (Scotland) act 1890, applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force;

"Outworker" means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles;

The exercise and performance of the powers and duties of a local or other public authority shall, for the purpose of this act, be treated as the trade or business of the authority;

"County court," "judge of the county court," "registrar of the county court," "plaintiff," and "rules of court," as respects Scotland, mean respectively sheriff court, sheriff, sheriff clerk, pursuer, and act of sederunt.

The terms defined in this section are for the most part not used in the original act. The definitions of "workman" and "dependents" are couched in such different language that it is deemed necessary to keep the cases separate.

1823. Meaning of "employer."—Who is embraced in the term "employer" has been passed upon in some cases.¹

1824. "Contract of service."—What constitutes a "contract of service" has been discussed in the cases cited in the subjoined note.¹

¹The owners of a threshing machine are the employers, within § 13 of the act, of a man employed by them as a road man to go along the road ahead of the thrasher, but who when the machine is at work acts as trusser, and is paid by the farmer, and was so at work when injured. *Reed v. Smith* (1910) 3 B. W. Comp. Cas. 223.

A coal trimmer, although employed by an agent of the harbor commissioners, is in the employment of a firm of shipping agents who act as managers of a vessel being loaded with coal for third persons, where the trimmers are directly under the control of the agents, and are paid from the freight, the balance of which, less charges, is sent by the agents to the owners of the vessel. *Gorman v. Gibson* [1909-10] S. C. 317, 47 Scot. L. R. 394.

The central body constituted under § 1 of the unemployed workmen act 1905, who has provided temporary work for a workman, is an "employer." *Porton v. Central (Unemployed) Body for London* [1908] W. N. 242, 25 Times L. R. 102; *Gilroy v. Makie* [1909] S. C. 466, 46 Scot. L. R. 325.

In *Re Ryan* (1911) 11 New South Wales St. Rep. 33, it was held that the expression "employers" covers the Sydney Harbor Trust Commissioners.

The court will not interfere with the decision of the county judge in questions of pure fact. *Pollard v. Goole & H. Steam Towing Co.* (1910) 3 B. W. Comp. Cas. 360 (respondents held to be employers of applicant).

Where a mandatary hires workmen in his own name, without disclosing his principal, and pays them with his own money or check, he is liable for any compensation to which they may be entitled because of injuries received while in such employment. *Demers v. McCrae* (1911) Rap. Jud. Quebec 40 S. C. 123.

An infant employer is liable as any other employer under the workmen's compensation act of 1908. *Re Smith* (1911) 17 West. L. Rep. (Can.) 550.

¹A workman who was injured while

at work in the labor yard of a charitable organization, having applied there for aid, had no "contract of service." *Burns v. Manchester & S. Wesleyan Mission* (1908) 99 L. T. N. S. 579.

There is no contract of service between a dispensary medical officer and the board of poor law guardians. *Murphy v. Enniscorthy Union* [1908] 2 I. R. 609.

There is no contract of service where a taxicab driver takes a cab from the owners' yard by the day, and pays over 75 per cent of the daily receipts to the owners, and retains 25 per cent, less the price of his petrol. *Bates-Smith v. General Motor Cab Co.* (1910) 3 B. W. Comp. Cas. 500; *Doggett v. Waterloo Taxi-Cab Co.* [1910] 2 K. B. 336, 3 B. W. Comp. Cas. 371, 102 L. T. N. S. 874, 79 L. J. K. B. N. S. 1085, 26 Times L. R. 491, 54 Sol. Jo. 541.

There is no contract of service between the owner of a vessel and the master, where the owner agreed to furnish the vessel and gear and repairs and the master was to hire the crew and pay all other expenses, and go to what port he liked, and was to be paid by taking two thirds of the gross freight. *Boon v. Quance* (1910) 102 L. T. N. S. 443, 3 B. W. Comp. Cas. 106.

But in *Jones v. The Alice & Eliza* (1910) 3 B. W. Comp. Cas. 495, it was held that the mere fact that the master was remunerated by the payment of two thirds of the gross receipts was not sufficient to enable the court to draw the inference that the master was not the servant of the owners, the latter declining to give any evidence upon the subject.

A letter fixer has a contract of service with a firm of enamel letter makers where he frequently obtained work from them, and was in the habit of calling regularly at their place of business and occasionally canvassed among shopkeepers to fix letters in behalf of the firm, and was paid by them in respect to the orders he received. *Taylor v. Burnham* [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. Comp. Cas. 569.

1825. Who are entitled to compensation; workmen.—a. *Who are "workmen."*—As to the question who are "workmen" or "workers" within the purview of these statutes, see § 1970, *post*.

b. Employment of a "casual nature."—A charwoman who has been employed regularly every Friday and every other Tuesday for over eighteen months is in the regular, and not the casual, employment of the defendants.¹

Where a carpenter undertakes a job of cutting down trees on the property of a person for whom he has been working as a carpenter, his employment is casual.²

In two cases it has been held that a window washer who worked only occasionally as such work was necessary was engaged in casual employment only.³

c. Remuneration.—The word "remuneration," as used in the act (§ 13 and sched. 1, par. 2 (a)), means the same as "earnings."⁴

d. Seaman.—The compensation act of 1897 does not "deal with the relation between shipowners and sailors, when engaged in their ordinary occupation of sailing upon the seas."⁵ Compare § 1728, *ante*. But this doctrine does not involve the consequence that the mere fact of the accidents having happened in or upon a ship prevents the injured workman from claiming compensation under the

¹ *Dewhurst v. Mather* [1908] 2 K. B. 754, 77 L. J. K. B. N. S. 1077, 99 L. T. N. S. 568, 24 Times L. R. 819, 52 Sol. Jo. 681.

² *McCarthy v. Norcott* (1908) 43 Ir. Law Times (C. A.) 17.

³ A man who was sent for to wash windows whenever they needed it, which was at intervals of about six weeks, there being no agreement between the parties, was in the casual employment only, although he had been doing the work for about two years. *Hill v. Begg* [1908] 2 K. B. 802, 77 L. J. K. B. N. S. 1074, 99 L. T. N. S. 104, 24 Times L. R. 711, 52 Sol. Jo. 581.

Where a window cleaner about once a month went to clean the windows of the house of a medical practitioner, who used a portion of the house in connection with his professional practice, there being no formal contract between the parties, and the window cleaner calling and doing the work without receiving on each occasion a special invitation or special permission to do so, his

employment was of a casual nature. *Rennie v. Reid* [1908] S. C. 1057.

⁴ In estimating the remuneration of the purser on a ship under § 13 of the act, both a bonus which he received and the profit which he made by selling whisky, are to be taken into consideration. *Skailes v. Blue Anchor Line* [1911] 1 K. B. 360, 80 L. J. K. B. N. S. 442, 103 L. T. N. S. 741, 27 Times L. R. 119, 55 Sol. Jo. 107, 4 B. W. Comp. Cas. 16.

⁵ Lord Halsbury in *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

In an Irish case it was held that an able-bodied seaman, working at the hoisting of a ship's boat by means of a crane on the quay alongside his ship, is merely carrying out the normal duties of a seaman, and is therefore not engaged in an employment to which the act applies. *O'Hanlon v. Dundalk & N. Steam Packet Co.* (1899) 33 Ir. Law Times 36.

act. His right of recovery must be tested with reference to the circumstances attending the accident.⁶

1826. Meaning of "dependent."—*a. Under the act of 1906.*—Compensation is recoverable for the death of a workman, although his wages went into a common fund out of which the dependents were supported.¹

A widow who lived with and was entirely supported by an unmarried son was wholly dependent upon him, notwithstanding her right to relief from four other sons, who were married, and who did not contribute to her support.²

Illegitimate children may be dependents within the sense of the act; and this is so even if they are posthumous.³

⁶ An ordinary laborer employed for the purpose of doing anything that is to be done on a ship lying in a dock is not without the scope of the act. *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

Nor is a man working on a dredger, which went 2 miles out to sea for the purpose of being emptied. *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. 132, 68 L. J. Q. B. N. S. 740, 47 Week. Rep. 533, 80 L. T. N. S. 586, 15 Times L. R. 341.

¹ Where a father and two sons, all killed in one accident, paid their wages in a common fund for the support of the family, the mother and the surviving children are entitled to receive compensation in respect to the death of each of the deceased. *Hodgson v. West Stanley Colliery* [1910] A. C. 229, 79 L. J. K. B. N. S. 356, 102 L. T. N. S. 194, 26 Times L. R. 333, 54 Sol. Jo. 403, 3 B. W. Comp. Cas. 260, 392, 47 Scot. L. R. 881.

To the same effect, *McLean v. Moss Bay Hematite Iron & Steel Co.* [1910] W. N. 102, 54 Sol. Jo. 441, 3 B. W. Comp. Cas. 402, where a mother sought and was allowed compensation for the death of a son who put his wages into the common household fund, although the mother lived with her husband and was also dependent upon his wages.

The effect of these decisions is to overrule *Senior v. Fountains* [1907] 2 K. B. 563, 76 L. J. K. B. N. S. 928, 97 L. T. N. S. 562, 23 Times L. R. 634, where it was held that a widow and children of a workman were none the less "wholly dependent upon his earnings at

the time of his death" because he had been enabled through the receipt by him, either directly or through his wife as his agent, of moneys from wage-earning sons, or of moneys coming to him through other channels, to augment the fund out of which he was legally bound to maintain, and had maintained, his household.

² *Rintoul v. Dalmeny Oil Co.* [1908] S. C. 1025.

³ A child *en ventre sa mere* is a "dependent" of the man who admits that he is the father, and who had promised to marry the mother. *Orrell Colliery Co. v. Schofield* [1909] A. C. 433, 78 L. J. K. B. N. S. 677, 100 L. T. N. S. 786, 25 Times L. R. 569, 53 Sol. Jo. 518.

A posthumous illegitimate child is a dependent within the act. *Schofield v. Orrell Colliery Co.* [1908] W. N. 243, 25 Times L. R. 106, 53 Sol. Jo. 117.

In *Bowhill Coal Co. v. Neish* [1909] S. C. 252, 46 Scot. L. R. 250, where the mother of an illegitimate child had obtained a decree for aliment against the father, but nothing had been actually paid thereon, the court rejected the contention of the defendant that, inasmuch as no actual money of the deceased was proved to have been actually spent upon the child, the child could not be said to be dependent on him.

But an illegitimate child who at its birth had been taken over by another woman and supported by her and her husband, except for a small sum of money and a little clothing, is not a dependent upon her mother. *Briggs v. Mitchell* [1911] S. C. 705, 48 Scot. L. R. 606, 4 B. W. Comp. Cas. 400.

And the husband of the mother of an

Whether or not a woman living apart from her husband is dependent upon him apparently depends upon the facts of the particular case.⁴

Whether or not parents are partially dependent upon a son's wages is a question of fact, and the finding of the county judge will not be disturbed if there is any evidence to support it.⁵

b. Under the act of 1897; in England and Ireland.—At p. 197 of his treatise on Accidents to Workmen, Mr. Minton-Senhouse remarks that the word “dependent” probably means, dependent for the ordinary necessities of life for a person of that class and position,” and this definition has been approved by high judicial authority.⁶ The term does not signify a person who merely derived a benefit from the earnings of the injured workman.⁷

A father earning wages may be “in part dependent” upon the earnings of his child, within the meaning of the act; and there is evidence upon which the father may be found to be, in fact, so dependent, and to be entitled to compensation for the death of the child,

illegitimate son, who is not the latter's putative father, is not a “dependent,” although the son's earnings were put into a common fund for the support of the family. *McLean v. Moss Bay Iron & Steel Co.* [1909] 2 K. B. 521, 78 L. J. K. B. N. S. 849, 100 L. T. N. S. 871, 25 Times L. R. 633. This decision was reversed by the House of Lords, but on another point. See note, 1, *supra*.

⁴ A woman living apart from her husband may be found to be partially dependent upon him, although he has contributed nothing to her support during the separation. *Keeling v. New Monckton Collieries* [1910] W. N. 249, 103 L. T. N. S. 622, 27 Times L. R. 90.

Where a wife has not, for twenty years previous to a man's death, lived with him or been supported in any way by him, she is not a dependent upon him. *New Monckton Collieries v. Keeling* [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. Comp. Cas. 332.

Where a wife had been deserted for a number of years, and subsequently lived with another man, neither she nor their children can be considered dependents. *Lee v. The Bessie* [1912] 1 K. B. 83 [1911] W. N. 222, 105 L. T. N. S. 659.

The presumption that a wife is wholly dependent upon her husband is not re-

butted by proof that, at the time of his death, she was confined in an asylum as a dangerous lunatic, and was maintained by the asylum authorities. *Kelly v. Hopkins* [1908] 2 I. R. 84.

⁵ *Turner v. Miller* (1910) 3 B. W. Comp. Cas. 305; *Robertson v. Hall Bros. S. S. Co.* (1910) 3 B. W. Comp. Cas. 368.

⁶ *Romer, L. J., in Simmons v. White Bros.* [1899] 1 Q. B. 1007, 68 L. J. Q. B. N. S. 507, 47 Week. Rep. 513, 80 L. T. N. S. 344, 15 Times L. R. 263, and Lord Shand in *Main Colliery Co. v. Davies* [1900] A. C. 358, 69 L. J. Q. B. N. S. 755, 83 L. T. N. S. 83, 16 Times L. R. 460, 65 J. P. 20. In the latter case Lords Halsbury and Davey expressed the opinion that the question of dependency was to be decided without respect to the standard of living in the neighborhood or the class to which the family belong; that the act sets up no such standard; and that the actual means of living and expenditure need alone be regarded. Lord Shand did not agree with this view.

The latter case was followed by *French v. Underwood* (1903) 19 Times L. R. 416.

⁷ *Simmons v. White* (1899) 80 L. T. N. S. (C. A.) 344, [1899] 1 Q. B. 1007, 68 L. J. Q. B. N. S. 507, 47 Week. Rep. 513, 15 Times L. R. 263.

where it is proved that the child contributed to the family wages fund, and that the father received the contribution and spent it in maintaining himself and his family.⁸ Similarly it is held there may be a "dependency" for the purposes of the act, although the claimant is able to maintain himself and family without the assistance of the deceased.⁹

In the case of the death of a workman, leaving dependents, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of the act, is whether money which the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time. Accordingly the fact that money came to them on the death of the workman cannot be taken into consideration.¹⁰

An inmate of a workhouse to whose support the injured workman does not in fact contribute anything is not a "dependent" within the meaning of the act, although a liability under the poor law to contribute to his support could be enforced against the workman.¹¹

The fact that a workman had when out of work left his wife, and remained away until his death, three months afterwards, does not prevent her from being "dependent" upon him.¹²

A posthumous child is a "dependent" within the act.¹³

c.—in Scotland.—The mother of a deceased workman, whose

⁸ *Main Colliery Co. v. Davies* [1900] A. C. 358, 69 L. J. Q. B. N. S. 755, 83 L. T. N. S. 83, 16 Times L. R. 460, 65 J. P. 20. This decision embodies a doctrine similar to that adopted in an earlier case, in which it was held that a finding of "dependency" was sufficiently supported by evidence that the parents of an employee fourteen year old, who was killed, had received his weekly wages for five weeks before his death, and handed over to him such pocket money as they thought right. *Simmons v. White Bros.* (1899) 68 L. J. Q. B. N. S. (C. A.) 507 [1899] 1 Q. B. 1005, 47 Week. Rep. 513, 80 L. T. N. S. 344, 15 Times L. R. 263.

⁹ *Howells v. Vivian* (1901) 18 Times L. R. 36, 50 Week. Rep. 163, 85 L. T. N. S. 529.

¹⁰ *Pryce v. Penrikyber Nav. Colliery Co.* [1902] 1 K. B. 221, 85 L. T. N. S. 477, 18 Times L. R. 54, 71 L. J. K. B. N. S. 192, 66 J. P. 198, 50 Week. Rep. 197.

¹¹ *Rees v. Penrikyber Nav. Colliery*

Co. [1903] 1 K. B. 259, 72 L. J. K. B. N. S. 85, 67 J. P. 231, 51 Week. Rep. 247, 87 L. T. N. S. 661, 19 Times L. R. 113, 1 L. G. R. 173.

¹² *Coulthard v. Consett Iron Co* [1905] 2 K. B. 869, 22 Times L. R. 25, 75 L. J. K. B. N. S. 60, 54 Week. Rep. 139, 93 L. T. N. S. 756.

The fact that a workman who, being out of work in Scotland, went to Ireland, and obtained employment there, had not contributed anything to the support of his wife for several months while he was out of work, during which time she was supported by her father, does not prevent her and a posthumous child from being dependents, where, prior to the time he was out of work, he had supported her, and he had been at work but little over a week when he was killed. *Reg. v. Clarke* [1906] 2 I. R. 135.

¹³ *Williams v. Ocean Coal Co.* [1907] 2 K. B. 422, 76 L. J. K. B. N. S. 1073, 97 L. T. N. S. 150, 23 Times L. R. 584.

parents were in part dependent on him, is not entitled to sue, where the father is alive.¹⁴

Grandchildren are entitled to claim compensation for the death of their grandfather, in cases where their father is dead.¹⁵

An illegitimate child has no right to sue the employer of his deceased mother.¹⁶

A woman living separate from a husband who only contributed a small sum to her support, the rest of her sustenance being obtained from relatives, and occasional employment, may claim compensation for his death.¹⁷

But if, as a matter of fact, the wife receives nothing at all from her husband who has left her, then she is not dependent upon him.¹⁸

A woman deserted by her husband, having no title to sue for damages or *solatium* for the death of her son, has no title to claim compensation under the act as a dependent upon him.¹⁹

The fact that the father of the decedent was assisting a crippled relative does not show, as a matter of law, that he was not "partially dependent" on his son's earnings.²⁰

¹⁴ *Barrett v. North British R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1139, 36 Scot. L. R. 874, 7 Scot. L. T. 88.

¹⁵ *Hanlin v. Melrose* (1899) 1 Sc. Sess. Cas. 5th series, 1012, 36 Scot. L. R. 814, 7 Scot. L. T. 67; *Cooper v. Fife Coal Co.* [1906-07] S. C. 564 (grandchild's mother was dead, and whereabouts of father unknown).

¹⁶ *Clement v. Bell* (1899) 1 Sc. Sess. Cas. 5th series, 924, 36 Scot. L. R. 725, 7 Scot. L. T. 44.

¹⁷ *Cunningham v. McGregor* (1901) 3 Sc. Sess. Cas. 5th series, 775, 38 Scot. L. R. 574, 9 Scot. L. T. 36.

Cunningham v. McGregor was followed in *Sneddon v. Addie & Sons' Collieries* (1904) 6 Sc. Sess. Cas. 5th series, 992, 41 Scot. L. R. 826, 12 Scot. L. T. 229, where it was held that a woman unable to do anything for her own support is entitled to compensation for the death of her husband, although he had deserted her.

The wife of a foreigner who came to Scotland, and during eight months' residence forwarded her the sum of £1, may be found to be a "dependent," but not wholly dependent upon her husband, where she supported herself in part by earnings as an outdoor laborer at a small wage. *Baird v. Birsztan* (1906) 8 Sc. Sess. Cas. 5th series, 438.

¹⁸ Where a wife voluntarily left her husband, and a month afterwards gave birth to a child, and subsequently, by means of her earnings as a weaver, and the assistance of the relatives with whom she lived, she supported herself and her child, never asking for and never receiving aliment from her husband, it cannot be said that either the wife or the child were either wholly or in part dependent upon the earnings of the workman at the time of his death, twelve years after the separation. *Lindsay v. McGlashen* [1908] S. C. 762, 45 Scot. L. R. 559; *Turners v. Whitefield* (1904) 6 F. 822, 41 Scot. L. R. 631, 12 Scot. L. T. 131, followed.

A woman who has been for fourteen years living apart from her husband, and was supported by an illegitimate son, is not wholly or in part dependent on the earnings of her husband, and is not entitled to compensation. *Turners v. Whitefield* (1904) 6 Sc. Sess. Cas. 5th series, 822, 41 Scot. L. R. 631, 12 Scot. L. T. 131.

¹⁹ *Campbell v. Barclay, Curle & Coy* (1904) 6 Sc. Sess. Cas. 5th series, 371, 41 Scot. L. R. 289, 11 Scot. L. T. 682.

²⁰ *Legget v. Burke* (1902) 4 Sc. Sess. Cas. 5th series, 693, 39 Scot. L. R. 448, 9 Scot. L. T. 518.

A parent who has a wage sufficient for his support is not a dependent merely because some member of his family had been in the way of giving him presents of money.²¹

A daughter who keeps house for her father may be dependent upon him.²²

A person confined in a prison is not a dependent upon her son.²³

d. In the Colonies.—As a general thing, a woman living apart from her husband is not a dependent upon him.²⁴ Alien dependents resident abroad are not within the purview of the act.²⁵

²¹ *Arrol v. Kelly* (1906) 8 Sc. Sess. Cas. 5th series, 906 (son had made payments to his father which averaged 10 s. weekly; father's average weekly income was £1, 4s. 11d.).

²² The daughter of a workman, who had been previously earning wages, but who after her mother's death remained at home to keep her father's house, getting from him board, lodging, and clothing, but no wages, is a dependent in the sense of the act. *Moynes v. Dixon* (1905) 7 Sc. Sess. Cas. 5th series, 386. Lord McLaren said: "If it had been meant that the right was to be limited to those who were in the position to sue an action for aliment, it would have been very easy to say so, or if it had been meant to exclude those who were earning wages for themselves, that again could have been very shortly and definitely expressed in the statute."

... But the analogy of an alimentary claim is not suggested by anything in the statute,—the condition of total or partial dependence upon a man at the time of his death introduces an idea wholly foreign to the common law. I can see no other construction for this provision except that the ground of liability is whether the wages of the workman at the time of his death were in fact applied to the maintenance of the person who is making the claim." Lord Ardwell observed that "it would be establishing a very hard precedent, and a precedent that might work very badly in practice, to say that a daughter who acts as the appellant did here shall not only lose the opportunity of saving money, but shall have no claim under this act in respect of her father's death."

²³ A widow who at the date of her son's death was undergoing a sentence of confinement in a state reformatory for inebriates, and during the four years preceding had been in prison with

the exception of ten months, and during that period had occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son, who had contributed 5s. or 6s. a week towards her support, was not wholly or partially dependent on her son's earnings at the time of his death, within the meaning of the act. *Addie & Sons' Collieries v. Trainer* (1904) 7 Sc. Sess. Cas. 5th series, 115.

²⁴ A wife who had been separated from her husband for sixteen years, until the time when she spent a few days in the same house with him, but not as his wife, and who for a considerable portion of the period of separation had lived in adultery with another man, is not a dependent upon the husband. *Allan v. Oroya Brounhill Co.* (1910) 12 West. Australian L. R. 1.

A woman living apart from her husband may be found to be in fact dependent upon the earnings of a deceased son who, with several other sons, had lived with her and contributed to her support, although her husband lives in the same town, and she has never taken any steps to procure maintenance from him. *Kilgariff v. Associated Gold Mines* (1910) 12 West Australian L. R. 73.

²⁵ *Krzus v. Crow's Nest Pass Coal Co.* (1911) 16 B. C. 120, 17 West. L. Rep. (Can.) 687. This in effect overrules *Varesick v. British Columbia Copper Co.* (1906) 12 B. C. 286, where it was held that foreigners were within the scope of the act.

In *Brown v. British Columbia Electric R. Co.* (1910) 15 B. C. 350, there was evidence that the deceased workman had on two occasions sent money to his parents in a foreign country; but it also appeared that they had in the first instance assisted him by advancing money for his passage to Canada. Held, that the parents were not entitled to

1827. Text of sections 14, 15, 16, and 17.— Sec. 14. In Scotland, where a workman raises an action against his employer, independently of this act, in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the employers' liability act 1880, or alternatively at common law or under the employers' liability act 1880, shall, notwithstanding anything contained in that act, not be removed under that act or otherwise to the court of session, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the second schedule to this act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this act shall apply.

Sec. 15 (1) Any contract (other than a contract substituting the provisions of a scheme certified under the workmen's compensation act 1897 for the provisions of that act) existing at the commencement of this act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this act.

(2) Every scheme under the workmen's compensation act 1897, in force at the commencement of this act, shall, if recertified by the registrar of friendly societies, have effect as if it were a scheme under this act.

(3) The registrar shall recertify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this act as to schemes.

(4) If any such scheme has not been so recertified before the expiration of six months from the commencement of this act, the certificate thereof shall be revoked.

These sections are new.

Sec. 16 (1) This act shall come into operation on the 1st day of July, 1907, but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this act.

(2) The workmen's compensation acts 1897 and 1900 are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this act, except to the extent to which this act applies to those cases.

Sec. 17. This act may be cited as the workmen's compensation act 1906.

A scheme of compensation under § 3 of the act of 1897 does not, unless recertified under § 15 of the act of 1906, apply to an accident happening after the act came in operation, but within the six months mentioned in § 15, subs. 4.¹

maintain the action as "dependents," tion of pecuniary benefit" from the de-
inasmuch as they had failed to show ceased.
that they had "any reasonable expecta-¹ *Moss v. Great Eastern R. Co.* [1909]

A workman who entered on his employment after the 1st of July 1907, is not barred from obtaining compensation under the act by having agreed to accept the provisions of a scheme certified under the act of 1897, but which had not been recertified under the act of 1906.² An appeal to the House of Lords from a decision of the court of session reversing a decision of a medical referee will not lie under sched. II, par. 17 (b), of the act of 1906, in a proceeding under the act of 1897 in regard to an accident which occurred before the commencement of the act of 1906, notwithstanding the exception in § 16, subs. 1, of the latter act, as to "references to medical referees and proceedings consequential thereon."³

B. COMPENSATION RECOVERABLE.

1828. [788a] Text of statutory provisions.—First Schedule. Scale and Conditions of Compensation.

(1) The amount of compensation under this act shall be: (a) where death results from the injury—

(i) if the workman leaves any dependents wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this act, and any lump sum paid in redemption thereof, shall be deducted from such sum; and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii) if the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this act, to be reasonable and proportionate to the injury to the said dependents; and—

(iii) if he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding £10;

(b) Where total or partial incapacity for work results from injury, a weekly payment during the incapacity not exceeding 50 per cent of his average weekly earnings during the previous twelve months, if he has been so long employed but if not, then for any less period during which he has been in the employment of the same employer such weekly payment not to exceed £1: Provided that (a) if the incapacity lasts less than two weeks no compensation shall be pay-

2 K. B. 274, 78 L. J. K. B. N. S. 1048, 100 L. T. N. S. 747, 25 Times L. R. 466. ³ *Mackay v. Rosie* (1911) 49 Scot. L. R. 48, 56 Sol. Jo. 48.

² *Wallace v. Hawthorne* [1908] S. C. 713, 45 Scot. L. R. 547.

able in respect of the first week; and (b) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than 20s., 100 per cent shall be substituted for 50 per cent of his average weekly earnings, but the weekly payment shall in no case exceed 10s.

The proviso under paragraph 1 (b) is new; otherwise the paragraph is practically the same as in the original act.

(2) For the purpose of the provisions of this schedule relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed:

(a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided, that where, by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

(b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident;

(c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause;

(d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings.

Paragraph 2 is new.

(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.

Paragraph 3 takes the place of paragraph 2 of the original act.

(4) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this act in relation to compensation, shall be suspended until such examination has taken place [par. 3 of the original act].

(5) The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into county court, and any sum so paid into court shall, subject to rules of court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this act; and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in:

Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependents, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due [par. 4 of the original act].

(6) Rules of court may provide for the transfer of money paid into court under this act from one court to another, whether or not the court from which it is to be transferred is in the same part of the United Kingdom as the court to which it is to be transferred [new].

(7) Where a weekly payment is payable under this act to a person under any legal disability, a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of this schedule with respect to sums required by this schedule to be paid into court shall apply to sums paid into court in pursuance of any such order [new].

(8) Any question as to who is a dependent shall, in default of agreement, be settled by arbitration under this act, or, if not so settled before payment into court under this schedule, shall be settled by the county court, and the amount payable to each dependent shall be settled by arbitration under this act, or, if not so settled before payment into court under this schedule, by the county court. Where there are both total and partial dependents, nothing in this schedule shall be construed as preventing the compensation being allotted partly to the total and partly to the partial dependents [similar to 5th paragraph of the act of 1897].

(9) Where, on application being made in accordance with rules of court, it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependents, or for any other sufficient cause, an order of the court, or an award as to the apportionment amongst the several dependents of any sum paid as compensation, or as to the manner in which any sum payable to any such dependent is to be invested, applied, or otherwise dealt with, ought to be varied the court may make such order for the variation of the former order or the award as in the circumstances of the case the court may think just [new].

(10) Any sum which under this schedule is ordered to be invested may be

invested in whole or in part in the Postoffice Savings Bank by the registrar of the county court in his name as registrar [par. 7 of the original act].

(11) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Postoffice Savings Bank, or be accepted by the Postmaster General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums [par. 8 of the original act].

(12) No part of any money invested in the name of the registrar of any county court in the Postoffice Savings Bank under this act shall be paid out, except upon authority addressed to the Postmaster General by the Treasury or, subject to regulations of the Treasury by the judge or registrar of the county court [par. 9 of the original act].

(13) Any person deriving any benefit from any moneys invested in a postoffice savings bank under the provisions of this act may nevertheless open an account in a postoffice savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank [par. 10 of the original act].

(14) Any workman receiving weekly payments under this act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

Paragraph 14 is the same as paragraph 11 of the original act, with the exception of the following clause, which formed a part of the first sentence, but was omitted in the later act:

But if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition, when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this act, as mentioned in the second schedule to this act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition.

(15) A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (4) or paragraph (14) of this schedule, otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations [new].

Where a workman has so submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on applica-

tion being made to the court by both parties, may, on payment by the applicant of such fee, not exceeding £1, as may be prescribed, refer the matter to a medical referee [new].

The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified [new].

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this paragraph shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman [new].

If a workman, on being required so to do, refuses to submit himself for examination, by a medical referee to whom the matter has been so referred as aforesaid, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under this act in relation to compensation or, in the case of a workman in receipt of a weekly payment, his right to that weekly payment, shall be suspended until such examination has taken place [par. 11 of the original act].

Rules of court may be made for prescribing the manner in which documents are to be furnished or served and applications made under this paragraph, and the forms to be used for those purposes, and, subject to the consent of the Treasury, as to the fee to be paid under this paragraph [new].

(16) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided; and the amount of payment shall, in default of agreement, be settled by arbitration under this act; Provided that where the workman was at the date of the accident under twenty one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1. [The proviso is new.]

(17) Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Postoffice Savings Bank, purchase an annuity for the workman equal to 75 per cent of the annual value of the weekly payment, and, as in any other case, may be settled by arbitration under this act; and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum [similar to par 13 of the original act].

(18) If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment

unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature. If the medical referee so certifies, the workman shall be entitled to receive quarterly the amount of the weekly payments accruing due during the preceding quarter so long as he proves, in such manner and at such intervals as may be prescribed by rules of court, his identity and the continuance of the incapacity in respect of which the weekly payment is payable [new].

(19) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same [same as par. 14 of the original act].

(20) Where under this schedule a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension [new].

(21) Where a scheme certified under this act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subs. of § 8, § 16, and § 41 of the friendly societies act 1896, shall not apply to such society in respect of such scheme [par. 15 of the original act].

(22) In application of this act to Ireland the provisions of the county officers and courts (Ireland) act 1877, with respect to money deposited in the Postoffice Savings Bank under that act shall apply to money invested in the Postoffice Savings Bank under this act [par. 17 of the original act].

1829. "Where death results from the injury" (par. 1, a).—The death may be the result of the injury within the meaning of this paragraph of the act, even though, in fact, it may not be the natural or probable consequence thereof.¹

1830. [789] Amount recoverable in case of death, by persons wholly dependent on workman's earnings (par. 1, a, i).—The effect of this provision, as a whole, is that, where death results from the injury, and the workman leaves dependents who were wholly dependent on his earnings, the amount of compensation is to be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or, where the employment has been less than the three years, a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case is the compensation to exceed £300 or be less than £150. The maximum and minimum amounts of compensation which are

¹ *Dunham v. Clare* [1902] 2 K. B. (C. A.) 292, 71 L. J. K. B. N. S. 683, 66 J. P. 612, 50 Week. Rep. 596, 86 L. T. N. S. 751, 18 Times L. R. 645.

In *Malone v. Cayzer* [1908] S. C. 479, 45 Scot. L. R. 351, it was held that the death was caused by accident, where the workman committed suicide while insane as the result of the accident.

The fact that a workman who, after

receiving an injury, was taken to a hospital, and thereafter was found to be afflicted with pneumonia, subsequently went to his home contrary to the advice of his doctor, and died two days afterward, does not necessarily preclude a finding that his death "results from the injury." *Dunnigan v. Cavan* [1911] S. C. 579, 48 Scot. L. R. 459, 4 B. W. Comp. Cas. 386.

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specified apply to the whole provision,—not merely to the first branch of it, but also to the second.¹

Where a workman dies some months after an award of a weekly sum has been made, his dependents are entitled to claim, as compensation, three years' wages, after giving credit for the payments already made.² The dependents are not precluded from recovering the compensation due them under the act, by any action on the part of the workman, except that the employer is to be credited with any compensation which he had paid to the workman himself.³

Upon the death of the sole dependent, his representative is entitled to claim all that the dependent might have claimed.⁴

In estimating compensation to a dependent, it is proper to consider the former earnings and the proportion thereof spent for maintenance.⁵

¹ *Forrester v. McCallum* (1901) 3 Sc. Sess. Cas. 5th series, 650, 38 Scot. L. R. 448, 8 Scot. L. T. 486, reconsidering and disapproving *Doyle v. Beattie* (1900) 2 Sc. Sess. Cas. 5th series, 1166, 37 Scot. L. R. 915, 8 Scot. L. T. 131.

² *O'Keefe v. Lovatt* (1901) 18 Times L. R. (C. A.) 57.

³ The mere fact that a workman who has been receiving compensation goes back to his work, nothing being said by either the workman or the employer as to the discontinuance of the compensation, does not show that he had abandoned his right to further compensation; and even if he had, he cannot deprive his dependents under the act, except that the employer is entitled to credit for what he had paid the workman. *Williams v. Vauxhall Colliery Co.* [1907] 2 K. B. 433, 76 L. J. K. B. N. S. 854, 97 L. T. N. S. 559, 23 Times L. R. 591.

In *Howell v. Bradford & Co.* (1911) 104 L. T. N. S. 433, it was held that the act of an injured workman in signing a receipt as "being in full satisfaction and liquidation of all claims under the employers' liability act of 1880 and the common law in respect of the injuries, whether now or hereafter to become manifest, arising, directly or indirectly, from an accident which occurred" to him, would not bar his dependents from subsequently claiming compensation under the act, they being barred merely from recovering under the act to the extent of the benefits received by him.

⁴ *United Collieries v. Simpson* [1909] A. C. 383, 78 L. J. C. P. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630 [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780.

If the sole dependent dies after making a claim, but before the award is made, the claim survives. *Darlington v. Roscoe* [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167.

The right to compensation given by the act to a dependent vests in the dependent immediately on the death of the workman, and passes to the representatives of the dependent, although the dependent may have made no claim for compensation during his lifetime. *Hendry v. United Collieries* (1908) Sc. Sess. Cas. 1215, affirmed in (1909) A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. (H. L.) 19, 46 Scot. L. R. 780; *Darlington v. Roscoe*, *supra*, followed.

The above decisions disapprove *Re O'Donovan* [1901] 2 I. R. 633, 34 L. T. 169, where it was held that where the sole dependent of a deceased workman dies after having served notice of the accident, but before any claim for compensation has been made, the right to recover compensation does not pass to the personal representative of the dependent.

⁵ *O'Neill v. Bansha Co-op. Agri. & Dairy Soc.* [1910] 2 I. R. 324, 44 Ir. Law Times, 52.

1831 [790] —by persons partially dependent on the workman's earnings.—There could be no claim under the act of 1897 by a person in part dependent on a workman at the time of his death, if there is in existence a person who is wholly dependent.¹ But see paragraph 8 of the second schedule of the act of 1906.

In determining the sum, "reasonable and proportionate to the injury," which is to be awarded to the dependents, the funeral expenses of the workman may be taken into consideration.²

In determining the question of the dependency of a father on the earnings of his son, the county court judge is not precluded by law from making a deduction in respect of the cost of the son's maintenance, and he is not precluded by law from taking into account, as against the cost of the son's maintenance, the pecuniary value, if any, of the services rendered by the son to the father in the conduct of the latter's business.³

When compensation is "reasonable and proportionate to the injury" to a dependent partially dependent upon the earnings of a deceased workman is a question of fact for the county court judge.⁴

1832. [791] —in case of total or partial incapacity (par. 1, b).—No general rule as to the amount of compensation can be laid down; but the judge must use his discretion with regard to the particular facts of each case.¹ So the question as to what constitutes incapacity is to be determined by the facts of each case.²

In fixing the amount of compensation in cases of partial incapacity,

¹ *Fagan v. Murdoch* (1899) 1 Sc. Sess. Cas. 5th series, 1179, 36 Scot. L. R. 921, 7 Scot. L. T. 113.

² *Bevan v. Crawshaw Bros.* [1902] 1 K. B. (C. A.) 25, 71 L. J. K. B. N. S. 49, 85 L. T. N. S. 496, 50 Week. Rep. 98; *Murray v. Gourlay* [1908] s. c. 769, 45 Scot. L. R. 577; *Hughes v. Summerlee & M. Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series, 784.

³ *Tamworth Colliery Co. v. Hall* [1911] A. C. 665, 105 L. T. N. S. 449, 55 Sol. Jo. 615, 4 B. W. Comp. Cas. 313.

⁴ *Littleford v. Connell* (1909) 3 B. W. Comp. Cas. 1.

¹ *Webster v. Sharp* [1904] 1 K. B. 218, 73 L. J. K. B. N. S. 141, 68 J. P. 140, 52 Week. Rep. 275, 89 L. T. N. S. 627, 20 Times L. R. 121, [1905] A. C. 284, 74 L. J. K. B. N. S. 776, 92 L. T. N. S. 373.

² A workman injured in the knee is entitled to full compensation where, although he is able to resume work, the

knee is liable to break down at any time, and for that reason he is unable to procure work either from his former employer or elsewhere. *Thomas v. Fairbairne* (1911) 4 B. W. Comp. Cas. 195.

A miner whose left eye was affected by disease so as to be useless for underground work may be held to be suffering from incapacity resulting from an accident, where his right eye was injured to such an extent that it was of little use for underground work, although the condition of the left eye was neither caused nor aggravated by the accident. *Lee v. Baird* [1908] S. C. 905, 45 Scot. L. R. 717.

An accident which necessitates the removal of the left eyeball, the sight of the eye having previously been lost, does not cause an incapacity, although the victim is unable to obtain work, as being manifestly a one-eyed man. *Ball v. Hunt* [1911] 1 K. B. 1048. In a dissenting opinion, Fletcher Moulton, L. J.,

the arbitrator may, if upon the evidence he sees fit, give as compensation the whole amount of the difference between the average earnings of the workman before the injury and the average amount of his earnings after the injury, provided that it does not exceed 50 per cent of the average earnings before the injury, and does not exceed £1 a week.³

The proper and only test of the right of a workman to be awarded a weekly payment, on the ground of a partial incapacity for work, is his comparative wage-earning capacity before and after the acci

observes: "In the phrase 'incapacity for work' in sched. I. (1) the word 'work' is used in the sense of doing work as a workman, *i. e.*, for wages or other remuneration. It is to the capacity for earning wages as a workman that the whole scheme of the act relates. It is beyond question that the amount of the compensation depends on the change produced in this, and, in my opinion, the right to receive compensation depends on it also. A capacity to do certain physical acts, but not to do them as a workman for wages, is not in my opinion a capacity to do that work within the meaning of the act. It follows, therefore, that as a general principle a workman has brought himself within the act when he shows that by reason of an accident arising out of and in the course of his employment he has sustained an injury which lessens his earning capacity, and this, whether or not it has diminished his physical capacity for doing his work."

The county judge may find that mining coal is not a "suitable occupation" for a man one of whose eyes is defective. *Eyre v. Houghton Main Colliery Co.* [1910] 1 K. B. 695, 79 L. J. K. B. N. S. 698, 102 L. T. N. S. 385, 26 Times L. R. 302, 54 Sol. Jo. 304, 3 B. W. Comp. Cas. 250.

The nervous and mental as well as the physical condition of an injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity. *Turner v. Brooks* (1909) 3 B. W. Comp. Cas. 22.

But mere mental brooding over an accident, causing inability to work, is not an incapacity under the act. *Holt v. Yates* (1909) 3 B. W. Comp. Cas. 75.

A waitress who because of an injury to her finger was unable to do her work

as efficiently as before may be found to be entitled to compensation, although after receiving compensation for a time she returned to her work at the former wages, where she voluntarily left the place upon complaint by her employers of her clumsiness due to the injury *Ward v. Miles* (1911) 4 B. W. Comp. Cas. 182.

In *Doharty v. Boyd* [1909] S. C. 87 the arbitrator awarded compensation finding that the workman was permanently incapacitated for work at his trade, and that there was no proof of his being able to work in his present condition. In an appeal the employer contended that there was no finding in fact to the effect that the workman was incapacitated for other work than stonebreaking. But the court refused to set aside the award. Lord McLaren said: "The statute does not say, incapacity for work of any description, but uses language of a more general nature which I think has been properly chosen because otherwise it might be open to an employer to state in defense some fanciful work which the injured workman might get, and might be supposed capable of performing. What, therefore, the sheriff-substitute had to consider was whether this was a substantial case of incapacity for work for a man in the grade of a stonebreaker. He is satisfied that this man is not fit for stonebreaking, and I can quite understand his taking the view that, if not fit for that, he is not fit for any other description of work."

³ *Parker v. Dixon* (1902) 4 Sc. Sess. Cas. 5th series, 1147, 39 Scot. L. R. 663 10 Scot. L. T. 153; *Corbet v. Glasgow Iron & Steel Co.* (1903) 5 Sc. Sess. Cas. 5th series, 782, 40 Scot. L. R. 601, 11 Scot. L. T. 60.

dent.⁴ If an actual diminution of his wage-earning capacity is established, the fact that, at the date of his claim, he was earning the same wages as he had earned before the accident does not, of itself, show that he is not entitled to compensation. The arbitrator may consider the probabilities that, if the injuries had not been sustained,

⁴ In *Irons v. Davis* [1899] 2 Q. B. (C. A.) 330, 68 L. J. Q. B. N. S. 673, 80 L. T. N. S. 673, 47 Week. Rep. 616, a workman lost the top joint of his left thumb, and was consequently incapacitated for work for a certain period. Subsequently he was taken back again into the service of the same master at the same rate of wages as before the accident, but upon a different kind of work. The county court judge awarded him compensation for the period during which he was incapacitated for work, and also half a crown a week for life. Upon appeal it was held that there was no evidence justifying the award of half a crown a week for life.

In estimating compensation of a servant for the loss of a thumb, the circumstance that his chances of employment in competition with others are lessened may properly be taken into account. *Roylance v. Canadian P. R. Co.* (1908) 14 B. C. 20.

In *Pomphrey v. Southwark Press* [1901] 1 K. B. 86, 83 L. T. N. S. 468, 70 L. J. Q. B. N. S. 48, 65 J. P. 148, 17 Times L. R. 53, an apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, and the indenture of apprenticeship was canceled. He obtained, in proceedings under the act, an award of a weekly payment based on his wages for the previous year. He afterwards resumed work at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. The county court judge dismissed the application by the employers for the review and termination of the weekly payment, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand. On appeal it was held that, on a review of a weekly payment made by

award under the act, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that in the absence of evidence of advantages incidental to the employment, and capable of being appraised at a money value, the earnings before the accident must be determined by the wages received; that the county court judge was therefore wrong in refusing to review the weekly payment; but that the weekly payment should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary.

A workman is not entitled to payment for a time during which he was earning full wages. *Beath v. Ness* (1903) 6 Sc. Sess. Cas. 5th series, 168, 41 Scot. L. R. 113, 11 Scot. L. T. 455.

In this point of view it follows that "if there is a practical admission on the part of the workman that incapacity has ceased, then he cannot claim compensation in respect of incapacity." *Nimms v. Fisher* [1906-07] S. C. 890. In this case the servant had returned to work, and earned at first wages lower than those received before the injury, and afterwards somewhat more than those wages.

In *Baird v. M'Whinnie* [1908] S. C. 440, it was held that a charge against the employers would be suspended where the workman, who had returned to work, refused the tender by the employers of the difference between what he earned after he returned and what he had earned for a like period before his injury.

Profits made in business undertaken by the workman after his injury are not the measure of the workman's earning capacity. *Paterson v. Moore* [1909-10] S. C. 29. Lord Dunedin observed: "You cannot get at the man's wage-earning capacity by finding out what he is making in business."

the man might be making more money.⁵ Nor is his right to compensation necessarily forfeited because he refused to accept an offer of his employer to give him work at wages equal to his former earnings.⁶

The words "if he has been so long employed" do not import employment in the same class or kind of employment, but employment by the same employer.⁷

The clause which provides that, in fixing the amount of a weekly payment, regard is to be had to the difference between the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by this paragraph of the schedule.⁸ A workman engaged at a weekly salary, who has received compensation under the act, in respect to partial incapacity resulting from an injury, is not entitled to claim his wages during the time for which he has been incapacitated.⁹

A workman who, upon the suspension of payments made under the act, commences a common-law action for his injuries, will be held to have acquiesced in the suspension of payments under the act during the continuance of the action, and is barred from thereafter claiming compensation for such time.¹⁰

The county court judge is required under the act of 1906, in fixing compensation, to have regard to extraneous circumstances, such as a universal reduction in wages.¹¹

⁵ *Freeland v. Macfarlane* (1900) 2 Sc. Sess. Cas. 5th series, 832, 37 Scot. L. R. 599, 7 Scot. L. T. 456.

The fact that a miner who has been injured returns to work at the same compensation does not *per se* entitle the employer to have the compensation ended. *Malcolm v. Bowhill Coal Co.* [1910] S. C. 447, 47 Scot. L. R. 449, 3 B. W. Comp. Cas. 562.

⁶ *Fraser v. Great North of Scotland R. Co.* (1901) 3 Sc. Sess. Cas. 5th series, 908, 38 Scot. L. R. 653, 9 Scot. L. T. 96.

⁷ *Price v. Marsden* [1899] 1 Q. B. (C. A.) 493, 80 L. T. N. S. 15, 68 L. J. Q. B. N. S. 307, 47 Week. Rep. 274, 15 Times L. R. 184, holding that the amount of compensation due to a workman who had been employed by the same employer during twelve months before the accident should be computed from the weekly earnings during the

entire twelve months, although the character of his work had, within that period, been altered, and his wages increased.

⁸ *Illingworth v. Walmsley* [1900] 2 Q. B. (C. A.) 142, 82 L. T. N. S. 647, 69 L. J. Q. B. N. S. 519, 16 Times L. R. 281.

⁹ *Elliott v. Liggins* [1902] 2 K. B. 84, 71 L. J. K. B. N. S. 483, 50 Week. Rep. 524, 87 L. T. N. S. 29, 18 Times L. R. 514.

¹⁰ *Rosie v. MacKay* [1909-10] S. C. 714, 46 Scot. L. R. 999.

¹¹ In *Bevan v. Energlyn Colliery Co.* [1912] 1 K. B. 63 [1911] W. N. 206, 105 L. T. N. S. 654, 28 Times L. R. 27 it was held that a county court judge misdirected himself when in fixing compensation he took the view that he ought to disregard all extraneous circumstances. The court pointed out that

The employer, upon proving that the workman is able to do any kind of light work, is entitled to have the compensation reduced, and there is no obligation resting upon the employer to show that he can get such work to do.¹² The fact that a workman receiving weekly payments because of partial incapacity is unable to find light work which he can do is no ground for review of the award, where there is no change in his physical condition.¹³

But if the workman finds himself unable to do the work, a different situation is presented.¹⁴

the words of clause 3 of schedule 1, "such relation to the amount of that difference as under the circumstances of the case may appear proper," did not appear in the act of 1897, and consequently the decision in *James v. Ocean Coal Co.* [1904] 2 K. B. 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483, did not apply to the present case. In the *James Case* it was held that the amount originally fixed as the compensation was not subject to variation by reason of a fall in wages in the workman's line of work.

In *Black v. Merry* [1909] S. C. 1150, 46 Scot. L. R. 812, and in *Jamieson v. Fife Coal Co.* (1903) 5 Sc. Sess. Cas. 5th series, 958 (decided under the act of 1897) it was held that a workman is not entitled to compensation in respect to the diminution of his earnings after he returns to work, which is due to a general fall in wages, and not to any supervening incapacity.

¹² *Cardiff Corp. v. Hall* [1911] 1 K. B. 1009, 80 L. J. K. B. N. S. 644, 104 L. T. N. S. 467, 27 Times L. R. 339, 4 B. W. Comp. Cas. 159.

In *Carlin v. Stephen* [1911] S. C. 901, 48 Scot. L. R. 862, it was shown that the workman was able to do light work and that the employers had offered him such work. Lord Salveson was of the opinion that the compensation might have been reduced on the first finding alone.

It is difficult to reconcile the decision in the *Cardiff Case* with that in *Proctor v. Robinson* [1911] 1 K. B. 1004, where it was held that in the absence of any evidence that the workman is able to procure light work, such as he is able to do, no reduction of compensation will be made. Fletcher Moulton, L. J., who was a member of both courts rendering

the decisions, attempts to distinguish them upon the ground that in the *Proctor Case* the finding was that he could do "some" light work if he could find it. But Cozens-Hardy, M. R., dissented in the *Cardiff Case*, and reiterated his views as expressed in the *Proctor Case*: "Either they (the employers) should first obtain some work which the workman could do, and offer it to him, and give evidence of this, or else they should give evidence that there is some chance of the workman obtaining a particular kind of light work in the district. Here the employers failed to prove the case they put forward. The burden was upon them, and they have failed to discharge it."

In the *Cardiff Case* Bulkley, L. J., said: "To express the same thing more briefly, inability to earn for the purposes of sched. I. ¶ 3, is inability to get employment owing to some incapacity for work personal to the workman, to the exclusion of inability to get employment owing to the state of the labor market. The employer may be called an insurer of 'capacity for work,' but he is not an insurer of a 'right to work.'"

The decision in *Clark v. Gaslight & Coke Co.* (1905) 21 Times L. R. 184, under the earlier act, was to the effect that where the workman's injury left him physically fit for a narrow circle of occupations only, and he is unable to find work in any of them, he is entitled to compensation as being wholly incapacitated. But Fletcher-Moulton, L. J., said that there was nothing in this decision which conflicted with his conclusions in the *Cardiff Case*.

¹³ *Boag v. Lochwood Collieries* (1909) 47 Scot. L. R. 47.

¹⁴ *Rex v. Templer* (1911) 132 L. T. Jo. 203.

Whether or not the refusal of the workman to do light work is unreasonable is a question of fact.¹⁵

An allowance of coal given by custom to all miners when in capacitated is not to be regarded as compensation, this being his due under his contract of employment.¹⁶

The county judge is not justified in finding that a workman who loses his employment by one act of misconduct is not entitled to compensation.¹⁷

1833. [792] Average weekly earnings.—*a. Generally.*—The “average weekly earnings” of the workman constitute the basis of computation for the assessment of the amount recoverable, both in cases where there is a fatal accident after a period of employment amounting to less than three years, and also in cases where total or partial incapacity results from the injury. This phrase has been defined as the total amount actually earned by the workman during his employment, divided by the number of weeks during which, or during part of which, he was employed.¹

The only proper basis for the assessment of the amount of compensation with reference to the average weekly earnings of the workman is to consider the period of actual employment under his own employer, and the sum actually recovered by him from that employer. An arbitrator is not entitled to take into consideration what the workman might possibly earn in the employment of other employers.² In computing the average weekly earnings of a casual

¹⁵ *Furness v. Bennett* (1910) 3 B. W. Comp. Cas. 195.

¹⁶ *Simmonds v. Stourbridge Brick & Fire Clay Co.* [1910] 2 K. B. 269, 79 L. J. K. B. N. S. 997, 102 L. T. N. S. 732, 26 Times L. R. 430.

¹⁷ *White v. Harris* (1911) 4 B. W. Comp. Cas. 39.

¹ *Fleming v. Lochgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Scot. L. R. 684, 10 Scot. L. T. 114.

The expression, “the average amount which may be able to earn after the accident,” is not limited to earnings under a master, but includes earnings in a private business. *Norman v. Walder* [1904] 2 K. B. 27, 73 L. J. K. B. N. S. 461, 68 J. P. 401, 52 Week. Rep. 402, 90 L. T. N. S. 531, 20 Times L. R. 427.

² In *Bartlett v. Tutton* [1902] 1 K. B. (C. A.) 72, 71 L. J. K. B. N. S. 52, 66 J. P. 196, 50 Week. Rep. 149, 85 L.

T. N. S. 531, 18 Times L. R. 35, a workman employed as a casual dock laborer to work for a day met with an accident in the course of his employment. He was paid 3s. 3d. for the work done by him up to the time of the accident, being at the rate of so much an hour for the number of hours he had worked. There was no evidence that the workman had ever before, or would again, work for the employers. An award in the workman's favor for 50 per cent of 18s.,—which the judge found to be the average weekly earnings of an ordinary casual dock laborer in the port of Bristol (where the workman worked) taking one week with another throughout the year,—was held to be erroneous as there were materials before the arbitrator upon which it was possible for him to find the weekly earnings of the workman in the employment of the defendant.

laborer hired by the hour, it is not competent to take into account the probability of his continuing in the employment.³

In computing the average weekly earnings for a year or more the total amount of the year's earnings should be divided by 52, and not by any less number obtained by excluding the weeks when he was not at work.⁴

In a Scotch case, where death ultimately resulted from injuries received during the workman's first week of employment, but he had continued to work during a second week, it was held that the earnings of the second week might be taken into account in calculating the amount recoverable.⁵

In case of minors it is necessary to introduce in sched. I., § 3, the probable earnings of the minor as distinguished from his average earnings.⁶

In determining the average weekly earnings of a seaman who is paid a certain sum per week and his board and lodging on the ship, the cost to the employer is to be taken as the value to the workman.⁷

The word "grade" as used in sched. I., § 2 (a), does not refer to the individual characteristics of the workman, but to the particular rank in the industrial hierarchy occupied by the workman, such as

³ *Case v. Colonial Wharves* (1905) 53 Week. Rep. (C. A.) 514.

⁴ *Keast v. Barrow Hematite Steel Co.* (1899) 15 Times L. R. (C. A.) 141, 63 J. P. 56. To the same effect is a Scotch ruling to the effect that, in computing the "average weekly earnings" of a laborer who had been employed for a varying number of hours on seventy-seven stated days at irregular intervals, during a period of 105 weeks, the total amount of the earnings should be divided by the whole number of weeks, without discarding weeks in which there had been no employment. *Small v. M'Cormick* (1899) 1 Sc. Sess. Cas. 5th series, 883, 36 Scot. L. R. 700, 7 Scot. L. T. 35.

The proper method of computing the average weekly earnings of a workman who has not worked all the weeks of the year, partly because there was no work and partly because he voluntarily took some time off, is to divide the whole amount earned by the number of weeks actually worked, divide the result by 52, and multiply the quotient by the number of weeks which he might have worked. *Anslow v. Cannock Chase Colliery Co.* [1909] 1 K. B. 352, 78 L.

J. K. B. N. S. 154, 99 L. T. N. S. 901, 25 Times L. R. 167, 53 Sol. Jo. 132, affirmed in [1909] A. C. 435, 78 L. J. K. B. N. S. 679, 100 L. T. N. S. 786, 25 Times L. R. 570, 53 Sol. Jo. 519.

Ordinarily the average weekly earnings of a workman are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and if there are regularly recurring trade holidays when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned. *Carter v. Lang* [1908] S. C. 1198.

⁵ *Doyle v. Beattie* (1900) 2 Sc. Sess. Cas. 5th series, 1166, 37 Scot. L. R. 915, 8 Scot. L. T. 131.

⁶ *Edwards v. Alyn Steel Tinsplate Co.* (1910) 3 B. W. Comp. Cas. 141.

⁷ *Rosenqvist v. Bowring* [1908] 2 K. B. 108, 77 L. J. K. B. N. S. 545, 98 L. T. N. S. 773, 24 Times L. R. 504.

See also *Dothie v. MacAndrew & Co.* [1908] 1 K. B. 803, 77 L. J. K. B. N. S. 388, 98 L. T. N. S. 495, 24 Times L. R. 326.

shepherd, carter, bricklayer, etc.⁸ In fixing the compensation of an injured workman who had served the same employer as a boilermaker and as a laborer, the compensation must be based on the wage the workman was earning in the grade of employment in which he met with the accident.⁹

The average earnings of a workman constitute a question of fact, and if there is evidence to support the county court judge's conclusion, it will not be interfered with.¹⁰

b. Period of employment necessary to furnish basis for computation of average weekly earnings.—The English court of appeal laid down the rule that in order to obtain the benefit of the act a workman must have been, for at least two weeks, in the employment of the employer in whose service he has sustained the injury for which he seeks compensation.¹¹ But the decisions cited were reversed by the House of Lords,¹² and the correct doctrine was declared to be that the right to compensation given by section 1 of the act is not restricted by schedule I. to employments by the week, or for weekly wage or for two weeks at least, and that employment by the day for one or more days is within the act. It was remarked that the word "average" in the expression "average weekly earnings" is used loosely and inaccurately in the schedule, and that the words in section "in accordance with the first schedule to this act" are not intended to limit or restrict the right of the workman to receive compensation or the obligation upon the employer to pay it, but denote the manner and mode in which the payment is to be carried into effect. The effect of this decision is that the right to compensation does not depend on the length of service, but merely on the fact that the workman was injured while in the employment of the "undertaker through an accident arising out of the employment."¹³

⁸ *Perry v. Wright* [1908] 1 K. B. 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186.

⁹ *Babcock v. Young* [1911] S. C. 406, 48 Scot. L. R. 298, 4 B. W. Comp. Cas. 367.

¹⁰ *Williams v. Wynnstay Collieries* (1910) 3 B. W. Comp. Cas. 473.

¹¹ *Lysons v. Knowles* [1900] 1 Q. B. 780, 69 L. J. Q. B. N. S. 449, 64 J. P. 292, 48 Week. Rep. 408, 82 L. T. N. S. 189, 16 Times L. R. 250; *Stuart v. Nixon* [1900] 2 Q. B. 95, 82 L. T. N. S. 489, 69 L. J. Q. B. N. S. 598, 48 Week. Rep. 598, 16 Times L. R. 335.

¹² [1901] A. C. 79, 70 L. J. Q. B. 1 S. 170, 65 J. P. 388, 49 Week. Rep. 63 84 L. T. N. S. 65, 17 Times L. R. 156.

¹³ *Leonard v. Baird* (1901) 3 Sc. Ses. Cas. 5th series, 890, 38 Scot. L. R. 64 9 Scot. L. T. 83, holding that in a case where a servant was killed so soon after the employment that no right to any wages had accrued at the time of his death, a dependent was entitled to recover £150.

There is a sufficient basis for computing the "average weekly earnings" where a servant worked on the Friday in one week, and then during the follow

There is a conflict between the English and Scotch courts with regard to the effect of the decision of the House of Lords upon the rights of a servant who is working under a weekly contract. The court of appeal has taken the position that where such a servant had worked less than two weeks before the accident, the average earnings are to be arrived at by taking the actual facts, and deducing therefrom a hypothetical sum which represents what the workman would have earned if he had had the opportunity of performing his duties during two complete weeks. The actual sum earned in a given fraction of a week is not treated as the week's earnings.¹⁴ The same court has also held that, where the employment has extended over two calendar weeks, the amount actually earned should not be divided by two, so as to average the amount under two weeks' earnings.

In Scotland, on the other hand, it has been held that the proper construction of the decision of the House of Lords is that the actual earnings for part of a week, if the period of work has been no longer, are to be taken as the earnings with reference to which the compensation is to be assessed.¹⁵

There is no difference of opinion as to the point that, in cases of casual and intermittent employment, the average weekly earnings are arrived at by taking the total amount earned, and dividing that sum by the number of weeks during which the employment lasted.¹⁶

Where a workman, after working one week, is injured so soon after the beginning of the following week that no right to any wages

ing week until Thursday, when the accident occurred. *Cadzow Coal Co. v. Gaffney* (1900) 3 Sc. Sess. Cas. 5th series, 72, 38 Scot. L. R. 40, 8 Scot. L. T. 224.

And where the servant was injured on the fifth day of his second week of work. *Russell v. McCluskey* (1900) 2 Sc. Sess. Cas. 5th series, 1312, 37 Scot. L. R. 931, 8 Scot. L. T. 172.

In *Brown v. Cunningham* (1904) 6 Sc. Sess. Cas. 5th series, 997, it was held that where a workman was engaged for a fixed weekly wage, entered upon his work on a Saturday, and worked for the whole of the following calendar week, at the end of which his employment was terminated by his employers in consequence of an injury resulting in total incapacity, he was entitled to compensation, and that the fixed weekly wage was the basis for determin-

ing the amount of the weekly payment. The Lord Justice Clerk said: "I am satisfied that where there is a fixed contract, and it is fulfilled over a full week, the earnings so made by contract form the true basis for ascertaining the rights as to compensation. This is, I think, consistent with the view expressed in the House of Lords in the case of *Lysons*." See note 11, *supra*.

¹⁴ *Ayres v. Buckeridge* [1902] 1 K. B. 57, 71 L. J. K. B. N. S. 28, 65 J. P. 804, 50 Week. Rep. 115, 85 L. T. N. S. 472, 18 Times L. R. 20.

¹⁵ *McCue v. Barclay* (1902) 4 Sc. Sess. Cas. 5th series, 909, 39 Scot. L. R. 690, 10 Scot. L. T. 116; *Grewar v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 895, 39 Scot. L. R. 687, 10 Scot. L. T. 111.

¹⁶ *Williams v. Poulson* (1899) 16 Times L. R. (C. A.) 42, 63 J. P. 757.

had then accrued, the sum earned in the first week represents his average weekly earnings.¹⁷

c. Trade and calendar weeks.—In an English case, where a servant worked for six consecutive days, beginning on Wednesday and ending on the following Tuesday, the work being done under a daily engagement, no notice on either side being necessary to terminate the connection, but where it was also shown that there was a custom in the trade to pay weekly wages, it was held that compensation was properly awarded on the footing that the sum earned during the six days represented his average weekly earnings. The court considered that it was immaterial, for the purposes of the computation, that the trade week of the employer ended on the Thursday night, and negatived the contention of the employer that, for this reason, the average weekly earnings were half of the amount actually received.¹⁸ But another view prevails in Scotland, where it has been held that the week to be taken as the unit of division is not the calendar week, but the trade or pay week of the particular employment.¹⁹

If there is no trade week, the calendar week from Sunday to Saturday is to be taken as the week with reference to which the average earnings are to be estimated.²⁰

d. Continuity of the employment.—The words “period of his actual employment under the said employer,” as used in paragraph 1 (a) (i), are construed as denoting the period of continuous employment immediately preceding the accident; and that period alone is to be taken into account in computing the amount of compensation recoverable.²¹ Any separate and distinct periods during which the

¹⁷ *Nelson v. Kerr* (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Scot. L. R. 645, 9 Scot. L. T. 83.

¹⁸ *Watters v. Clover* (1901) 18 Times L. R. (C. A.) 60.

¹⁹ *Fleming v. Lochgelly Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 890, 39 Scot. L. R. 684, 10 Scot. L. T. 114. The facts were that the claimant had been employed for three days in one week, and during the whole of the next two weeks, and on the Sunday of the fourth week. It was held that, in estimating his average weekly earnings, the total amount of his earnings must be divided by the number of calendar weeks, *i. e.*, four, over which his employment extended. The court explained that the special point thus ruled upon

had not been raised in an earlier case in which the system of computation followed was the same as in the English case just cited. *Peacock v. Niddric & B. Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 443, 39 Scot. L. R. 317, 9 Scot. L. T. 379.

In *Campbell v. Fife Coal Co.* (1902) 5 Sc. Sess. Cas. 5th series, 170, 40 Scot. L. R. 143, 10 Scot. L. T. 410, the decision in the *Fleming Case* was followed.

²⁰ *McCue v. Barclay* (1902) 4 Sc. Sess. Cas. 5th series, 909, 39 Scot. L. R. 690, 10 Scot. L. T. 116.

²¹ *Appleby v. Horseley Co.* [1899] 2 Q. B. (C. A.) 521, 80 L. T. N. S. 853, 68 L. J. Q. B. N. S. 892, 47 Week. Rep. 614; *Rothwell v. Davies* (1903) 15 Times L. R. 423.

servant may previously have worked are not intended to be taken into consideration.²²

A temporary cessation of work does not necessarily break the continuity of the employment in such a manner as to exclude from the computation the period anterior to that cessation.²³ To bring about that consequence there must have been an actual interruption for the time being of the relation of master and servant. Whether there has been such an interruption is to be determined from the evidence, as a question of fact.²⁴

To enable a court to say that "a series of short periods [of work] should be taken together and treated as a continuous term, there must be some *nexus* to join them. There must be some contract, express or

²² *Grewar v. Caledonian R. Co.* (1902) 4 Sc. Sess. Cas. 5th series, 895, 39 Scot. L. R. 687, 10 Scot. L. T. 111.

²³ There is no break in the workman's employment where he goes away on a holiday. *Keast v. Barrow Hematite Steel Co.* (1899) 15 Times L. R. (C. A.) 141, 63 J. P. 56.

In *Jones v. Ocean Coal Co.* [1899] 2 Q. B. (C. A.) 124, 68 L. J. Q. B. N. S. 731, 47 Week. Rep. 484, 80 L. T. N. S. 582, 15 Times L. R. 339, while it was declared that, while the average of the weekly earnings should not be reduced by taking into account a part of the year during which the relation of master and servant did not exist, a different rule was applicable where the relation continued, and the men did not work simply because there was nothing for them to do. To the same effect *Giles v. Belford* [1903] 1 K. B. 843, 72 L. J. K. B. N. S. 569, 67 J. P. 399, 51 Week. Rep. 692, 88 L. T. N. S. 754, 19 Times L. R. 422.

²⁴ A workman was in the employment of the defendants as a riveter at a weekly wage of £2, 10s., from the 27th of September, 1895, to the 16th of March, 1896, when he was injured by an accident which incapacitated him for eleven months, during which time he did not work, and earned no wages. In February, 1897, the defendants employed him as a time keeper at a weekly wage of £1, 10s., and he continued in such employment until the 27th of September, 1898, when he was killed by an accident. Held, that for the purpose of calculating the compensation payable, the period of the workman's employment by the defendants had been less than three

years, and that his "average weekly earnings" must be calculated with reference only to the period between the time when he resumed work and the date of his death. *Appleby v. Horsey Co.* [1899] 68 L. J. Q. B. N. S. (C. A.) 892 [1899] 2 Q. B. 521, 80 L. T. N. S. 853, 47 Week. Rep. 614, 15 Times L. R. 410.

A finding that the employment was not continuous was held justifiable in a case where the workman had been absent eleven weeks on account of sickness, although when he resumed work no fresh engagement was entered into. *Hewlett v. Hepburn* (1899) 16 Times L. R. (C. A.) 56.

A period of six weeks during which the servant was disabled from work, owing to a previous accident, constitutes a break in the employment, and any compensation that may be due for a second injury received after resuming work must be ascertained with reference to the period which had elapsed between the resumption of work and the occurrence of the second accident, upon which the claim is based. *Gibb v. Dunlop* (1902) 4 Sc. Sess. Cas. 5th series, 971, 39 Scot. L. R. 750, 10 Scot. L. T. 184.

Such portion of the period of one year preceding the injury as occurred prior to a strike during which the injured workman was not employed, and after the termination of which he re-entered the employment under a new agreement, is not to be considered. *Jones v. Ocean Coal Co.* [1899] 2 Q. B. (C. A.) 124, 68 L. J. Q. B. N. S. 731, 47 Week. Rep. 484, 80 L. T. N. S. 582, 15 Times L. R. 339.

implied, which raises a reasonable expectation of continuity in the employment. In the absence of that *nexus*, casual engagements on noncontract days do not constitute one continuous employment, for they are not bound together.”²⁵

e. Deductions.—In one case the court of appeal approved of the course followed by an arbitrator, who disregarded a weekly deduction from the workman’s wages which, under the employer’s rules, was made on account of lamp oil supplied to him, and took the full amount of his weekly wages as the basis of the award.²⁶ In another case the same court intimated its opinion, but did not expressly decide, that the value of the tuition given to an apprentice should not be taken into account in computing the amount of his “average weekly earnings.”²⁷ In another it was held by the Scotch court of sessions that, in estimating the average earnings of a servant who was paid according to his output, nothing is to be deducted in respect to the value of the services of his son, whom he employed as an assistant, without paying him anything.²⁸

The cost of explosives used by a miner, although procured from the employer, who deducts the cost thereof from the miner’s wages,

²⁵ Collins, L. J., in *Hathaway v. Argus Printing Co.* [1901] 1 K. B. (C. A.) 96. There a workman was under an agreement to work for his employers on the nights of Thursday and Friday in each week, for a period extending over two weeks, and at a fixed rate of wages for each night. During the rest of the week he worked, at times, for the same employers, when they had work to give him, and at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement, and an award was made in his favor, based on the weekly wages earned by him in respect of the two nights a week during which he worked under the agreement. On appeal it was held (1) that the employment for two nights a week was a continuous one, and that the earnings of those two nights were properly taken into account in determining the weekly payment to be made to the applicant; (2) that the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of the applicant.

²⁶ *Houghton v. Sutton Heath & Lea Green Collieries Co.* [1901] 1 K. B. (C. A.) 93, 83 L. T. N. S. 472, 70 L. J. Q. B. N. S. 61, 65 J. P. 134, 49 Week. Rep. 196, 17 Times L. R. 54.

In estimating the compensation payable to an injured servant under the workmen’s compensation act 1897, the word “earnings” in the act means the sum the workman receives for his labor when he comes to it properly equipped according to the general understanding and practice in the particular trade. *Abram Coal Co. v. Southern* [1903] A. C. 306, 72 L. J. K. B. N. S. 691, 89 L. T. N. S. 103, 19 Times L. R. 579. It was accordingly held that the earnings of a collier from whose weekly wages were deducted by agreement sums for cleaning lamps, supply of oil, sharpening wicks, and checking weights, were his full wages without the deductions. The decision of the court of appeal in the *Houghton Case* was approved.

²⁷ *Pomphrey v. Southwark Press* [1901] 1 K. B. 86, 83 L. T. N. S. 468, 70 L. J. Q. B. N. S. 48, 65 J. P. 148, 17 Times L. R. 53.

²⁸ *Nelson v. Kerr* (1901) 3 Sc. Sess. Cas. 5th series, 893, 38 Scot. L. R. 645, 9 Scot. L. T. 83.

is not to be regarded in estimating the average weekly earnings of the miner.²⁹

f. Remuneration other than regular wages.—Where the giving and receiving of “tips” are notorious, the money thus received is to be included in the “average weekly earnings.”³⁰

The “average weekly earnings” do not include weekly payments by way of compensation for a previous accident.³¹

In the note below, will be found several cases involving the question whether remuneration other than regular wages is to be considered in determining the “earnings” of the workman.³²

²⁹ Where a miner was in the habit of purchasing the explosives which he required for his work from his employers, and the price of these was retained by them from his wages, held (1), that it had been authoritatively settled, by decisions prior to the workmen’s compensation act 1906, that the cost of explosives did not represent a sum paid to the miner “to cover any special expenses.” *McKee v. Stein* [1909–10] S. C. 38, 47 Scot. L. R. 39, 3 B. W. Comp. Cas. 544; *Abram Coal Co. v. Southern*, supra, and *Midland R. Co. v. Sharpe*, infra, followed.

³⁰ *Penn v. Spiers* [1908] 1 K. B. 766, 77 L. J. K. B. N. S. 542, 98 L. T. N. S. 541, 24 Times L. R. 354, 52 Sol. Jo. 280, 14 Ann Cas. 335.

The county court judge in calculating the average weekly earnings of an employee may take into consideration tips obtained by the workman, although they were given for services outside the regular employment. *Knott v. Tingle Jacobs & Co.* (1911) 4 B. W. Comp. Cas. 55.

³¹ *Gough v. Crawshay Bros.* [1908] 1 K. B. 441, 77 L. J. K. B. N. S. 236, 98 L. T. N. S. 327, 24 Times L. R. 186.

³² “Earnings” includes a fixed sum paid to the workman whenever his duties called him away from home. *Midland R. Co. v. Sharpe* [1904] A. C. 349, 73 L. J. K. B. N. S. 666, 91 L. T. N. S. 181, 20 Times L. R. 546, 53 Week. Rep. 114.

In fixing the average weekly earnings of a stoker, a retainer as stoker in the Royal Naval Reserve must be taken into account, as well as his wages. *The Raphael v. Brandy* [1911] A. C. 413, 80 L. J. K. B. N. S. 1067, 105 L. T. N. S. 116, 27 Times L. R. 497, 55 Sol. Jo. 579, 4 B. W. Comp. Cas. 307.

The steward of a vessel is entitled to have a monthly bonus received from his employers when satisfied with his work, and the profit which he makes on the sale of whisky at the bar of the vessel taken into consideration in fixing his average earnings. *Skailes v. Blue Anchor Line* [1910] W. N. 267, 27 Times L. R. 119, 55 Sol. Jo. 107.

An employee of a laundry who also gives music lessons is not entitled when injured in the laundry to claim anything for the money earned by giving music lessons. *Simmons v. Heath Laundry Co.* [1910] 1 K. B. 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 Times L. R. 326, 54 Sol. Jo. 392, 3 B. W. Comp. Cas. 200.

In *McDermott v. The Tintoretto* [1911] A. C. 35, 80 L. J. K. B. N. S. 161, 103 L. T. N. S. 769, 27 Times L. R. 149, 55 Sol. Jo. 124, 11 Asp. Mar. L. Cas. 515, 4 B. W. Comp. Cas. 123, 48 Scot. L. R. 728, it was held that the provisions of paragraph 3 of the first schedule do not require that, in fixing the compensation of a seaman who was totally incapacitated by accidental injury, regard must be had to the payment of any wages and maintenance which the vessel was required to give him under the merchants’ shipping acts.

Where a permanent dock laborer has been employed by the same employer during the three years next preceding his injury, in estimating the measure of compensation a sum earned as a sorter of mails in the postoffice for a part of each day is to be disregarded. *Busby v. London & India Docks* (1909) 126 L. T. Jo. 521.

The amount of the poor relief paid to a workman employed by a distress committee under the unemployed workman act 1905 does not fail to be taken

1834. [793] Medical examination after accident (par. 4).—The mere fact that an employer has made no objection to the commencement of proceedings, on the ground that no notice of the accident was given by the workman, does not warrant the inference of a waiver by the employer of his right to compel the workman to submit to a medical examination, nor justify the arbitrator in imposing terms upon the employer, as a condition of his obtaining an order that the workman shall be examined.¹

1835. [794] Payment to dependents (par. 5).—Where an application for compensation under the workmen's compensation act 1897 is made by the legal personal representative of a deceased workman, or behalf of himself and other dependents of the workman, the county court judge or other arbitrator has jurisdiction under schedule I. pars. 4–7, to order so much of the compensation as is allotted to the dependents, to be paid to the county court registrar for investment in his name on their behalf, and is not compelled to order it to be paid to the legal personal representative.¹

1835a. Determination of question who are dependents (par. 8).—It is the duty of the arbitrator, in determining the question whether the claimant was a dependent, to decide incidentally her relationship to the deceased.¹

1836. Medical examination after receiving compensation (par. 14. 15 [5]).—A workman who while receiving compensation submits to an examination by a medical practitioner provided by the employer need not submit to an examination by one of the referees appointed under the second schedule of the act, but may file a request for arbitration upon the employer's discontinuing the compensation.¹

into account in calculating the amount of the compensation payable by the distress committee. *Gilroy v. Mackie* [1909] S. C. 466, 46 Scot. L. R. 325.

The right to use a uniform which remains the property of the defendant must be treated as part of his "earnings." *Great Northern R. Co. v. Dawson* [1905] 1 K. B. 331, 74 L. J. K. B. N. S. 271, 53 Week. Rep. 309, 92 L. T. N. S. 145, 21 Times L. R. 193.

¹ *Osborn v. Vickers* [1900] 2 Q. B. (A. C.) 91, 69 L. J. Q. B. N. S. 606, 82 L. T. N. S. 491, 16 Times L. R. 333.

¹ *Daniel v. Ocean Coal Co.* [1900] 2 Q. B. (A. C.) 250, 82 L. T. N. S. 523, 69 L. J. Q. B. N. S. 567, 64 J. P. 436, 48 Week. Rep. 467, 16 Times L. R. 368.

¹ *Johnstone v. Spencer* [1908] S. C. 1015.

But see *Wallace v. Fife Coal Co* [1909] S. C. 682, where opinions were reserved on the question whether it was competent for the arbitrator in the arbitration proceedings to determine whether the claimant was the widow of the deceased workman, and *Johnstone v. Spencer & Co.* [1908] S. C. 1015, was distinguished.

¹ *Niddrie & B. Coal Co. v. McKay* (1903) 5 Sc. Sess. Cas. 5th series, 1121 40 Scot. L. R. 798, 11 Scot. L. R. 275; *Neagle v. Nixson's Nav. Co.* [1904] 1 K. B. (A. A.) 339, 73 L. J. K. B. N. S. 165, 68 J. P. 297, 52 Week. Rep. 356, 90 L. T. N. S. 49, 20 Times L. R. 160; *Strannigan v. Baird* (1904) 6 Sc. Sess. Cas. 5th series, 784, 41 Scot. L. R. 609, 12 Scot. L. T. 152.

Davidson v. Summerlee & M. Iron &

The report of a medical practitioner appointed for the purpose of the act is conclusive upon the question whether the incapacity arising from the injury has ceased.²

Whether or not the workman is entitled to have his own doctor present at the examination is a question of fact, to be determined by the arbiter.³

A workman does not necessarily obstruct a medical examination, within the meaning of the act, by going into another country and refusing to return for an examination unless his expenses are paid.⁴

Steel Co. (1903) 5 Sc. Sess. Cas. 5th series, 991, 40 Scot. L. R. 764, 11 Scot. L. T. 269, was disapproved in the other two Scotch cases which were decided in the other division of the court.

² *Ferrier v. Gourlay Bros.* (1902) 4 Sc. Sess. Cas. 5th series, 711, 39 Scot. L. R. 453, 9 Scot. L. T. 517; *McAvan v. Boase Spinning Co.* (1901) 3 Sc. Sess. Cas. 5th series, 1048, 38 Scot. L. R. 772, 9 Scot. L. T. 152; *Arnott v. Fife Coal Co.* [1911] S. C. 1029, 48 Scot. L. R. 828, 4 B. W. Comp. Cas. 361.

A certificate of a medical referee, procured in accordance with sched. I., par. 15, that a workman is fit to work, is conclusive. *Sapcote v. Hancock* (1911) 4 B. W. Comp. Cas. 184.

The certificate of the statutory medical officer must be accepted by the trial judge as conclusive evidence of the workman's condition as of the time when it is given. *Bryce v. Connor* (1904) 7 Sc. Sess. Cas. 5th series, 193.

Whether or not a workman has recovered is a question of fact, and the arbiter's judgment will not be reviewed. *McNaughton v. Cunningham* [1910] S. C. 980, 47 Scot. L. R. 781, 3 B. W. Comp. Cas. 576, 577; *Anderson v. Darnagavil Coal Co.* [1910] S. C. 456, 47 Scot. L. R. 342.

Where a medical referee has reported that a miner who has lost an eye is as fit to work underground as any one-eyed man is, the miner is entitled to a proof of his earning capacity. *Arnott v. Fife Coal Co.* [1911] S. C. 1029, 48 Scot. L. R. 828, 4 B. W. Comp. Cas. 361.

³ In *Morgan v. Dixon* [1911] W. N. 220, 81 L. J. P. C. N. S. 57, 28 Times L. R. 64, 56 Sol. Jo. 88, 49 Scot. L. R. 45, it was held that the workman is not entitled as a matter of right, to have his own doctor present during a medical examination.

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In *Devitt v. The Bainbridge* [1909] 2 K. B. 802, 78 L. J. K. B. N. S. 1059, 101 L. T. N. S. 299, it was held that a workman did not refuse to be examined, in telling a medical man sent by the employers to examine him, that he did not object to a physical examination, provided his own physician was present.

There is no refusal to submit, under sched. I., par. 14, where the workman offers to submit to an examination at the surgery of his doctor. *Harding v. Royal Mail Steam Packet Co.* (1911) 4 B. W. Comp. Cas. 59. The court held that the workman's request was not unreasonable.

But it is a refusal where the workman refuses to be examined except at his solicitor's office or in his presence. *Warby v. Plaistowe* (1910) 4 B. W. Comp. Cas. 67.

⁴ Where a workman receiving compensation fixed by agreement, who had twice submitted himself for examination by a medical practitioner provided by the employers, and been certified not to have recovered, immediately after the second examination went to Ireland to reside with his father, by refusing another examination unless his expenses were paid, where he offered to submit himself for examination to a medical man near the place where he was residing, did not refuse to submit himself to medical examination, or obstruct the same, in the sense of the workmen's compensation act 1897, sched. I., § 11. *Baird v. Kane* (1905) 7 Sc. Sess. Cas. 5th series, 461.

But an injured workman who is in receipt of weekly payments under the workmen's compensation act 1897, and who goes to Australia without intimating to his employers that he is going, or leaving his address, obstructs the medical examination in the sense of

1837. [795] Review of weekly payments (par. 16).—A weekly payment awarded as compensation to an injured workman can only be reviewed under this provision in cases where the circumstances have changed since the making of the award.¹

When an application to review a weekly payment is brought before an arbitrator, he is not bound to treat the agreement for, or award of, a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity has ceased when the application to review was made, or at any and what subsequent time before the hearing, and to make his award with reference to the date so determined.² But it is not competent for the

§ 11 of the First Schedule of the act. *Finnie v. Duncan* (1904) 7 Sc. Sess. Cas. 5th series, 254.

¹ *Crossfield v. Tanian* (1900) 82 L. T. N. S. (C. A.) 813, [1900] 2 Q. B. 629, 69 L. J. Q. B. N. S. 790, 48 Week. Rep. 609, 16 Times L. R. 476; *Clark v. Gaslight & Coke Co.* (1905) 21 Times L. R. 184. And see *Sharman v. Holliday* [1904] 1 K. B. 235, 73 L. J. K. B. N. S. 176, 68 J. P. 151, 90 L. T. N. S. 46, 20 Times L. R. 135 (county court judge directed to entertain application of workman to review nominal award, where workman showed that he could not obtain any work because of his condition).

The burden is upon the employer to show such change of circumstances as to warrant the termination of the weekly payments. *Cory v. Hughes* [1911] 2 K. B. 738, 80 L. J. K. B. N. S. 1307, 105 L. T. N. S. 274, 27 Times L. R. 498, 4 B. W. Comp. Cas. 291.

Whenever the master wishes to have the compensation ended or diminished, the burden is upon him to show a change of circumstances justifying it; but when the master meets this burden by a certificate of the medical referee, then the burden is upon the workman to show that any supervening incapacity is due to the accident. *M'Ghee v. Summerlee Iron Co.* [1911] S. C. 870, 48 Scot. L. R. 807, 4 B. W. Comp. Cas. 424.

In the case of a payment fixed by a recorded memorandum of agreement, the burden is on the employer to prove affirmatively that the workman had recovered from his injuries. *Quinn v. M'Callum* [1909] S. C. 227, 46 Scot. L. R. 141.

² *Morton v. Woodward* [1902] 2 K. B. (C. A.) 276, 71 L. J. K. B. N. S. 736, 66 J. P. 660, 51 Week. Rep. 54, 86 L. T. N. S. 878; *Donaldson Bros. v. Cowan* [1909] S. C. 1292, 46 Scot. L. R. 920.

The latter case overruled earlier Scotch cases to the effect that in an application, under paragraph (12) of the first schedule to the workmen's compensation act 1897, to review a weekly payment under the act, the arbitrator has power to end, diminish, or increase the payments only as from the date of his decision in the application. *Steel v. Oakbank Oil Co.* (1902) 5 Sc. Sess. Cas. 5th series, 244, 40 Scot. L. R. 205, 10 Scot. L. T. 505; *Pumpherson Oil Co. v. Cavaney* (1903) 5 Sc. Sess. Cas. 5th series, 963, 40 Scot. L. R. 724, 11 Scot. L. T. 171; *Baird v. Stevenson* [1906-07] S. C. 1259.

In *Lochgelly Iron & Coal Co. v. Sinclair* [1909] S. C. 922, Lord Salveson recognized the earlier disagreement between the English and Scotch tribunals, and said: "One other matter has been conclusively settled by authority. Where the employer's liability to pay compensation has been judicially ascertained, either by an award of the arbitrator or by its equivalent, a recorded memorandum of agreement, such liability can only be terminated by the judgment of the arbitrator on an application made to him by the employer. On this matter all the judges who took part in the following three decisions, *Steel v. Oakbank Oil Co.*, *Pumpherson Oil Co. v. Cavaney*, and *Morton v. Woodward*, were absolutely agreed. There is no doubt a conflict between the Scotch and English tribunals as to the date on which the cessor of liability takes

arbitrator to terminate payment as from any date prior to that of the application.³ The arbitrator cannot, in the absence of a special request, award that the payment shall terminate from a date antecedent to the request for a review.⁴ Nor is it competent for an arbitrator to make a prospective award to terminate at a future day.⁵

Where an application for a review comes before the sheriff substitute at the same time as an application to register an agreement, he is not bound to grant warrant to record the agreement without awaiting the result of the proof in the proceeding to review.⁶

Of course the workman must use all reasonable means to recover his capacity.⁷ He will be denied compensation where he unreasonably refuses to undergo an operation which is of a minor character, and which would, in the opinion of medical men, restore his earning capacity.⁸ But it is otherwise where the operation is a serious one,

place,—the former holding that it can only operate from the date of the actual decision, while the view taken in England is that the arbitrator has jurisdiction to review the payments as from the date of the application. If the question is to be still open, I should have no difficulty in concurring with the reasoning of the English judges in the case of Woodward, and with the opinion of the dissenting judges in the two Scotch cases.”

Where payments have been made under an unrecorded agreement, and not under an award, the compensation is to be ended as of the time when the incapacity ceased. *Southhook Fire-Clay Co. v. Laughland* [1908] S. C. 831, 45 Scot. L. R. 664.

³ *Donaldson Bros. v. Cowan* [1909] S. C. 1292, 46 Scot. L. R. 920.

⁴ *Charing Cross, E. & H. R. Co. v. Boots* [1909] 2 K. B. 640, 78 L. J. K. B. N. S. 1115, 101 L. T. N. S. 53, 25 Times L. R. 683; *Upper Forest & Western Steel & Tinplate Co. v. Thomas* [1909] 2 K. B. 631, 78 L. J. K. B. N. S. 1113.

⁵ *Baker v. Jewell* [1910] 2 K. B. 673, 79 L. J. K. B. N. S. 1092, 103 L. T. N. S. 173, 3 B. W. Comp. Cas. 503; *Allen v. Thomas Spowart & Co.* (1906) 43 Scot. L. R. 599.

⁶ *McEwan v. Baird* [1909–10] S. C. 436; *McVey v. Dixon* [1909–10] S. C. 544.

In the *McEwan Case*, after referring to *Upper Forest & W. Steel & Tinplate Co. v. Thomas* [1909] 2 K. B. (C. A.) 631, 78 L. J. K. B. N. S. 1113, and

Charing Cross E. & H. R. Co. v. Boots [1909] 2 K. B. 640, 78 L. J. K. B. N. S. 1115, Lord Dunedin said: “They show, I think, conclusively, that the English courts proceed thus: Where the county court judge is applied to at one and the same time to register a memorandum and to vary a payment, their plan is to allow the memorandum to be registered, but to grant a stay of execution in order that the other matter may be taken up, and then, according as the decision in the other matter is one way or another, that stay of execution is either removed or not as the case may be.”

⁷ An employer is not bound to continue weekly payments to an injured workman when the continuance of his incapacity is due to his neglect to comply with certain simple medical directions which had been given to him. *Dowds v. Bennie* (1902) 5 Sc. Sess. Cas. 5th series, 268, 40 Scot. L. R. 219, 10 Scot. L. T. 439.

Where an injured worker refuses to follow a reasonable and safe course of conduct which would in all probability enable him to regain his usual health and strength, and his continued incapacity is attributable to such refusal, he is not entitled to receive further compensation under the act. *Gormley v. Brisbane Tramways Co.* (1909) Queensl. St. Rep. 329.

⁸ A workman by refusing to undergo an operation precludes himself from any right to receive further compensation, where the proposed operations are

or it is questionable whether it will aid him,—especially if his own doctor advises against it.⁹

simple or minor operations, not attended with appreciable risk or serious pain, and are likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work. *Donnelly v. Baird* [1908] S. C. 536. Lord McLaren said: "There is, of course, no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. . . . In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

A workman's refusal to undergo "a simple operation not attended with serious risk or pain, and . . . such as a reasonable man not claiming compensation for damages would for his own advantage and comfort elect to undergo," disentitles him to a continuance of substantial compensation. *Anderson v. Baird* (1903) 5 Sc. Sess. Cas. 5th series, 373.

If the operation is not serious, involving no appreciable risk, and is likely to remove his incapacity, he is not entitled to compensation if he refuses to have it performed. *Warncken v. Moreland* [1908] W. N. 252, 25 Times L. R. 129, 53 Sol. Jo. 134, [1909] 1 K. B. 184,

78 L. J. K. B. N. S. 332, 100 L. T. N. S. 12, 25 Times L. R. 129, 53 Sol. Jo. 134.

⁹ It cannot be said that a workman's refusal to undergo the operation of trephining was unreasonable, where it is admitted that it would not have effected a total cure. *Hawkes v. Coles* (1910) 3 B. W. Comp. Cas. 163.

In *Rothwell v. Davies* (1903) 19 Times L. R. 423, compensation was held not to be barred because of the refusal of a workman to undergo an operation which, although probably successful, would be attended with a certain amount of risk.

The refusal of an injured workman to undergo an operation which his own medical adviser, an eminent surgeon, had advised him not to submit to, is not a bar to compensation. *Sweeney v. Pumpherson Oil Co.* (1903) 5 Sc. Sess. Cas. 5th series, 972, 40 Scot. L. R. 721, 11 Scot. L. T. 279.

In *Tutton v. The Majestic* [1909] 2 K. B. 54, 78 L. J. K. B. N. S. 530, 100 L. T. N. S. 644, 25 Times L. R. 482, 53 Sol. Jo. 447, it was held that a workman who, in good faith and upon the advice of his own doctor, refuses to have an operation performed, cannot be said to be acting unreasonably.

The refusal to submit to a slight operation, although unreasonable, will not preclude an award of compensation to the workman for the loss of his finger, where it is not clear that the operation would have saved it. *Marshall v. Orient Steam Nav. Co.* [1909] W. N. 225, 101 L. T. N. S. 584, 26 Times L. R. 70, 54 Sol. Jo. 50.

That the second application of an anæsthetic, which proved fatal, would not have been necessary if the workman had permitted his hand to be amputated, instead of having skin grafted onto it, which would have preserved the hand, does not preclude the widow from compensation, where the operations were performed by a skilful surgeon. *Shirt v. Calico Printers' Asso.* [1909] 2 K. B. 51, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430.

The employer cannot have an award terminated on account of the applicant's unreasonable refusal to submit to an

An award terminating weekly payments is, in the absence of an appeal, final; and another application for payments will be denied.¹⁰

In view of the fact that an award terminating the compensation is final, there has grown up the custom of awarding a "penny a week" to a workman who is at the time of the application able to do this ordinary work, but is permanently injured, and may at any time again become incapacitated by reason of the injury. It is conceded that the statute makes no provision for such an award, and the only apparent justification for it is that it is a recognized custom, and convenient, and prevents the injustice that would occur when the compensation has been terminated in cases where there may be a recurrence of the workman's incapacity which is due to the accident.

This custom has been held incompetent by both divisions of the court of session.¹¹ But it is upheld by the court of

operation, by showing that he had refused to have another and different operation performed. *Hay's Wharf v. Brown* (1909) 3 B. W. Comp. Cas. 84.

Whether or not a workman is unreasonable in refusing to have an operation performed is a question of fact, with which the appellate court will not interfere, where the doctors are not wholly agreed as to the advisability of the operation. *Ruabon Coal Co. v. Thomas* (1909) 3 B. W. Comp. Cas. 32.

¹⁰ *Nicholson v. Piper* [1907] A. C. 215, 76 L. J. K. B. N. S. 856, 97 L. T. N. S. 119, 23 Times L. R. 620.

Payments of compensation having been ended by the arbitrator, on an application for a review under § 12 of the first schedule, a new application was incompetent, and the workman cannot again obtain compensation in respect of the accident. *Cadenhead v. Ailsa Shipbuilding Co.* [1909-10] S. C. 1129.

The certificate of the medical referee that incapacity has ceased does not bar a subsequent application to the sheriff by the workman against his employers for an award to fix the amount of compensation due in respect of an alleged supervening incapacity where no application was ever made by the employers for an order to end the compensation. *King v. United Collieries Co.* [1909-10] S. C. 42. Lord Low observed: "The obligation of the employers to give him weekly payments during incapacity has never been terminated in any way whatever. All that has been settled by the report of the medical referee is

that at a certain date he was incapacitated."

But where payments are made under an agreement, the mere report of the medical referee that the incapacity had ceased, and the acquiescence of the applicant in the nonpayment for several weeks, will not prevent the applicant from making further application for payments. *United Collieries v. King* (1909) 47 Scot. L. R. 41.

¹¹ *Rosie v. Mackay* [1910] S. C. 714, 47 Scot. L. R. 654; *Clelland v. Singer Mfg. Co.* (1905) 7 Sc. Sess. Cas. 5th series, 975.

In the latter case, Lord Adam observed: "The 13th section of the first Schedule, for example, gives to the employer, where weekly payments have been continued for not less than six months, a right to have his liability therefor redeemed by payment of a lump sum. This clause appears to me clearly to indicate that it was not intended that an employer's liability under the act should continue for an indefinite time, but that he should be able to get rid of it by payment of a lump sum at the end of six months. But it appears to me that the device of suspending the weekly payments, and substituting therefor the payment of a nominal sum of a penny, would render that clause practically inoperative. It was admitted on both sides that the payment of the nominal sum of a penny could not be treated as a weekly payment under the act. If that be so, then in this case, for example, in which

appeal,¹² while in the House of Lords the question has been expressly reserved.¹³

In jurisdictions recognizing this form of a suspensory award,—and it is to be noted that even in Scotland the custom has been frequently recognized,—the question whether the case is one to be thus kept open depends upon the facts of each case.¹⁴

the weekly payments ceased at the end of four months, if the appellants were to apply to have their liability under the act redeemed by payment of a lump sum, they would be met by the plea that the weekly payments had not been continued for the necessary period of six months. I see no answer to that plea, with the result that the appellant's liability under the act would be continued indefinitely. I think that the act assumes that the weekly payments are to be continuous, and if at the end of six months an application is made by an employer to an arbiter for redemption of his liability by payment of a lump sum, the arbiter must apply his mind to the facts as then existing, and determine the amount of that sum to the best of his ability. So I think that when an application is made to an arbiter, under the 12th section, to review a weekly payment, he must apply his mind to the facts as they exist at the time, and either diminish, increase, or end the payment, or, by refusing the application, continue it, but that he has no power under the act to suspend it."

¹² *The Tynron v. Morgan* [1909] 2 K. B. 66. Fletcher, Moulton, L. J., said: "It [the power of review] must not, however, be allowed to work injustice to the workman, and I will put a case which I think shows conclusively that, where there is a permanent injury, no judge is entitled to treat the fact that a man can at the moment earn just as much as he could before his accident as being a justification for terminating the compensation. Suppose there is an injury which produces incapacity only in the winter; in other words, suppose that in the summer, when the weather is fairly warm, the man can work as well as he could previously to the accident, but in the cold weather he is wholly or partially incapacitated, and that the owners apply in the summer for a review. They are perfectly entitled to have the compen-

sation cut down to a nominal amount at the time, but they are not entitled to have the compensation terminated, because, if once terminated, it cannot be reviewed again. If we were to hold that the fact that the man was earning full wages at the moment of review was sufficient to entitle the compensation to be terminated, the consequence would be that the county court judge, with full knowledge of the admitted fact that when the winter came on the man would develop an incapacity due to the accident, would be obliged to stop all compensation for the future. The tribunals which have to administer this act have got out of the difficulty by granting an award for nominal compensation so long as the immediate earning powers are not diminished, when there is reason to believe that they are not permanently as great as they were before the accident. This court has again and again had to deal with such awards, and has treated them as valid, and I think that they are in the interest of both parties."

Where there is some reason to anticipate any recurrence of the difficulty, the county judge should make a suspensory award of a nominal amount, in order to keep alive the employer's liability. *Griga v. The Harelda* (1910) 3 B. W. Comp. Cas. 116, Cozens-Hardy, M.R., observed: "In my opinion this court has distinctly laid down a principle from which we should not depart, that in a case of this kind, where a man has been ruptured, though by wearing a truss he may be physically able to earn full wages, still the circumstances are such that there is a possibility, if not a probability, that in the future there will be bad effects resulting from the accident which will effect his earning capacity."

¹³ *Nicholson v. Piper* [1907] A. C. 215, 76 L. J. K. B. N. S. 856, 97 L. T. N. S. 119, 23 Times L. R. 620.

¹⁴ The county court judge is not justified in granting merely a suspensory award where, but three days before the

Various other questions arising under this section of schedule I. will be found discussed in the cases cited below.¹⁵

application, there had been a second amputation of part of the finger which had been crushed. *Burgess v. Jewell* (1911) 4 B. W. Comp. Cas. 145.

A suspensory award was granted in *Pomphrey v. Southwark Press* [1901] 1 Q. B. 86, 70 L. J. Q. B. N. S. 48, 83 L. T. N. S. 468, 17 Times L. R. 53, 65 J. P. 148, where an apprentice was injured, although it did not appear that the incapacity was such as was likely to recur.

On the application by the employers to terminate the payment of a penny a week, the question for the county court judge is, Is the workman in such a position that in the open market his earning capacity in the future may be less than it was before the accident, as a result of the accident? The question is not whether the employers are paying him the same wages as he received before the accident. *Birmingham Cabinet Mfg. Co. v. Dudley* (1910) 102 L. T. N. S. 619, 3 B. W. Comp. Cas. 169.

Where the workman's inability to earn as much or more than before the accident is due to his drinking habits, he is entitled to no more than a suspensory award. *Hill v. Ocean Coal Co.* (1909) 3 B. W. Comp. Cas. 29.

Where the incapacity has ceased, and the injury to his finger has not prevented the workman from obtaining work, it is not a case for a suspensory award. *Goodall v. Kramer* (1910) 3 B. W. Comp. Cas. 315.

Where the employers offered to receive a workman back, and he admitted he was then able to do all his old work, he is not entitled to such a declaration of the liability of his former employers as would preserve his rights in the event of supervening incapacity. *Husband v. Campbell* (1903) 5 Sc. Sess. Cas. 5th series, 1146, 40 Scot. L. R. 822, 11 Scot. L. T. 243.

Freeland v. Macfarlane, Land & Co. (March 20th, 1900) 2 F. 832, and *Ferrier v. Gourley Bros. & Co.* (March 18th, 1902) 4 F. 711, 39 Scot. L. R. 453, 9 Scot. L. T. 517, were reconsidered in *Clelland v. Singer Mfg Co.* (see note 11, *supra*).

¹⁵ In an application by an employer for review and ending of a weekly payment made under agreement, because

the workman had recovered and had been certified as recovered by a medical practitioner selected by the employer, the sheriff substitute was not entitled to refuse the allowance of proof that the workman had not recovered. *Johnstone v. Cochran* (1904) 6 Sc. Sess. Cas. 5th series, 854, 41 Scot. L. R. 644, 12 Scot. L. T. 175.

Upon an application for review under schedule I, par. 16, the mental or nervous condition of the servant is to be considered. *Eaves v. Blaenclwydach Colliery Co.* [1909] 2 K. B. 73, 78 L. J. K. B. N. S. 809, 100 L. T. N. S. 751.

An arbiter may decline to diminish a payment where the average weekly wage was 36s. and 8d., and the weekly payment was 18s. and 4d., and the workman was earning but 17s. per week after his injury. *Bryson v. Dunn* (1905) 8 Sc. Sess. Cas. 5th series, 226.

The fact that a minor workman is earning the same wages as before the accident is not in itself conclusive as to the termination of his right to compensation. *Malcolm v. Bowhill Coal Co.* [1909-10] S. C. 447, 47 Scot. L. R. 449, 3 B. W. Comp. Cas. 562.

In determining what weekly sum the workman, under age, would probably have been earning at the date of the review if he had remained uninjured, the primary proposition to be dealt with is, what would have been his general earning capacity, not what would have been his earning capacity in the particular employment in which he then was. *Vickers v. Evans* [1910] A. C. 444, 79 L. J. K. B. N. S. 954, 103 L. T. N. S. 292, 26 Times L. R. 548, 54 Sol. Jo. 651, 3 B. W. Comp. Cas. 403.

An application by the employer to have the compensation terminated, or, in the alternative, to have an award of partial compensation, is competent at a date when no compensation is actually being paid to the workman, the parties being in dispute as to the amount and duration of compensation, and no memorandum of agreement has been recorded. *Nelson v. Summerlee Iron Co.* [1910] S. C. 360, 47 Scot. L. R. 344; *Southhook Fire-Clay Co. v. Laughland* [1908] S. C. 831, 45 Scot. L. R. 664.

The arbitrator should determine whether compensation should terminate at a

1837a. Payment of lump sum (par. 17).— This paragraph has been discussed in a few cases.¹

1837b. Set-off against weekly payments (par. 19).— The purpose of the act is to give to the workman for his subsistence the full amount of the weekly payments.¹

certain date, although the workman does not ask for any compensation after that date, where the employer claims that the incapacity ceased at that time, and asks for an order to that effect. *Malcolm v. Bowhill Coal Co.* [1909] S. C. 426.

An award based upon medical opinion of a man's physical condition at one time in no way prevents a different award at a subsequent date, when experience may have proved that the views of the doctors were wrong. *Radcliffe v. Pacific Steam Nav. Co.* [1910] 1 K. B. 685, 79 L. J. K. B. N. S. 429, 102 L. T. N. S. 206, 26 Times L. R. 319, 54 Sol. Jo. 404, 3 B. W. Comp. Cas. 185.

The reduction of the weekly compensation, due to a change of circumstances, does not present a question of law reviewable by the court of appeal. *Taff Vale R. Co. v. Lane* (1910) 3 B. W. Comp. Cas. 297.

¹ There does not exist anywhere in the act, except in sched. I., par. 17, any right to award a lump sum. *Mulholland v. Whitehaven Colliery Co.* [1910] 2 K. B. 278, 79 L. J. K. B. N. S. 987, 26 Times L. R. 462, 102 L. T. N. S. 663, 3 B. W. Comp. Cas. 317.

In fixing the lump sum by which the weekly payments of an injured employee may be redeemed, the county court judge must direct his mind to the question whether the payments may be increased or diminished in the future; the fact that the physical injury is permanent is not conclusive on the question whether the incapacity is permanent. *Calico Printers Asso. v. Higham* [1912] 1 K. B. 93, [1911] W. N. 221, 28 Times L. R. 53, 56 Sol. Jo. 89.

In *Victor Mills v. Shackleton* [1912] 1 K. B. 22 [1911] W. N. 197, 81 L. J. K. B. N. S. 34, 105 L. T. N. S. 613, it was held that under § 13 of the first schedule (act of 1897) it was error for the county court judge, in fixing the lump sum, to estimate the damages

which the workman would have been awarded at the time of the accident, and deduct therefrom the payments received by him, and to award the balance; all the county court judge has to do in such a case is to assess the redemption price of the weekly payments payable under the award.

The incapacity of a workman who has lost an arm is permanent within the sense of sched. I., par. 17. *National Teleph. Co. v. Smith* [1909] S. C. 1363, 46 Scot. L. R. 988.

¹ An employer who has been found liable in a weekly payment under the act to a workman cannot set off against that payment a sum awarded to him as expenses, against the workman, in an application for the diminution of the weekly payment. *Rosewell Gas Coal Co. v. M'Vicar* (1904) 7 Sc. Sess. Cas. 5th series, 290. The Lord Justice Clerk said: "The object of the act is to secure that an injured workman shall have for his subsistence the sum awarded to him, and that is not to be trenched upon in any way."

Where by order of the county court judge the amount of compensation has been duly reduced as of a prior date, the employer is not entitled to treat the excess which he paid between the time when the reduction was to take place and the date when the order was made as payments *pro tanto* in advance of the reduced payments. *Hosegood v. Wilson* [1911] 1 K. B. 30, 80 L. J. K. B. N. S. 519, 103 L. T. N. S. 616, 27 Times L. R. 88, 4 B. W. Comp. Cas. 30, [1910] W. N. 242.

The amount overpaid under a recorded agreement, between the date from which a reduction is to take place under a review made in accordance with schedule I., § 16, and the date of the order, cannot be treated as a payment in advance on account of future weekly payments. *Ibid.*

C. ARBITRATION.

1838. [795a] Text of statutory provisions.—Second Schedule. Arbitration, etc. (1) For the purpose of settling any matter which under this act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter, or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or, in the absence of agreement, by the judge of the county court, according to the procedure prescribed by rules of court.

(3) In England the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorizes, be settled, according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this act, have all the powers of that judge.

(4) The arbitration act 1889 shall not apply to any arbitration under this act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this act, or where he gives any decision or makes any order under this act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the supreme court either party appeals to the court of appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court.

(5) A judge of county courts may, if he thinks fit, summon a medical referee to sit with him as an assessor.

(6) Rules of court may make provision for the appearance, in any arbitration under this act, of any party by some other person.

(7) The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court, subject as respects such judge and an arbitrator appointed by him to rules of court. The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules, and such taxation may be reviewed by the judge of the county court.

(8) In the case of the death, or refusal or inability to act, of an arbitrator, the judge of the county court may, on the application of any party, appoint a new arbitrator.

(9) Where the amount of compensation under this act has been ascertained, or any weekly payment varied, or any other matter decided under this act, either by a committee or by an arbitrator or by agreement, a memorandum

thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment. Provided that—(a) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and—

(b) Where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this act, and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just; and—

(c) The judge of the county court may at any time rectify the register; and—

(d) Where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge, who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; and—

(e) The judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependents, has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just.

(10) An agreement as to the redemption of a weekly payment by a lump sum, if not registered in accordance with this act, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability, or to dependents, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation, unless, in either case, he proves that the failure to register was not due to any neglect or default on his part.

(11) Where any matter under this act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or, if they reside in different districts,

the district prescribed by rules of court without prejudice to any transfer in manner provided by rules of court.

(12) The duty of a judge of county courts under this act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this act authorized rules of court to be made, and also generally for carrying into effect this act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under § 164 of the county courts act 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

(13) No court fee, except such as may be prescribed under paragraph (15) of the first schedule to this act, shall be payable by any party in respect of any proceedings by or against a workman under this act in the court prior to the award.

(14) Any sum awarded as compensation shall, unless paid into court under this act, be paid on the receipt of the person to whom it is payable under any agreement or award, and the solicitor or agent of a person claiming compensation under this act shall not be entitled to recover from him any costs in respect of any proceedings in an arbitration under this act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the committee, the arbitrator or the judge of the county court, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(15) Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee or report any matter which seems material to any question arising in the arbitration.

(16) The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative of an employer and his workmen, as respects any matter in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be paid in cases where, but for the order, the money would be required to be paid into court, and the order may exclude from the operation of provisos (d) and (e) of paragraph (9) of this schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential, or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order.

(17) In the application of this schedule to Scotland— (a) "County court judgment" as used in paragraph (9) of this schedule, means a recorded decree arbitral;

(b) Any application to the sheriff as arbitrator shall be heard, tried, and

determined summarily in the manner provided by § 52 of the sheriff Courts (Scotland) act 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the court of session, who may hear and determine the same, and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such divisions to the House of Lords;

(c) Paragraphs (3), (4), and (8) shall not apply.

(18) In the application of this schedule to Ireland the expression "judge of the county court" shall include the recorder of any city or town, and an appeal shall lie from the court of appeal to the House of Lords.

It has not been deemed necessary to give any of the text of the second schedule of the original act; but it may be noted that, for the most part, the later act follows along the lines of the earlier one.

1838a. [796] Effect of these provisions; generally.—In a general treatise upon the law of employers' liability it would be out of place to undertake to analyse such provisions as those which are set out above, or make any reference to the local rules of court which have been framed with reference to the administration of the act. The rights of injured servants from the standpoint of procedure are fully discussed in the English works mentioned in § 1803, *ante*. But it will not be amiss to mention the substance of the few cases in which the effect of these provisions has been directly under consideration by courts of review.

If there is such a committee as is spoken of in paragraph 1 of schedule 2 of the act, and the jurisdiction of that committee is not excluded as provided for in that paragraph, that tribunal has full jurisdiction to the exclusion of the county court and of everybody else, excepting in the circumstances mentioned in the next following paragraph.¹

The power of the arbitrator does not go beyond fixing the compensation to be made.²

¹ *Mulholland v. Whitehaven Colliery* 353, 80 L. T. N. S. 342, 15 Times L. R. Co. [1910] 2 K. B. 278, 79 L. J. K. B. 262.
N. S. 987, 26 Times L. R. 462, 102 L. T. N. S. 663, 3 B. W. Comp. Cas. 317.

² A county court judge sitting to hear an application for compensation is acting as an arbitrator only, and has no jurisdiction to grant a new trial. *Mountain v. Parr* [1899] 1 Q. B. (C. A.) 805, 68 L. J. Q. B. N. S. 447, 47 Week. Rep.

An arbitrer is not entitled to pronounce an order the validity of which will depend on the workman's condition at a future date. *Allan v. Spowart* (1906) 8 Sc. Sess. Cas. 5th series, 811.

The arbitrator has no power to exclude any dependent who is not *sui juris* from the award. *Manchester v. Carlton*

A number of decisions passing upon the question of costs will be found in the subjoined note.³

The memorandum of the compensation awarded by an arbitrator under the act, when recorded in the manner prescribed by paragraph (8), may be enforced by an order of committal under the debtors' act 1869, § 5.⁴

When a workman resident in England, is injured by an accident occurring in England, but his employer resides in Scotland, proceedings for compensation under the act may be taken in the county court of the district in which the accident occurred, and service of the necessary notices may be effected by registered post.⁵

A number of cases involving appeals under this schedule will be found in the subjoined note.⁶

Iron Co. (1904) 68 J. P. 209, 52 Week. Rep. 291, 89 L. T. N. S. 730, 20 Times L. R. 155.

A county judge sitting to hear an application for compensation under the act is acting as arbitrator only, and has no jurisdiction to make an order for discovery before hearing, by interrogatories or otherwise. *Sutton v. Great Northern R. Co.* [1909] 2 K. B. 791, 79 L. J. K. B. N. S. 81, 101 L. T. N. S. 175, 2 B. W. Comp. Cas. 428.

An arbitrator, although he has no power to vary his award, is entitled to deal with a subsequent claim by the dependents of a workman who has died from his injuries, after having been awarded weekly payments. *O'Keefe v. Lovatt* (1902) 18 Times L. R. 57.

The authority given to the sheriff to rectify the register does not, in an application to rectify, empower him to determine questions as to the rights and liabilities of the parties. *Baird v. Stevenson* [1906-07] S. C. 1259.

A sheriff acting as arbitrator under the workmen's compensation act may competently dismiss a claim as irrelevant, without hearing proof. *Coyne v. Glasgow Steam Coasters Co.* [1906-07] S. C. 112.

The sheriff as arbiter has under the act no power to enforce an agreement by decreeing for arrears of compensation due under it. *Colville v. Tigue* (1906) 8 Sc. Sess. Cas. 5th series, 179; *Malcolm v. Bowhill Coal Co.* [1909] S. C. 426.

³ Under sched. 11, subs. 7, the county court cannot award a lump sum as costs.

Beadle v. The Nicholas [1909] W. N. 227, 101 L. T. N. S. 586.

The county court judge has no jurisdiction to allow, as a set-off against costs awarded the applicant on the arbitration, the costs granted to the employer on a prior appeal from interlocutory orders of the county court judge. *Sutton v. Great Northern R. Co.* (1910) 3 B. W. Comp. Cas. 160.

Costs may be taxed immediately at the close of the hearing. *Gardner v. Cox* (1910) 3 B. W. Comp. Cas. 245.

The court will not interfere with the exercise of the county judge's discretion in respect to awarding costs to the applicant, where the employer's answer was not an unconditional submission to pay a certain sum to the applicant, although the applicant did not recover more than the amount offered. *Nicholson v. Thomas* (1910) 3 B. W. Comp. Cas. 452.

⁴ *Bailey v. Plant* [1901] 1 K. B. (C. A.) 31, 70 L. J. Q. B. N. S. 63, 65 J. P. 49, 49 Week. Rep. 103, 83 L. T. N. S. 459, 17 Times L. R. 48.

⁵ *Rex v. Owen* [1902] 2 K. B. 436, 71 L. J. K. B. N. S. 770, 87 L. T. N. S. 298, 18 Times L. R. 701.

⁶ An appeal will not lie to the court of appeal under par. (4), against the refusal of the county court judge to direct insurers to pay insurance money into the Postoffice Savings Bank, in accordance with the provisions of subs. 1 of § 5 of the act. *Leech v. Life & Health Assur. Asso.* [1901] 1 K. B. (C. A.) 707, 70 L. J. K. B. N. S. 544, 49 Week. Rep. 482, 84 L. T. N. S. 414, 17 Times L. R. 354.

The limitations of the powers of the court of appeal, as defined by paragraph (4), are indicated by the following remark of Smith, L. J.: "In cases under this act, as in appeals generally from county courts, questions of fact are not the subject of appeal. The county court judge has found the facts and has relegated them to us, and we have to decide any question of law arising on them."⁷

Where a verbal agreement for the payment of a certain weekly compensation was entered into between the master and the injured workman, it was held that this agreement, after having been recorded, fixed the rights of the parties until another agreement should be recorded. It was not displaced by a subsequent unrecorded agreement.⁸

It is contrary to the intention of the act that questions as to whether one agreement has been superseded by another, and whether the workman was or was not incapacitated for work, should be determined by proof in a suspension.⁹

And see *Rigby v. Coe* [1904] 1 K. B. 358, 73 L. J. K. B. N. S. 80, 68 J. P. 195, 52 Week. Rep. 195, 89 L. T. N. S. 717, 20 Times L. R. 136 (no appeal against refusal of county judge to direct a review of taxation of costs).

The only method of reviewing the decision of an arbitrator under § 2 of the 2d schedule is by submission of a point of law to the county judge, no appeal lying directly to the court of appeal. *Gibson v. Wormald* [1904] 2 K. B. 40, 73 L. J. K. B. N. S. 491, 68 J. P. 382, 52 Week. Rep. 661, 91 L. T. N. S. 7, 20 Times L. R. 452.

In *Binning v. Easton* [1906-07] S. C. 406, it was held that the granting or rejecting by a sheriff of a warrant for the recording of an agreement concerning the payment of compensation was a ministerial act, and consequently could not be appealed.

On the other hand, in *Hughes v. This-tle Chemical Co.* [1906-07] S. C. 607, it was held that if the sheriff does entertain a petition to rectify a recorded agreement, he is deemed to be acting judicially, and his judgment is subject to review.

In *Johnston v. Mew* (1907) 98 L. T. N. S. 517, 24 Times L. R. 175, the court refused to follow the decision in the *Binning Case*, and it was held that the order of a county court judge to register an agreement was a judicial act, and therefore appealable.

From the refusal of a county court judge to entertain jurisdiction of an application to review an award made by a committee, an appeal lies to the divisional court, and not to the court of appeal. *Howarth v. Samuelson* (1906) 104 L. T. N. S. 907, 4 B. W. Comp. Cas. 287.

In cases within paragraph 14 (c) no appeal lies to the House of Lords from a decision of the Scotch court of session. *Osborne v. Barclay* [1901] A. C. 269, 85 L. T. N. S. 286.

A decision of the sheriff as to whether a memorandum of an agreement fixing the amount of compensation shall be recorded is a decision *qua* arbiter, not merely a ministerial act, and therefore subject to appeal. *Addie v. Coakley* [1909] S. C. 545, 46 Scot. L. R. 408, distinguishing *Binning v. Easton* (1906) 8 Sc. Sess. Cas. 5th series, 407,—a decision under the act of 1897.

The act of the sheriff in recording a memorandum of agreement is a judicial act. *Brown v. Orr* [1909-10] S. C. 526.

⁷ *Smith v. Lancashire & Y. R. Co.* [1899] 1 Q. B. 141.

⁸ *Fife Coal Co. v. Davidson* [1906-07] S. C. 90.

⁹ *Fife Coal Co. v. Lindsay* [1908] S. C. 431.

Where under an agreement a workman has received weekly payments of compensation, which were varied or dis-

An agreement by the employers to pay a certain sum "during the time of the incapacity" of a workman injured while in their employ does not entitle the workman to obtain execution without a hearing.¹⁰

The county court judge has no power to record a memorandum of an agreement different from that actually made.¹¹

A number of cases involving the practice in respect to the recording of agreements are set out in the note.¹²

continued by employers, and he afterwards records a memorandum of that agreement and charges for payment, the court, with regard to payments due for the period subsequent to recording, will not suspend the charge, the employers' remedy lying in an application for review. *Lochgelly Iron & Coal Co. v. Sinclair* [1909] S. C. 922.

¹⁰ *Said v. Welsford* (1910) 3 B. W. Comp. Cas. 233.

¹¹ *Shore v. The Hyrcania* (1911) 4 B. W. Comp. Cas. 207; *Lunt v. Sutton Heath & L. G. Collieries* (1911) 4 B. W. Comp. Cas. 219; *M'Geown v. Workman, Clark & Co.* (1911) 45 Ir. Law Times 165; *Phillips v. Vickers* [1912] 1 K. B. 16 [1911] W. N. 193, 105 L. T. N. S. 564; *Halls v. Furness*, (1909) 3 B. W. Comp. Cas. 72.

The only duty of the registrar of the county court under paragraph (8) is to ascertain whether the memorandum actually represents the agreement of the parties; he cannot refuse to record it simply because changed conditions would not entitle the workman to the amount of compensation fixed. *Blake v. Midland R. Co.* [1904] 1 K. B. 503, 73 L. J. K. B. N. S. 179, 68 J. P. 215, 90 L. T. N. S. 433, 20 Times L. R. 191.

No warrant to record an agreement should be granted where the agreement sought to be recorded has been superseded and brought to an end by the report of a referee appointed by a joint letter, that incapacity had ceased. *McNaughton v. Cunningham* [1909-10] S. C. 980, 47 Scot. L. R. 781, 3 B. W. Comp. Cas. 576, 577.

¹² Where the registrar has refused to register an agreement between the employer and the workman for substitution of a lump sum for weekly payments, and the matter has been referred to the judge under sched. II., cl. 9 (d), all the latter can do is to decide whether the agreement ought or ought not to be

registered. *Mortimer v. Secretan* [1909] 2 K. B. 77, 78 L. J. K. B. N. S. 521, 100 L. T. N. S. 721.

Objections by the employers that an agreement had been made under essential error as to the rights of parties under the act, and that the sum agreed to be paid was more than half of the workman's average weekly earnings, are irrelevant as answers to a petition for warrant to register an agreement which is not denied. *Macdonald v. Fairfield Shipbuilding & Engineering Co.* (1905) 8 Sc. Sess. Cas. 5th series, 8.

The refusal of the county court judge to record an agreement for a lump sum settlement, on the ground of inadequacy, will not bind him to award compensation to the workman on his subsequent application for compensation, where the judge finds that the incapacity is no longer due to the accident. *Beech v. Bradford Corp.* (1911) 4 B. W. Comp. Cas. 236.

It is the duty of the county court judge to pass upon the adequacy of an agreement for the redemption of a weekly payment by a lump sum. *The Segura v. Blampied* (1911) 4 B. W. Comp. Cas. 192.

The arbitrator can competently determine the validity of an alleged discharge, in an application to record a memorandum of agreement. *Hanley v. Niddrie & B. Coal Co.* [1909-10] S. C. 875.

Under sched. 2, § 9, subs. B, where a workman has returned to work at the same or better wages than before the accident, but is subsequently dismissed because of a reduction of the staff, and not because of incapacity, he cannot have the unrecorded agreement under which he has been receiving compensation recorded. *Matthews v. Baird* [1910] S. C. 689, 47 Scot. L. R. 627.

An agreement to give an injured

The arbitrator may refer a case to a medical referee whenever the evidence as to the condition of the workman is conflicting.¹³

Notwithstanding a reference to the medical referee, the county judge should form an independent judgment, and is not bound by the referee's report.¹⁴

It has been held, in construing par. 4 of rule 56a of the Rules of 1908, that if someone on behalf of infant dependents agreed, so far as he could, to the payment of a certain sum into court, and the registrar was satisfied with the amount and signed the receipt, the agreement was binding upon the infant.¹⁵

D. INDUSTRIAL DISEASES.

1839. Text of third schedule.—The third schedule, mentioned in § 8 of the act, is given below.

DESCRIPTION OF DISEASE.	DESCRIPTION OF PROCESS.
Anthrax	Handling of wool, hair, bristles, hides, and skins.
Lead poisoning or its sequelæ	Any process involving the use of lead or its preparations or compounds.
Mercury poisoning or its sequelæ	Any process involving the use of mercury or its preparations or compounds.
Phosphorus poisoning or its sequelæ	Any process involving the use of phosphorus or its preparations or compounds.
Arsenic poisoning or its sequelæ	Any process involving the use of arsenic or its preparations or compounds.
Ankylostomiasis	Mining.

workman a lump sum and to give him "regular" employment in lieu of all claims under the act is not broken by a dismissal of the workman after three years, where the agreement contained no term of endurance for the employment. *Lawrie v. Brown* [1908] S. C. 705.

¹³ The county court judge is entitled to refer a case in which the medical evidence is conflicting, to a medical referee. *Henricksen v. The Swanhilda* (1911) 4 B. W. Comp. Cas. 233.

It is competent for the arbitrator, with the view of fixing the weekly payment in the application for review, to remit to a medical practitioner appointed for the purposes of the act to

report as to the condition of the workman. *Niddrie & B. Coal Co. v. M'Kay* (1903) 5 Sc. Sess. Cas. 5th series, 1121.

The power of the county court judge to submit a case to a medical referee under sched. II., par. 15, extends to a case where the workman had been killed. *Carolán v. Harrington* [1911] 2 K. B. 733, 80 L. J. K. B. N. S. 1153, 105 L. T. N. S. 271, 27 Times L. R. 486, 4 B. W. Comp. Cas. 253.

¹⁴ *Quinn v. Flynn* (1910) 44 Ir. Law Times 183, 3 B. W. Comp. Cas. 594; *Jackson v. Scotstoun Estate Co.* [1911] S. C. 564, 48 Scot. L. R. 440, 4 B. W. Comp. Cas. 381; *Dowds v. Bennie* (1902) 5 Sc. Sess. Cas. 5th series, 268.

¹⁵ *Rhodes v. Soothill Wood Colliery*

Where regulations or special rules made under any act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then, in the application of this schedule to that industry, the expression "process" shall, unless the Secretary of State otherwise directs, include only the processes so specified.

A workman is not necessarily barred from compensation because he falsely stated in his application he had not used white lead when employed by other persons.¹

E. EMPLOYMENTS TO WHICH THE ACT OF 1897 IS APPLICABLE.

1840. [778a] Text of sections 7-10.—Sec. 7.—(1) This act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on in or about any building which exceeds 30 feet in height and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2) In this act "railway" means the railway of any railway company to which the regulation of railways act 1873, applies, and includes a light railway made under the light railways act 1896; and "railway" and "railway company" have the same meaning as in the said acts of 1873 and 1896; "factory" has the same meaning as in the factory and workshop acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the factory acts is applied by the factory and workshop act 1895, and every laundry worked by steam, water, or other mechanical power; "mine" means a mine to which the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, applies; "quarry" means a quarry under the quarries act 1894; "engineering work" means any work of construction or alteration or repair of a railroad, harbor, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water or other mechanical power is used; "undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof, within the meaning of the factory and workshop acts 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the coal mines regulation act 1887, or the metalliferous mines regulation act 1872, as the case may be; in the case of an engineering work, means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition; "employer" includes any body of persons, corporate or unincorporate, and the legal personal representative of a deceased employer; "workman" includes every per-

Co. [1908] W. N. 252, [1909] 1 K. B. 191, 78 L. J. K. B. N. S. 141, 100 L. T. N. S. 14. ¹*Taylor v. Burnham* [1910] S. C. 705, 47 Scot. L. R. 643, 3 B. W. Comp. Cas. 569.

son who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependents, or other person to whom compensation is payable; "dependents" means (a) in England and Ireland, such members of the workman's family specified in the fatal accidents act 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and (b) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

This section was omitted in the later act.

As to the meaning of the word "workman," see § 1970, *post*.

As to the meaning of the word "dependents," see § 1826, *ante*.

1841. [779] Scope and effect of these provisions; generally.—

From the provisions above set out it will be seen that the right of the servant to recover compensation under the act is made to depend, in the majority of instances, upon two distinct tests, *viz.*: (1) physical contiguity with respect to the locality in which one or other of certain specified classes of business are carried on; and (2) the character of the operations in which the servant is engaged. In any case in which the former of these tests is controlling, the essential subject of inquiry is the import of the phrase "on or in or about." The applicability of the latter test is a question which hinges upon the connotation of the various terms used to designate the various kinds of business which fall within the purview of the act.

1842. [780] Meaning of the phrase "on or in or about," when used in connection with various kinds of concerns.— In the subjoined note is stated the effect of the cases which turn directly upon the question whether the conditions of physical contiguity implied by the phrase "on or in or about" existed at the time of the accident, with regard to certain localities in which one or other of the various kinds of business which are covered by the act was carried on.¹

¹ (a) *On or in or about a railway.*— and from a station of the company is injured owing to the fact that, after contemplated by these words do not exist where a carter in the employ of a contractor for the cartage of goods to his day's work is finished, his horse bolts just outside the gate of the station and dashes into a shop 315 yards dis-

tant. *Bathgate v. Caledonian R. Co.* (1901) 4 Sc. Sess. Cas. 5th series, 313, 39 Scot. L. R. 246, 9 Scot. L. T. 334.

Nor can any compensation be recovered under the act, where the conductor of a freight train met with an accident about $\frac{3}{4}$ of a mile from the main line of a railway, from which a private siding belonging to a trading company diverged. *Brodie v. North British R. Co.* (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Scot. L. R. 38, 8 Scot. L. T. 248. With respect to this case it should be observed that the siding itself was not a "railway" for the purposes of the act, as it was not one to which the regulation of railways act 1873, referred to in section 7, subs. 2, was applicable. See § 1845, *post*.

In England the accepted doctrine is that no part of the premises of a railway company can be regarded as being "used for purposes of public traffic," within the meaning of the regulation of railways act, unless some one of the processes directly connected with the operation of the trains are conducted thereon. This doctrine is assumed to involve the consequence that no recovery can be had under the compensation act where the accident occurs in a railway refreshment room, which the only entrance for the public is from the station platform. *Milner v. Great Northern R. Co.* [1900] 1 Q. B. (C. A.) 795, 82 L. T. N. S. 187, 69 L. J. Q. B. N. S. 427, 64 J. P. 291, 48 Week. Rep. 387, 16 Times L. R. 249.

But another view prevails in Scotland, servants having been allowed to recover where the accident occurred in a smithy within the area of a yard, where the horses used by a railway company for collecting and delivering goods were shod. *Caledonian R. Co. v. Breslin* (1900) 2 Sc. Sess. Cas. 5th series, 1158, 37 Scot. L. R. 873, 8 Scot. L. T. 125.

And also where the claimant was a carter whose business it was to deliver to consignees goods received at one of the stations of his employers, a railway company. *Devine v. Caledonian R. Co.* (1899) 1 Sc. Sess. Cas. 5th series, 1105, 36 Scot. L. R. 877, 7 Scot. L. T. 99.

Of these two theories the latter would seem to be the preferable one. The English decision ignores the plain and liberal meaning of the words "on or in or about," and fastens on them a restricted significance which is not justi-

fied by any of the phraseology employed in the act itself.

(b) "*On, in or about a factory.*"—Recovery has been allowed where an employee was injured while loading a cart belonging to the owners of the factory, standing in a street close to the entrance to the factory yard, in a place where it was usually loaded. *Powell v. Brown* [1899] 1 Q. B. (C. A.) 157, 68 L. J. Q. B. N. S. 151, 79 L. T. N. S. 631, 47 Week. Rep. 145, 15 Times L. R. 65.

And where a workman employed as a quay laborer at a wharf was injured on the street outside the wharf shed, while engaged in removing girders to the side of a steamer. *Strain v. Sloan* (1901) 3 Sc. Sess. Cas. 5th series, 663, 38 Scot. L. R. 475, 8 Scot. L. T. 498.

And where a car driver of a cable railway company was injured, while oiling his car in the car shed, 374 feet distant from a machine room adjoining the shed in which grips and other parts of the cars were repaired. *Mooney v. Edinburgh & D. Tramways Co.* (1901) 4 Sc. Sess. Cas. 5th series, 390, 38 Scot. L. R. 260, 9 Scot. L. T. 366.

Recovery has been disallowed where a carter, employed by the occupiers of a factory to cart goods to and from the factory, was injured when he was about a mile and a half distant from the factory. *Lowth v. Ibbotson* [1899] 1 Q. B. 1003, 80 L. T. N. S. 341, 68 L. J. Q. B. N. S. 465, 47 Week. Rep. 506, 15 Times L. R. 264.

And where a laborer, whose duty it was to fetch water in a cart from a brook at some distance along the main road, for the use of a factory, was injured while returning with the cart, at a spot about 110 to 160 yards distant from the engine and mortar-mill, owing to the horse running away. *Fenn v. Miller* [1900] 1 Q. B. 788, 82 L. T. N. S. 284, 69 L. J. Q. B. N. S. 439, 64 J. P. 356, 48 Week. Rep. 369, 16 Times L. R. 265.

And where a cart used to carry timber from a factory upset about 2 miles away from the factory, and injured an employee. *Bell v. Whitton* (1899) 1 Sc. Sess. Cas. 5th series, 942, 36 Scot. L. R. 754, 7 Scot. L. T. 59.

And where the workman was injured in the employment of a firm of ship repairers, while repairing a ship in a public dock at a distance from his employer's factory of 550 yards in a direct

line, and about a mile by road. *Barclay v. M'Kinnon* (1901) 3 Sc. Sess. Cas. 5th series, 436, 38 Scot. L. R. 321, 8 Scot. L. T. 404, affirmed in [1901] A. C. 269, 85 L. T. N. S. 286.

The expression "employment by the undertakers . . . on or in or about a . . . factory" means employment by the undertakers on, in, or about their own factory. A workman, therefore, who is sent by his employers on their business to the factory of a third party, and is there injured by accident, is not entitled to compensation under the act. *Francis v. Turner Bros.* [1900] 1 Q. B. 478; *Wrigley v. Whittaker* [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

In a case where a railway carter was injured while taking goods from a factory to a dray, in which they were to be conveyed to the station of a railway which had contracted for the conveyance of the goods for a lump sum, including both collection and delivery, it was held that the owners of the factory were "undertakers," and that the accident occurred while the carter was employed "in or about" the factory. *McGovern v. Cooper* (1901) 4 Sc. Sess. Cas. 5th series 249, 39 Scot. L. R. 102, 9 Scot. L. T. 270. But this decision seems to be wholly anomalous and unsound.

It has been held that a workman employed on board a ship lying in dock is not employed "on or in or about" a dock, and is therefore not employed "on or in or about" a factory, whether the dock itself is or is not a "factory" within the meaning of that word, as defined in the act. (See § 1846, *post.*) *Flowers v. Chambers* [1899] 2 Q. B. (C. A.) 142, 80 L. T. N. S. 834, 68 L. J. Q. B. N. S. 648, 47 Week. Rep. 513, 15 Times L. R. 352. But this case was overruled in *Raine v. Jobson* [1901] A. C. 404, 70 L. J. Q. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

A fireman employed in a steamship, who was injured on board the ship while she was berthed in a dock where she had come for the purpose of loading, is not injured while engaged in factory work, within the meaning of the act, when the work alleged was not such repairs as required the docking of the ship, but was merely the ordinary work on the ship. *Coyne v. Glasgow Steam Coasters Co.* [1906-07] S. C. 112.

A workman at work in a shed situ-

ated about half a mile from the defenders' works, and having no direct connection therewith by rail, and no steam, water, or other mechanical power being used therein, is not employed "on or in, or about" the defenders' factory, and is not entitled to compensation for injuries while so engaged. *Ferguson v. Barclay Sons & Coy* (1902) 5 Sc. Sess. Cas. 5th series, 105, 40 Scot. L. R. 58, 10 Scot. L. T. 350.

(c) *On or in or about a mine.*—Recovery has been allowed where a servant was injured while engaged in blasting boulders, for the purpose of forming a road to be used in the operation of a mine which was being opened a few yards away. *Ellison v. Longden* (1901) 18 Times L. R. (C. A.) 48.

And where a brakeman in the service of a colliery company was injured while coupling cars on a siding belonging to the company. *Monaghan v. United Collieries* (1900) 3 Sc. Sess. Cas. 5th series, 149, 38 Scot. L. R. 92, 8 Scot. L. T. 261.

A drum-house and sidings on a private line of railroad which connects the mine with a main line of railroad is on or in or about a "mine," although located at a distance of 800 yards from the mine. *Anderson v. Lochgelly Iron & Coal Co.* (1904) 7 Sc. Sess. Cas. 5th series, 187.

Recovery has been disallowed where an engine driver in the employ of colliery owners was killed about $\frac{3}{4}$ of a mile from the pit mouth of the colliery, while his engine was drawing a coal train to the depot where the coal was stored. *Turnbull v. Lambton Collieries Co.* (1900) 82 L. T. N. S. (C. A.) 589, 16 Times L. R. 369, 64 J. P. 404.

And where an injury was received by a workman, who, after the conclusion of his day's work, was walking home along a private railway belonging to his employer, and was run over at a point about 230 yards from the place where he worked. *Caton v. Summerlee & M. Iron & Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 989, 39 Scot. L. R. 762, 10 Scot. L. T. 204.

A workman employed as a carter at a coal mine, who sustained fatal injuries while transferring timber to a colliery cart from a railway wagon at a railway siding belonging to and in the occupation of a railway company, at a distance of about 400 yards from the pit,—the distance being made up of (1) railway siding (123 yards), (2) the

1843. [781] "On or in or about a building" which exceeds 30 feet in height.—*a. Height of building.*—In an arbitration before the county court under this act, the question whether a building "exceeds 30 feet in height," within the meaning of this section, is a question of fact to be determined by the county court judge, having regard to the particular circumstances existing at the time of the accident to the workman.¹

breadth of a public road, and (3) a private cart road leading to the pit (259 yards)—, was not injured in the course of employment "on or in or about a mine." *Coylton Coal Co. v. Davidson* (1905) 7 Sc. Sess. Cas. 5th series, 727.

An employee engaged in screening tailings in a tailings area which was located about three-quarters of a mile from the mining lease is "employed in or about a mine." *Taylor v. The Cecil Syndicate* (1906) Queensl. St. Rep. 324.

(d) *On or in or about "engineering work."*—These words are not descriptive of an accident which occurred to a workman while he was engaged in unloading from a hopper, about 1½ miles out at sea, mud dredged from a harbor, notwithstanding that he was at times employed on the dredger. *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. (C. A.) 132, 68 L. J. Q. B. N. S. 740, 80 L. T. N. S. 586, 47 Week. Rep. 533, 15 Times L. R. 341.

No compensation can be recovered for an injury received in unloading and stacking rails in a yard which was 700 yards distant from the place where the old rails were being torn up and new ones laid. *Black v. Dick, Kerr & Co.* [1906] A. C. 325, 75 L. J. K. B. N. S. 569, 94 L. T. N. S. 802, 22 Times L. R. 548.

A workman engaged in the erection of gas engines for generating electricity for a shipbuilding yard, at a distance of 150 yards from where docks were being constructed, was not engaged on, in, or about an engineering work. *Rimmer v. Premier Gas Engine Co.* (1907) 97 L. T. N. S. 226, 23 Times L. R. 610.

A workman employed by a subcontractor to cart sand for the construction of a railway, who was injured at a point 2½ miles from the works, is not injured "on or in or about" engineering work. *Pattison v. White* (1904) 20 Times L. R. 775.

¹ *McGrath v. Neill* [1902] 1 K. B. (C. A.) 211, 71 L. J. K. B. N. S. 58, 66 J. P. 180, 50 Week. Rep. 162, 18 Times L. R. 36, approving a finding that the building was over 30 feet in height, where the judge took the lowest part of the footings as the level from which to estimate the height, and there was no evidence to show that, at the time, anything more than the footings had been covered in.

An accident to a workman employed on, in, or about a building in the course of construction, which does not at the time exceed 30 feet in height, although it is intended that when completed it shall exceed such height, is not within the act. *Billings v. Holloway* [1899] 1 Q. B. (C. A.) 70, 68 L. J. Q. B. N. S. 16, 79 L. T. N. S. 396, 47 Week. Rep. 105, 15 Times L. R. 53.

A finding that the employment of the workman was upon a building exceeding 30 feet in height, being demolished, is justifiable, where the evidence shows that, although the building had been reduced to less than 30 feet, the partywall between the building and the adjoining one remained intact at the time of the accident, and was more than 30 feet in height. *Knight v. Cubitt* [1902] 1 K. B. 31, 71 L. J. K. B. N. S. 65, 50 Week. Rep. 113, 18 Times L. R. 26, 66 J. P. 52, 85 L. T. N. S. 526.

The conditions indicated by this phrase are satisfied where the height of the building without including the foundation, is more than 30 feet. *Halstead v. Thomson* (1901) 3 Sc. Sess. Cas. 5th series, 668, 38 Scot. L. R. 473.

Internal communication between a building over 30 feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher, and that a workman injured while engaged in demolishing the lower

The distance from the ground to the top of the roof, and not the distance from the ground to the top of the walls, is to be considered in determining whether a building is more than 30 feet high, within the act.²

Workmen on an addition to a building which is over 30 feet high were within the protection of the act, although the addition was not then of that height.³

b. "*Being constructed or repaired.*"—These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed and believed to be complete, but, having been afterwards thought to be faulty and unstable, is being strengthened by the addition of stays or supports.⁴

The word "repair" includes painting, whitewashing, and dubbing the ceiling and walls of the interior of a building, where the painting and whitewashing is a portion of the work necessary to finish the building.⁵

On the ground that the buildings in question came within the de-

building is employed on the demolition of a building exceeding 30 feet in height. *Rissom v. Pritchard* [1900] 1 Q. B. 800, 82 L. T. N. S. 186, 69 L. J. Q. B. N. S. 494, 16 Times L. R. 250.

² *Hoddinott v. Newton* (1899) 68 L. J. Q. B. N. S. (C. A.) 495 [1899] 1 Q. B. 1018, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299, affirmed as to this point in [1901] A. C. 49, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 84 L. T. N. S. 1, 17 Times L. R. 134.

³ *Hartley v. Quick* [1905] 1 K. B. 359, 74 L. J. K. B. N. S. 257, 92 L. T. N. S. 191, 21 Times L. R. 207.

⁴ In *Hoddinott v. Newton* [1901] A. C. 49, reversing [1899] 1 Q. B. (C. A.) 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499, 80 L. T. N. S. 558, 15 Times L. R. 299, Lord Macnaghten said: "Construction, repair, demolition,—these three operations cover, I think, every varying phase in the life of a building, from its beginning to its end." Lord Morris said: "In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing,—alteration in its construction is, in my opinion, constructing. . . . In my opinion, whether completed or not completed, if work of the nature

of construction goes on, that is constructing, and if work in the nature of repair, that is repairing; and there is no room for any third operation of so-called alteration as distinct from constructing or repairing." Lords Shand and Lindley dissented from the judgment of the majority.

⁵ *Reddy v. Broderick* [1901] 2 I. R. 328.

A large amount of whitewashing work was being done upon a school building more than 30 feet high, by means of a scaffolding, and a workman, employed upon the work was killed owing to the collapse of the scaffolding. Held, that the building was "being repaired" by means of a scaffolding. *Dredge v. Conway* [1901] 2 K. B. 42, 84 L. T. N. S. 345, 70 L. J. Q. B. N. S. 494, 49 Week. Rep. 518, 17 Times L. R. 355.

The court stated that the effect of the decision in *Hoddinott v. Newton* [1901] A. C. 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, *supra*, was to overrule the earlier ruling (*Wood v. Walsh* [1899] 1 Q. B. 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 15 Times L. R. 279) that the ordinary outside painting of a building is not "repair" within the meaning of the act.

scriptive words, "being constructed by a scaffolding," recovery has been allowed in a case where, at the time of the accident, the component parts of the scaffolding were lying on the ground ready for use, but the scaffolding itself had not been erected;⁶ and where the building itself had been completed, but the scaffolding was still standing.⁷

c. What is a "scaffolding."—It is now definitely settled that the word "scaffolding" is not restricted to those permanent external structures to which the word is most commonly applied, but also embraces an internal staging, arranged by means of planks and trestles and without poles.⁸ Whether a mere temporary staging of this kind is a scaffolding is a mixed question of law and fact. When the facts are ascertained it is a question of law, upon which a court of review is not only entitled, but bound, to express an opinion.⁹

The cases dealing with the question whether a ladder is a "scaffolding" within the meaning of the act are conflicting. In some cases it has been held to be a conclusion of law that a ladder used in the

⁶ *Halstead v. Thomson* (1901) 3 Sc. Sess. Cas. 5th series, 668. The special consideration on which the court relied was that "the scaffolding was regularly used from time to time by all the tradesmen engaged in the work during the construction of the building, both prior and subsequently to the accident."

⁷ A builder erected a scaffolding for the purpose of raising building materials from a lower level to the higher level on which the building which he was constructing stood. After the building was complete, and while it was in actual use, a workman was injured as he was removing gear from his scaffolding. Held, that the workman was employed on a building which was "being constructed" by means of a scaffolding. *Frid v. Fenton* (1900) 82 L. T. N. S. (C. A.) 193, 69 L. J. Q. B. N. S. 437, 16 Times L. R. 267.

So a recovery was allowed where an employee of a plumbing contractor was sent to measure up the plumbing after that work was completed, although the building was still being constructed "by means of a scaffold." *Plant v. Wright* [1905] 1 K. B. 353, 74 L. J. K. B. N. S. 331, 53 Week. Rep. 358, 92 L. T. N. S. 720, 21 Times L. R. 217.

⁸ *Hoddinott v. Newton* [1901] A. C. 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, reversing [1899] 1 Q. B. 1018, 68 L. J. Q. B. N. S. 495, 47 Week. Rep. 499,

80 L. T. N. S. 558, 15 Times L. R. 299.

It is not necessary that the scaffold be put up by the undertaker; it is sufficient that the building is being constructed by means of the scaffold. *Fletcher v. Hawley* (1905) 21 Times L. R. 191.

⁹ *Hoddinott v. Newton* [1901] A. C. 49, 84 L. T. N. S. 1, 70 L. J. Q. B. N. S. 150, 49 Week. Rep. 380, 17 Times L. R. 134, per Lord Macnaghten.

A new house more than 30 feet high had been roofed in, and workmen employed by the builder were plastering the walls and ceilings inside the house, for which purpose trestles and boards were being used. One of the men, while standing on the floor of the top landing plastering the wall, fell down the well of the staircase, there being no railing, and was killed. At that time other workmen were at work plastering some of the rooms, and were standing on boards placed across trestles 4 feet high, in order to enable them to reach the ceilings and upper part of the walls. It was held that there was evidence to justify a finding of the county judge that such arrangement of trestles and boards was a "scaffolding." *Maude v. Brook* [1900] 1 Q. B. 575, 69 L. J. Q. B. N. S. 322, 64 J. P. 181, 48 Week. Rep. 290, 82 L. T. N. S. 39, 16 Times L. R. 164. Collins, L. J., dissented, being of opinion that the word "scaffolding" ought to be construed in its ordinary

ordinary way is not embraced in the word "scaffolding."¹⁰ But what appears to have become the settled rule is that whether a ladder is a scaffolding within the meaning of the act is a question of fact, and ordinarily the finding of the arbitrator will not be disturbed.¹¹

popular meaning, taken in connection with its context, and that it meant some structure of planks and supports capable of being used for the construction or repair of a building over 30 feet in height.

A new house more than 30 feet high had been roofed in and the external scaffolding removed. The applicant was engaged in plastering the walls and ceiling in one of the rooms, and in order to reach his work was standing on a structure of trestles, with boards on them. While at work in this manner he met with an accident, for which he claimed compensation. An arbitrator appointed by a county court judge decided that the structure was not a scaffolding, and refused to make an award of compensation, but referred the matter to the court judge, who reversed the decision of the arbitrator and awarded the compensation provisionally settled by the arbitrator. On appeal it was held that the question whether the structure was a scaffolding or not was a question for the arbitrator, and that his finding was not open to review. *Ferguson v. Green* [1901] 1 K. B. 25, 70 L. J. K. B. N. S. 21, 64 J. P. 819, 49 Week. Rep. 105, 83 L. T. N. S. 461, 17 Times L. R. 41.

The word "scaffolding" includes an internal staging formed by planks resting on the step of a ladder and upon one of the roof principals in the center of a room. *Reddy v. Broderick* [1901] 2 I. R. (C. A.) 328.

¹⁰ *Wood v. Walsh* [1899] 1 Q. B. 1009, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 80 L. T. N. S. 345, 15 Times L. R. 279; *M'Donald v. Hobbs* (1899) 2 Sc. Sess. Cas. 5th series, 3, 37 Scot. L. R. 4, 7 Scot. L. T. 157, 36 Scot. L. R. 393; *Campbell v. Sellars* (1903) 5 Sc. Sess. Cas. 5th series, 900, 40 Scot. L. R. 643, 11 Scot. L. T. 89 (no evidence that ladder was used other than in the ordinary way).

¹¹ In one case the finding of the county court judge that a ladder used in whitewashing by placing it against the building, and the workmen sitting or standing on the rungs, was not a scaffolding, was held binding on the court

of appeal. *Crowther v. West Riding Window Cleaning Co.* [1904] 1 K. B. 232, 73 L. J. K. B. N. S. 71, 68 J. P. 122, 52 Week. Rep. 374.

In another the court of appeal refused to disturb a finding to the effect that a ladder placed so that one end rested on the ground and the other against the parapet of a house was not a "scaffolding." *Marshall v. Rudeforth* [1902] 2 K. B. 175, 71 L. J. K. B. N. S. 781, 66 J. P. 627, 50 Week. Rep. 596, 86 L. T. N. S. 752, 18 Times L. R. 649.

On the other hand, in *O'Brien v. Dobbie* [1905] 1 K. B. 346, the finding that a ladder upon which a workman was standing to do some work was a scaffolding was upheld. Mathew, L. J., said: "It [the ladder] was put to answer the purposes that might be secured by a scaffolding, because the workmen did not have recourse to it merely to pass up and down; but it was put there, and intended to be used there, and was used there, as a support for the workman at a certain height from the ground to enable him to do part of the work that he had to do. Under those circumstances it seems to me that there is nothing in the cases that have been decided which precludes us from taking the view that there was evidence before the learned arbitrator that this structure was not being used merely as a ladder, but was being used for the additional purpose of affording support to the workman. I consider the question was one for him. It was first a question of fact, and, when the facts had been ascertained, there is no rule of law which precluded him from coming to the conclusion at which he arrived."

A finding that a "crawling board" used in the repair of a roof was scaffolding" was held not to be an improper one in *Veazey v. Chattle* [1902] 1 K. B. 494, 71 L. J. K. B. N. S. 252, 66 J. P. 389, 50 Week. Rep. 263, 85 L. T. N. S. 574, 18 Times L. R. 99 (Stirling, L. J., dissenting). The crawling board, a contrivance ordinarily used in the repair of roofs, consisting of a wooden plank about 18 to 20 feet long and 10 inches wide, across which were nailed trans-

The result of the decisions, as a whole, is manifestly to bring within the purview of the act some classes of structures which are assuredly not scaffolds in the sense in which that term is ordinarily employed, when it is applied to a contrivance for facilitating the erection of buildings. The question whether the interpretation thus adopted is correct is now practically closed in the only country in which the meaning of the provision is, as yet, a matter of any moment. But it would certainly seem to be not improbable, to say the least, that the legislature really intended to confine the statutory right of compensation to cases in which the cause of the accident is a scaffolding which is of such a height and in such a situation that the workmen on it are exposed to the danger of falling about 30 feet or over. The present mode of interpreting the act involves the curious result that a plasterer who, when working in a house exceeding 30 feet in height, falls from a low, temporary platform, erected in a room where the floor is completely finished, and where he is in no greater danger than if he were on a similar platform in a completed house, may recover compensation, while on the other hand, no compensation is recoverable by a servant who, while working on a house of less than 30 feet in height, falls from a platform resting on the ground, which subjects him to precisely the same amount of peril. It is, no doubt, true that the construction of the act has disclosed other anomalies of the same description. But in this instance the courts appear to have gone out of their way to create one.

As to what constitutes scaffolds under the statutes imposing specific duties upon the master in respect to scaffolds, see § 1892, *post*.

d. What is a "building."—A structure built to carry a steam crane to be used in the erection of a permanent structure is a "building" within the act.¹²

verse pieces of wood to give support to the man while working upon it; on the under side at one end was fastened a cross piece of wood, which fitted over the ridge of the roof and kept the board in position. At the time of the accident the workman was on the roof fixing the crawling board, while the lower end of the board was being steadied by an assistant standing on the ladder.

So the court of appeal refused to disturb a finding that painters' steps come within the terms of the act. *Elvin v. Woodward* [1903] 1 K. B. 838, 72 L. J. K. B. N. S. 468, 67 J. P. 413, 51 Week. Rep. 518, 88 L. T. N. S. 671, 19 Times L. R. 410.

See also *Veazey v. Chattle* [1902] 1 K. B. 494, where Collins, M. R., remarked: "A ladder might be—at any rate I cannot say that it could not be—a scaffolding; and it would make no difference whether it were high above ground on the roof of a house, or whether it were resting on the ground."

The question whether or not an arrangement of a plank and ladder is a scaffolding is deemed to be a question of fact in *Wood v. Walsh* [1899] 1 Q. B. 1009, 80 L. T. N. S. 345, 68 L. J. Q. B. N. S. 492, 63 J. P. 212, 47 Week. Rep. 504, 15 Times L. R. 279.

¹² *Aylward v. Matthews* [1905] 1 K. B. 343, 74 L. J. K. B. N. S. 336, 53

The mere fact that a building is more than 30 feet in height and that more than 20 persons other than domestic servants are employed therein, does not make such a building a factory within the compensation act.¹³

1844. [782] "On or in or about a building in which machinery driven by steam," etc.—The act applies to employment in or about a building "in which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof," although the building does not exceed 30 feet in height.¹

1845. [783] Meaning of "railway."— See also § 1842, note 1, subd. (a), *ante*. Private railways, not being "used for purposes of public traffic," are not covered by the compensation act, although they may be connected with a public railway.¹

1846. [783a] —of "factory."—As appears from the text of the compensation act of 1897, set out above, the provisions of the factory acts from 1878 to 1891 were practically incorporated into the compensation act; but as this portion of the act of 1897 was omitted from the act of 1906, it has been deemed wise to include the compensation cases construing the term "factory" with the other cases which arise in connection with the factory acts and in connection with which they are still valid authority. See §§1868–1873, *post*.

1847. [784] —of "engineering work."—These descriptive words have been held applicable to the employment of the driver of a water cart used to sprinkle a newly laid surface before it is rolled by a steam roller;¹ to work which includes the hoisting of iron girders by means of a steam winch to the top of a building to which a new story is being added;² to the work of connecting a house drain to the main

Week. Rep. 518, 88 L. T. N. S. 671, 19 Times L. R. 196.

¹³ *Dyer v. Swift Cycle Co.* [1904] 2 K. B. 36, 73 L. J. K. B. N. S. 566, 68 J. P. 394, 52 Week. Rep. 483, 90 L. T. N. S. 613, 20 Times L. R. 429 (building used for bicycle salesroom; no mechanical power of any kind used).

¹ *Mellor v. Tomkinson* [1899] 1 Q. B. (C. A.) 374, 68 L. J. Q. B. N. S. 214, 79 L. T. N. S. 715, 63 J. P. 55, 47 Week. Rep. 240, 15 Times L. R. 142; *Murnin v. Calderwood* (1899) 1 Sc. Sess. Cas. 5th series, 862, 36 Scot. L. R. 648, 7 Scot. L. T. 16.

¹ The word "railway" is not applicable to a siding in a dockyard, constructed merely as an adjunct to the

ordinary business of the proprietors of the dockyard. *London & I. Docks Co. v. Midland R. Co.* (1901) 18 Times L. R. (Q. B. Div.) 171, 71 L. J. K. B. N. S. 153, 86 L. T. N. S. 29 [1902] 18 Times L. R. (C. A.) 325, 71 L. J. K. B. N. S. 369, 50 Week. Rep. 461, 86 L. T. N. S. 339 [1902] 1 K. B. 568. Nor to a private siding belonging to a trading company which does business with the railway company. *Brodie v. North British R. Co.* (1900) 3 Sc. Sess. Cas. 5th series, 75, 38 Scot. L. R. 38, 8 Scot. L. T. 248.

¹ *Middlemiss v. Berwickshire* (1900) 2 Sc. Sess. Cas. 5th series, 392, 37 Scot. L. R. 297, 7 Scot. L. T. 330.

² *Cosgrove v. Partington* (1900) 17 Times L. R. (C. A.) 39, 64 J. P. 788.

sewer;³ and to the work of laying pipes in a trench to be connected with a reservoir.⁴ It may be that they also embrace work on a steam dredger.⁵ But they do not cover pulleys worked by a winch;⁶ nor the operation of lifting an air compressor by means of a hydraulic jack, for the purpose of taking it away on a truck after it had been purchased from the party who had used it in building a bridge.⁷

A tramway laid along a public road is a "railroad" within the definition of "engineering work."⁸ The word "railroad" is used in the same comprehensive sense as the word "railway," and is not restricted to the permanent way merely.⁹

Several other cases construing these words will be found in the note below.¹⁰

1848. [785] —of "mine."—The provision in the coal mines regulation act 1887, § 75, to the effect that "in this act, unless the con-

³ *Coles v. Anderson* (1905) 69 J. P. 201, 21 Times L. R. 204.

⁴ *Atkinson v. Lumb* [1903] 1 K. B. 861, 72 L. J. K. B. N. S. 460, 67 J. P. 414, 51 Week. Rep. 516, 88 L. T. N. S. 789, 19 Times L. R. 412.

⁵ In *Chambers v. Whitehaven Harbour Comrs.* [1899] 2 Q. B. 132, 80 L. T. N. S. 586, 47 Week. Rep. 533, 68 L. J. Q. B. N. S. 740, 15 Times L. R. 351, this point was referred to, but not explicitly decided, the action being held not maintainable for another reason. See § 1842, note 1, subd. (d), *ante*.

⁶ *Wrigley v. Bagley* [1901] 1 K. B. 780, 70 L. J. K. B. N. S. 538, 65 J. P. 372, 49 Week. Rep. 472, 84 L. T. N. S. 415.

⁷ *Gibson v. Wilson* (1899) 1 Sc. Sess. Cas. 5th series, 1017, 36 Scot. L. R. 777, 7 Scot. L. T. 65.

⁸ *Fletcher v. London United Tramways* [1902] 2 K. B. (C. A.) 269, 71 L. J. K. B. N. S. 653, 66 J. P. 596, 50 Week. Rep. 597, 86 L. T. N. S. 700, 18 Times L. R. 639.

⁹ *Fullick v. Evans* (1901) 84 L. T. N. S. (C. A.) 413, 17 Times L. R. 346, holding that, where a workman was accidentally injured in the course of his employment on the construction of a signal box on a new line of railway, his employment was on, in, or about a work of construction of a "railroad."

¹⁰ Digging tunnels under a railroad in a street is an "engineering work." *Adams v. Shaddock* [1905] 2 K. B. 859, 54 Week. Rep. 97, 22 Times L. R. 15,

75 L. J. K. B. N. S. 7, 93 L. T. N. S. 725.

A workman engaged in repairing a hydraulic lift, who was injured while availing himself of the hydraulic power of the lift partly to put himself in a position to carry out the repairs, and partly for testing purposes, is engaged in engineering work. *Tullock v. Waygood* [1906] 2 K. B. 261, 75 L. J. K. B. N. S. 557, 95 L. T. N. S. 223.

A lineman employed by a tramway company to repair its overhead wires was engaged in engineering work while going from one place where he did repairing to another place where there was repairing to be done. *Rogers v. Cardiff* [1905] 2 K. B. 832, 54 Week. Rep. 35, 22 Times L. R. 9, 75 L. J. K. B. N. S. 22, 4 L. G. R. 1, 70 J. P. 9, 93 L. T. N. S. 683.

A workman engaged in repairing a boiler, where the work was all done by hand and no mechanical power was being used, was not engaged in engineering work. *Cooper & Greig v. Adam* (1905) 7 Sc. Sess. Cas. 5th series, 681, relying on *Wrigley v. Whittaker* [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

The work of clearing land from the natural growth thereon is not a work of construction, alteration, or repair, which is intended by the act to be termed an engineering work. *Basanta v. Canadian P. R. Co.* (1911) 16 B. C. 304.

text otherwise requires, 'mine' includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine," cannot be construed in such a sense as to enable an engine driver to recover for an injury received while he was operating his engine on his employers' private railway about $\frac{3}{4}$ of a mile from the pit mouth. The words "adjacent to and belonging to the mine" mean "physically adjacent to and belonging to the mine itself," and not merely belonging to the owner.¹

Road work done as a necessary preliminary to the operation of a mine has been held to be a "mine" within the act, although no mine in actual operation may exist.²

1849. [786] —of "undertakers"—a. In the case of a factory.—An "undertaker" with relation to a factory is a person who occupies, and conducts his business upon, the premises where those processes are conducted which constitute the place of work or "factory" within the meaning of the act.¹ Accordingly a person who, for the time being, has the actual use of a "dock, wharf, or quay," as those terms are construed (see § 1872, subd. a, *post*), is liable as an "undertaker" for an injury received by one of his workmen, while engaged in any of the operations with a view to which the use of the premises has been obtained.² As a ship in a dock is deemed to be a "factory" (see §

¹ *Turnbull v. Lambton Collieries Co.* (1900) 82 L. T. N. S. (C. A.) 589.

² *Ellison v. Longden* (1901) 18 Times L. R. 48.

¹ See the judgment of Smith, L. J., in *Francis v. Turner Bros.* [1900] 1 Q. B. 480, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105, where it was laid down that, in the definition of "undertakers" in the compensation act, the meaning of the word "occupier" is not affected by the sense in which that word is used in section 23 of the factory act 1895.

² Where the owners of a ship moored alongside of a quay, who acted as their own stevedores, had the use of the portion of the quay alongside of which their ship lay, for the purpose of unloading the ship's cargo onto the quay, and a workman employed by them was killed through an accident arising out of, and in the course of, his employment on the quay, the ship owners are liable as "undertakers." *Merrill v. Wilson* [1901] 1 K. B. (C. A.) 35, 70 L. J. K. B. N. S.

97, 65 J. P. 53, 49 Week. Rep. 161, 83 L. T. N. S. 490, 17 Times L. R. 49; *Hainsborough v. Ralli Bros.* (1901) 18 Times L. R. (C. A.) 21.

Persons who are in the actual use or occupation of a dock (or, *semble*, of a berth in a dock), and employ workmen in cleaning or repairing a ship in the dock, are "undertakers" within the meaning of the act, and liable to pay compensation to a workman injured in the course of his employment. *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

A person using machinery, the property of another party, in the process of loading a ship from a quay, is an "undertaker." *Carrington v. Bannister* [1901] 1 K. B. (C. A.) 20, 70 L. J. K. B. N. S. 31, 83 L. T. N. S. 457, holding that, in section 23 of the factory act of 1895, the expression "such machinery," as last used in the latter part of the section, refers to the "machinery and plant" mentioned previously in

1872, *post*), an employer who is doing work on such a ship is also an "undertaker."³

To render the employer an "undertaker" it is not necessary that his possession of the premises should be exclusive. All that is requisite is that he should be in possession so far as may be necessary for the purpose of doing the work in hand.⁴

It has been held that an employer is not liable, as an "undertaker," for injuries received by one of his servants in the factory of another person, while he was engaged in removing a portion of the plant which was to be transferred to the defendant's own factory.⁵ But,

clause (a), and not to the "machinery" mentioned in clause (b).

³ Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, and the men employed by the stevedores were "finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, and injured so that he died. Under these circumstances it was held by the House of Lords (Lord Lindley dissenting) that the stevedores were occupying a "factory," namely, the machinery, within the meaning of the act, and that the deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those acts. *Stuart v. Nixon* [1901] A. C. 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156.

A shipbuilding firm which has sent a newly-launched ship to a public dock to have the engines for which it had contracted with another firm erected and fitted are "undertakers." *Jackson v. Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76 (1900) 37 Scot. L. R. 390, 2 Sc. Sess. Cas. 5th series, 533, 7 Scot. L. T. 363.

⁴ A firm of employers contracted to do the painting and plumbing on a ship lying in a dock, and sent workmen on board to do the work. Some of the crew were in charge of the ship for the owners, but the firm were in possession of the ship so far as was necessary for the work that they had contracted to do. One of the workmen was injured by an accident in the course of his employ-

ment. Held, that the possession of the shipowners, for a purpose not inconsistent with the possession of the employers, did not prevent the latter from having the "actual use or occupation" of the ship within the meaning of the factory and workshop act 1895, § 23, subd. (b). *Bartell v. Gray* [1902] 1 K. B. (C. A.) 225, 18 Times L. R. 70, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658.

A similar doctrine is embodied in *Jackson v. Rodger* (1899) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76. But in other Scotch decisions a different view was taken. In one of these the mere fact that a steamship was lying in a dock while a workman employed by a firm of engineers was engaged in repairing the boilers was held not to make the firm "occupiers" of the dock. *Low v. Abernethy* (1900) 2 Sc. Sess. Cas. 5th series, 722, 37 Scot. L. R. 506, 7 Scot. L. T. 423.

In another, shipping agents who had contracted with the owners of a vessel lying at a dock to load her were denied to be "occupiers" of the dock. *Bruce v. Henry* (1900) 2 Sc. Sess. Cas. 5th series, 717, 37 Scot. L. R. 571, 7 Scot. L. T. 421.

The occupants of a small hut on a dock, engaged in supplying horses and men for hauling wagons loaded with coal, "occupied" the dock so as to be undertakers. *Pacific Steam Nav. Co. v. Pugh* (1907) 23 Times L. R. 622.

⁵ *Francis v. Turner Bros.* [1900] 1 Q. B. 478, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105. With this decision may be compared three Scotch cases. In one of these a firm of engineers making a preliminary run for

manifestly, it is not easy to define precisely the boundary line between the circumstances which call for the application of the principle thus exemplified and that which controls cases of the type mentioned in the preceding paragraph.

b. In the case of engineering work.—Where it is the usual practice of a firm of builders to enter into contracts for pulling down and rebuilding, but they invariably sublet the work of pulling down, they are “undertakers” as regards the servants of the subcontractors.⁷ The owner of a building who contracts with someone to execute repairs on the building, and does not engage in the work himself, is not an “undertaker.”⁸ But a building contractor who is erecting a tenement for himself is deemed to be within that description in such a sense as to be liable to a servant of one of the trading firms with whom he had contracted for particular parts of the work which are not being executed by his own workmen.⁹

The word “undertaker” is not restricted to persons who contract for the construction of a building as a whole. Hence, where a building over 30 feet high is being constructed by means of a scaffolding, and the work of construction is carried on by several persons, not acting jointly, but each of them contracting with the building owner for the construction of a separate substantial part of the building, each of them is an “undertaker,” and is liable to compensate the workmen employed by him for personal injury sustained by them in the course of their employment. Every workman employed by the undertaker

the purpose of testing machinery in a building belonging to a cold storage company were denied to be “occupiers.” *Purves v. Sterne* (1900) 2 Sc. Sess. Cas. 5th series, 887, 37 Scot. L. R. 696.

In another it was held that the term “occupiers” was not applicable to the place where a laborer in the employ of a coal dealer, who was under contract to deliver coal to the steamers of a packet company, fell into the water, while he was waiting for the arrival of a steamer on which some coal was to be shipped. *Stewart v. Darnagvil* (1902) 4 Sc. Sess. Cas. 5th series, 425, 39 Scot. L. R. 302, 9 Scot. L. T. 378.

In another it was held that an iron founder was not liable to the widow of a workman, who was killed by falling from a scaffold while he was doing some work in a soap factory to which he had been sent for that purpose. *Malcolm v. M'Millan* (1900) 2 Sc. Sess.

Cas. 5th series, 525, 37 Scot. L. R. 383, 7 Scot. L. T. 364.

A firm of boiler makers are not “undertakers” within the meaning of the act, so as to be responsible for injuries to a workman in their employ who was injured while repairing a boiler in a spinning mill belonging to another person. *Cooper & Greig v. Adam* (1905) 7 Sc. Sess. Cas. 5th series, 681, relying on *Wrigley v. Whittaker* [1902] A. C. 299, 71 L. J. K. B. N. S. 600, 66 J. P. 420, 50 Week. Rep. 656, 86 L. T. N. S. 775, 18 Times L. R. 559.

⁷ *Knight v. Cubitt* [1902] 1 K. B. (C. A.) 31, 71 L. J. K. B. N. S. 65, 66 J. P. 52, 85 L. T. N. S. 526, 50 Week. Rep. 113, 18 Times L. R. 26.

⁸ *M'Gregor v. Dansken* (1899) 1 Sc. Sess. Cas. 5th series, 536, 36 Scot. L. R. 393 (Lord Young dissenting).

⁹ *Stalker v. Wallace* (1900) 2 Sc. Sess. Cas. 5th series, 1162, 37 Scot. L. R. 898, 8 Scot. L. T. 134.

upon the building is within the act, whatever may be the nature of his own particular work.¹⁰

A firm of engineers who have sold a hay-cutting machine are "undertakers" as regards one of their workmen, who is injured while its operation is being tested.¹¹

It was at first held that a subcontractor for engineering work is not an "undertaker" within the meaning of the compensation act.¹² But this view has now been pronounced erroneous by the House of Lords.¹³

An employee who, under a contract with a firm engaged in building operations on their own premises, supplies the labor for the brickwork,—the workmen so supplied, although paid by him, being under the control, while at work, of the foreman of the building owners,—is not an "undertaker."¹⁴

1850. [788] "Shipbuilding yard" (sec. 7, subs. 3).—The question whether a dock 2 miles from a shipbuilding yard was "near" it was held to be a question of fact, not of law.¹ In the case cited the court agreed with the finding of the arbitrator in favor of the servant, as having been injured "near" the yard.

¹⁰ *Mason v. Dean* [1900] 1 Q. B. (C. A.) 770, 69 L. J. Q. B. N. S. 358, 64 J. P. 244, 48 Week. Rep. 353, 82 L. T. N. S. 139, 16 Times L. R. 212.

And see *Weavings v. Kirk* [1904] 1 K. B. 213, 73 L. J. K. B. N. S. 77, 68 J. P. 91, 52 Week. Rep. 209, 89 L. T. N. S. 577, 20 Times L. R. 152 (employer who contracted to cut pigeon holes in building others were constructing, held to be "undertaker.")

¹¹ *Reid v. Fleming* (1901) 3 Sc. Sess. Cas. 5th series, 1000, 38 Scot. L. R. 720, 9 Scot. L. T. 113.

¹² *Cass v. Butler* [1900] 1 Q. B. 777, 69 L. J. Q. B. N. S. 362, 64 J. P. 261, 48 Week. Rep. 309, 82 L. T. N. S. 182, 16 Times L. R. 227; *Cooper v. Davenport* (1900) 16 Times L. R. (C. A.) 266.

¹³ *Cooper v. Wright* [1902] A. C. 302, 71 L. J. K. B. N. S. 642, 51 Week. Rep. 12, 86 L. T. N. S. 776, 18 Times L. R. 622, holding that a person contracting to erect a building is entitled to be indemnified by a subcontractor for the amount for which he is liable to a workman employed by the latter. See section 1, subs. 4 of the act.

Cooper v. Wright was followed by

Topping v. Rhind (1904) 6 Sc. Sess. Cas. 5th series, 666, 41 Scot. L. R. 573, 12 Scot. L. T. 88, holding that a subcontractor for ornamental carving work which was part of the design of a building was an "undertaker," and was consequently liable to indemnify the principal contractor for compensation paid by him to an injured workman. To the same effect, *Evans v. Cook, L. & Y. Ins. Co.* [1905] 1 K. B. 53, 74 L. J. K. B. N. S. 95, 53 Week. Rep. 81, 92 L. T. N. S. 43, 21 Times L. R. 42; *McCabe v. Jopling* [1904] 1 K. B. 222, 73 L. J. K. B. N. S. 129, 68 J. P. 121, 52 Week. Rep. 358, 89 L. T. N. S. 624, 20 Times L. T. 119; *Wagstaff v. Perks* (1902) 51 Week. Rep. 210, 87 L. T. N. S. 558, 19 Times L. R. 112.

¹⁴ *Percival v. Garner* [1900] 2 Q. B. (C. A.) 406, 69 L. J. Q. B. N. S. 824, 64 J. P. 500, 16 Times L. R. 396, holding that the persons from whom recovery should have been sought were the firm of contractors.

¹ *M'Millan v. Barclay* (1899) 2 Sc. Sess. Cas. 5th series, 91, 37 Scot. L. R. 61, 7 Scot. L. T. 214.

F. ACT OF 1900.

1851. Text of the act.—Sec. 1.—(1) From and after the commencement of this act, the workmen's compensation act 1897 shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment.

(2) Where any such employer agrees with a contractor for the execution by or under that contractor of any work in agriculture, section 4 of the workmen's compensation act 1897 shall apply in respect to any workmen employed in such work as if that employer were an undertaker within the meaning of that act. Provided, That, where the contractor provides and uses machinery driven by mechanical power, for the purpose of threshing, ploughing, or other agricultural work, he, and he alone, shall be liable under this act to pay compensation to any workman employed by him on such work.

(3) Where any workman is employed by the same employer mainly in agricultural, but partly or occasionally in other, work, this act shall apply also to the employment of the workman in such other work.

The expression "agriculture" includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables.

Sec. 2. This act may be cited as the workmen's compensation act 1900, and shall be read as one with the workmen's compensation act 1897, and that act and this act may be cited together as the workmen's compensation acts 1897 and 1900.

Sec. 3. This act shall come into operation on the 1st day of July, 1901.

This statute is supplanted by the general act of 1906.

1851a. [797] Effect of this statute.—The meaning of these provisions has been very little considered by courts of review. The few cases will be cited below.¹

G. AMERICAN STATUTES.

1852. Text of the statutes.—The text of the various compensation acts which have been passed in the different states are given in full

¹ The work of a man hired by a saw miller to cut down trees and cart them to a sawmill is not forestry. *Meally v. M'Gowan* (1902) 4 Sc. Sess. Cas. 5th series, 883, 39 Scot. L. R. 662, 10 Scot. L. T. 145.

Threshing is agricultural work within the act. *Proctor v. Cumisky* (1904) 6 Sc. Sess. Cas. 5th series, 832, 41 Scot. L. R. 636, 12 Scot. L. T. 172.

The workman need not be on the premises owned by the employer, to be within the protection of the act of 1900. *Smithers v. Wallis* [1903] 1 K. B. 200, 72 L. J. K. B. N. S. 57, 67 J. P. 381, 51

Week. Rep. 261, 87 L. T. N. S. 556, 19 Times L. R. 111.

The county court judge may hold that the applicant was engaged in agricultural employment within the act, where the evidence showed that he acted as game keeper for three months in the year, but also lent a hand at hay harvest and at corn harvest, and made corn ricks and straw ricks, helped with the threshing, and did work like other laborers. *Smith v. Coles* [1905] 2 K. B. 827, 54 Week. Rep. 81, 22 Times L. R. 5, 75 L. J. K. B. N. S. 16, 93 L. T. N. S. 754.

below, and wherever the validity of the act has been passed upon, that fact will be noted. For a full discussion of the constitutionality of statutes of this character, see the concluding chapter of this treatise. These acts are of such recent origin that their scope has not as yet been determined by the courts.

California.—The California statute (Laws 1911, chap. 399) provides as follows:

Sec. 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

Sec. 2. No contract, rule, or regulation, shall exempt the employer from any of the provisions of the preceding section of this act.

Sec. 3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury accidentally sustained by his employees, and for his death if the injury shall approximately cause death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the accident, both the employer and employee are subject to the provisions of this act according to the succeeding sections hereof.

(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment, and in acting within the line of his duty or course of his employment as such.

(3) Where the injury is approximately caused by accident, either with or without negligence, and is not so caused by the wilful misconduct of the employee.

And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death, except that when the injury was caused by the personal gross negligence or wilful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employees from bodily injury, the employee may, at his option, either claim compensation under this act, or maintain an action for damages therefor; in all

other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act.

Sec. 4. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

(1) The state, and each county, city and county, city, town, village, and school districts and all public corporations, every person, firm, and private corporation (including any public service corporation) who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee, for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, at the time of such accident, have withdrawn such election, in the manner provided in the next section.

Sec. 5. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, the filing of which statement shall operate, within the meaning of § 3 of this act, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he withdraws his election to be subject to the provisions of the act.

Sec. 6. The term "employee" as used in section three of this act shall be construed to mean:

(1) Every person in the service of the state, or any county, city and county, city, town, village, or school district therein, and all public corporations, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city and county, city, town, village, or school district therein, or any public corporation, who shall have been elected or appointed for a regular term of one or more years, or to complete the unexpired portion of any such regular term.

(2) Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employees), but not including any person whose employment is but casual and not in the usual course of the trade, business, profession, or occupation of his employer.

Sec. 7. Any employee as defined in subsection (1) of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employee as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall, within the meaning of section 3 of this act be subject to the provisions of this act and of any act amendatory thereof, if, at the time the accident upon which liability is claimed:

(1) The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and—

(2) At the time of entering into his contract of hire, express or implied, with such employer, such employee shall not have given to his employer notice

in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employee shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.

Sec. 8. Where liability for compensation under this act exists the same shall be as provided in the following schedule:

(1) Such medical and surgical treatment, medicines, medical and surgical supplies, crutches and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same: Provided, however, that the total liability under this subdivision shall not exceed the sum of \$100.00.

(2) If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employee leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

(a) If the accident causes total disability, 65 per cent of the average weekly earnings during the period of such total disability: Provided, that if the disability is such as not only to render the injured employee entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance shall be increased to 100 per cent of the average weekly earnings.

(b) If the accident causes partial disability, 65 per cent of the weekly loss in wages during the period of such partial disability.

(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subsections (a) and (b), respectively.

(d) Said subsections (a), (b) and (c) shall be subject to the following limitations:

Aggregate disability indemnity for a single injury shall not exceed three times the average annual earnings of the employee.

If the period of disability does not last more than one week from the day the employee leaves work as the result of the accident, no indemnity whatever shall be recoverable.

If the period of disability lasts more than one week from the day the employee leaves work as the result of the accident, no indemnity shall be recoverable for the first week of the period of such disability.

The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

(3) The death of the injured employee shall not affect the obligation of the employer under subsections (1) and (2) of this section, so far as his liability shall have accrued and become payable at the time of the death, but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability benefits: Provided that such death was approximately caused by the accident causing such disability:

(a) In case the deceased employee leaves a person or persons wholly dependent upon him for support, the death benefit shall be a sum sufficient when added to the benefits which shall, at the time of death, have accrued and become payable under the provisions of subsection (2) of this section to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection (1), equal to three times his annual average earnings, not less than \$1,000 nor more than \$5,000, the same to be payable, unless and until the industrial accident board shall otherwise direct, in weekly instalments corresponding in amount to the weekly earnings of the employee.

(b) In case the deceased employee leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of three times such annual earnings of the employee as the annual amount devoted by the deceased to the support of the person or persons so partially dependent upon him for support bears to such average earnings, the same to be payable, unless and until the industrial accident board shall otherwise direct, in weekly instalments, corresponding to the weekly earnings of the employees: Provided, that the total compensation for the injury and death (exclusive of the benefit provided for in said subsection (1) shall not exceed three times such average annual earnings.

(c) In the event that the accident shall have approximately caused permanent disability, either total or partial, and the employee shall die within fifteen years after the date of the accident, liability for the death benefits provided for in said subsections (a) and (b) respectively shall exist only where the accident was the approximate cause of death within said period of fifteen years.

(d) If the deceased employee leaves no person dependent upon him for support, and the accident approximately causes death, the death benefit shall consist of the reasonable expenses of his burial not exceeding \$100.

Sec. 9. (1) The weekly earning referred to in section (8) shall be one fifty-second of the average annual earnings of the employee; average annual earnings shall not be taken at less than \$333.33, nor more than \$1,666.66, and between said limits shall be arrived at as follows:

(a) If the injured employee has worked in such employment, whether for the same employer, or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned as such employee during the days when so employed.

(b) If the injured employee has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place shall have earned during the days when so employed.

(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the average earning capacity of

the injured employee at the time of the injury in the employment in which he was working at such time.

(d) The fact that an employee has suffered a previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury, or for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury, and shall be arrived at according to the previous provisions of this section.

(2) The weekly loss in wages referred to in § 8 shall consist of the difference between the average weekly earnings of the injured employee, computed according to the provisions of this section, and the weekly amount which the injured employee, in the exercise of reasonable diligence, will probably be able to earn, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

(3) The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee:

(a) A wife upon a husband.

(b) A husband upon a wife upon whose earnings he is partially or wholly dependent at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employee, and in such other cases if there is more than one person wholly dependent, the death benefit shall be divided equally among them and persons partially dependent, if any, shall receive no part thereof, and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

(4) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the death of the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees.

Sec. 10. No claim to recover compensation under this act shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and the address of the person injured, the time and the place where the accident occurred, and the nature of the injury, and signed by the person injured or someone in his behalf, or in case of his death, by a dependent or someone in his behalf, shall be served upon the employer by delivering to and leaving with him a copy of such notice or by mailing to him by registered mail a copy thereof in a sealed and posted envelope addressed to him at his last known place of business or residence. Such mailing shall constitute complete service. Provided, however, that any payment of compensation under this act, in whole or in part, made

by the employer before the expiration of said thirty days shall be equivalent to the notice herein required, and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collections of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby, and provided further that if no such notice is given and no payment of compensation made, within one year from the date of the accident, the right to compensation therefor shall be wholly barred.

Sec. 11. Wherever in case of injury the right to compensation under this act would exist in favor of any employee, he shall, upon the written request of his employer, submit from time to time to examination by a regular practising physician, who shall be provided and paid for by the employer, and shall likewise submit to examination from time to time by any regular physician selected by said industrial accident board, or any member or examiner thereof. The employee shall be entitled to have a physician provided and paid for by himself present at any such examination. So long as the employee, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended, and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof.

Sec. 12. Any dispute or controversy concerning compensation under this act, including any in which the state may be a party, shall be submitted to a board consisting of three members, which shall be known as the industrial accident board. Within thirty days before this act shall take effect, the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve three years, and another who shall serve four years. Thereafter such three members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board shall receive an annual salary of \$3,600.

Sec. 13. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this act, it may adopt its own rules of procedure and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required. It may also appoint a secretary and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed.

Sec. 14. The board shall keep its office at the city of San Francisco, and shall be provided by the secretary of state with a suitable room or rooms, necessary

office furniture, stationery, and other supplies. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board, but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this act shall be audited and paid out of the general funds of the state the same as other general state expenses are audited and paid.

Sec. 15. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any dispute or controversy concerning compensation under this act, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing to be given to each party interested by service of such notice on him personally or by mailing a copy thereof to him at his last known postoffice address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings shall be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney or any other agent, and to present such testimony as shall be pertinent to the controversy before the board, but the board may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time, direct any employee claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby shall have power and authority to issue subpoenas to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the superior court of any county or city and county.

Sec. 16. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the party.

Sec. 17. Either party may present a certified copy of the award to the superior court for any county or city and county, whereupon said court shall, without notice, render a judgment in accordance therewith, which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with the like effect, be entered and docketed.

Sec. 18. The findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive, and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of the award, any party aggrieved thereby may file with the board an application in writing for a review of such award, stating generally the grounds upon which such review is sought; within thirty days thereafter the board shall cause all documents and papers on file in the matter, and a transcript of all testimony which may have been taken therein, to be transmitted with their findings and award to the clerk of the superior court of that county or city and county wherein

the accident occurred; such application for a review may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other, subject, however, to the provisions of law for a change of the place of trial or the calling of another judge. Upon such hearing the court may confirm or set aside such award, and any judgment which may theretofore have been rendered thereon, but the same shall be set aside only upon the following grounds:

- (1) That the board acted without or in excess of its powers.
- (2) That the award was procured by fraud.
- (3) That the findings of fact by the board do not support the award.

Sec. 19. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties, or city and county.

Sec. 20. Any party aggrieved by a judgment entered upon the review of any award may appeal therefrom within the time and in the manner provided for an appeal from the orders of the superior court; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

Sec. 21. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not, in the discretion of the court.

Sec. 22. No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged or paid, be subject to be taken for the debts of the party entitled thereto.

Sec. 23. A claim for compensation for the injury or death of any employee, or any award or judgment entered thereon, shall be entitled to a preference over the other debts of the employer if and to the same extent as the wages of such employee shall be so preferred; but this section shall not impair the lien of any judgment entered upon any award.

Sec. 24. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employees, or otherwise, for the payment to such employees, their families, dependents, or representatives, of sick, accident, or death benefits, in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contributions, or other benefit whatsoever due to or received by the person entitled to such compensation, and the person so entitled shall, in-

respective of any insurance or other contract, have the right to recover the same directly from the employer, and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company, which may, in whole or in part have insured the liability for such compensation: Provided, however, that payment in whole or in part of such compensation, by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employee, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them.

Sec. 25. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law.

Sec. 26. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment of any assignable cause of action in tort which the employee or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party.

Sec. 27. The board shall cause to be printed and furnished free of charge to any employer or employee such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his withdrawal of such election, and the date of the filing thereof; and a book in which shall be recorded all awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employees, by posting and keeping continuously posted in a public and conspicuous place such notice thereof, in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board shall deem most effective, and the board shall cause notice to be given in like manner of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and withdrawals of election, and of the time of the filing of the same, shall conclusively be imputed to all employees.

Sec. 28. Nothing in this act contained shall be construed as impairing the right of parties interested, after the injury or death of an employee, to compromise and settle upon such terms as they may agree upon, any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employee any interest which he may not divert by such settlement or for which he or his estate shall, in

the event of such settlement by him, be accountable to such dependents or any of them.

Sec. 29. The sum of \$50,000 is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, to be used by the industrial accident board in carrying out the purposes of this act, and the controller is hereby directed to draw his warrant on the general fund from time to time in favor of said industrial accident board for the amounts expended under its direction, and the treasurer is hereby authorized and directed to pay the same.

Sec. 30. All acts or parts of acts inconsistent with this act are hereby repealed.

Sec. 31. This act shall take effect and be in force on and after the 1st day of September, A. D. 1911.

This act was amended (Laws 1912, chap. 39) as follows:

Sec. 1. It shall be the duty of the industrial accident board to collect and compile statistics in regard to industrial accidents happening in this state resulting in personal injury and the cost and probable causes thereof, to investigate methods and devices for the prevention of such accidents, to investigate the comparative merits and relative cost of the various forms of insurance against liability and compensation for personal injuries resulting from industrial accidents.

Sec. 2. It shall be the duty of every employer of labor and of persons, firms, associations or corporations insuring against liability of employers for damages or compensation for personal injuries to employees by industrial accidents to furnish to the industrial accident board, upon the written request of a member thereof or an examiner appointed thereby, any and all information in his or its possession or under his or its control, pertinent to any of the matters referred to in the preceding section of this act. It shall be unlawful for the said board, or any member thereof, or any examiner appointed thereby, to divulge any information obtained from any employer of labor, or from any person, firm, association, or corporation insuring against liability or compensation for industrial accidents, without the written consent of such employer, and of such person, firm, association, or corporation; and any member of the said board, or any examiner appointed thereby, who violates the provisions of this section of this act, shall be guilty of a misdemeanor, and for each and every such violation shall be, upon conviction thereof, punishable by a fine of not less than ten dollars (\$10) or more than one hundred dollars (\$100) or by imprisonment for not more than thirty (30) days, or by both such fine and imprisonment; and any information so obtained shall not be used against any such employer, person, firm, association or corporation, in any action brought against such employer, person, firm, association or corporation without the written consent of such employer, person, firm, association or corporation: Provided, however, that this section shall not prevent the industrial accident board from making and publishing the results of its investigations and researches as provided in §§ 5 and 6 of this act.

Sec. 3. Any member of the said board or examiner appointed thereby may, during reasonable business hours, enter any place of employment for the purpose of collecting facts and statistics and examining the provisions made for the safety and welfare of the employees therein.

Sec. 4. It shall be unlawful for any person, firm, corporation, agent, or officer

of a firm or corporation to fail, neglect, or refuse to comply with any of the foregoing provisions of this act. Any person, firm, corporation, agent, or officer of a firm or corporation, that knowingly violates or omits to comply with any of the provisions of this act, shall be guilty of a misdemeanor for each and every offense and shall be, upon conviction thereof, punishable by a fine of not more than \$10.

Sec. 5. The industrial accident board shall report the results of its investigations covering the calendar year of 1912 to the governor of the state not later than February 1, 1913.

Sec. 6. The industrial accident board is authorized and empowered to make public and publish, at such times and in such manner as it deems best, the result of its investigations and researches, together with all such other information in relation to the liability of employers for damages or compensation for personal injuries to their employees as it may deem essential to fully acquaint the people of the state with the present law and its purpose and operation.

Sec. 7. The industrial accident board is hereby authorized to draw upon and expend for the purposes set forth in this act a sum not in excess of \$15,000 the same to be paid out of the sum of \$50,000 appropriated for the use of said board under § 29 of an act entitled "An Act Relating to the Liability of Employers for Injuries or Death Sustained by Their Employees, Establishing an Industrial Accident Board, Making Appropriation Therefor, Defining its Powers and Providing for a Review of its Awards, approved April 8, 1911," and the controller is hereby directed to draw his warrants in favor of said board for sums so expended when duly audited and approved by the state board of control, and the treasurer is hereby authorized and directed to pay the same.

This act was still further amended (Laws 1912, chap. 53) as follows:

Sec. 1. Every employer of labor in this state shall keep a full, true, and correct record of every personal injury suffered by his or its employees, arising out of or in the course of the employment, and resulting in death, or in disability extending over a period of a week or more. Within fifteen days after the happening of any such personal injury, a written report thereof shall be mailed by the employer to the industrial accident board informally, or on blanks to be provided by said board for this purpose. The said report shall contain the name of the employer, location of place of employment, nature of employment, name, address, age, nationality, sex, and occupation of the injured person, length of time the injured person had worked at the particular employment previous to injury, date and hour of the day or night of the accident, the hour at which the injured employee began work on the date of the accident, nature of the injury, cause of the injury, and rate of wages of the injured employee.

Sec. 2. Upon the termination of the disability of the injured employee or at the expiration of sixty days from the date of the accident, if the disability should extend beyond such period, the employer shall mail to the industrial accident board a supplemental report in relation to such disability, informally or on blanks to be provided by said board for this purpose. Such report must contain complete statements as to any claim made by the injured employee for

indemnification for the injury sustained, payment made to him or in his behalf for medical, surgical, or other care, claim for compensation or damages made for such injuries and any compromise or settlement of claim for compensation or damages entered into between the employer and such injured employee, his heirs, dependents, or legal representative. In the event that any payment shall be made to such injured employee, or his dependents at any time thereafter, in compromise or settlement of a claim for compensation or damages, the amount of such payment shall be forthwith reported by the employer to the industrial accident board.

Sec. 3. Every physician who attends any such injured employee shall keep a record of this case. Within ten days from the date of his first attendance upon the injured employee, he shall mail to the industrial accident board a report, informally or on blanks to be provided by the said board for this purpose. The said report shall contain the name and address of the employer, name, address, sex, and age of the injured employee, date of accident, description of the injury, probable nature and extent of disability. Upon the termination of the disability of the injured employee or the termination of said physician's attendance upon his case, he shall forthwith mail to the industrial accident board a supplemental report in relation to such case describing the physical condition of the injured employee, his disability, convalescence, or discharge from the doctor's care.

Sec. 4. Every person, firm, association, or corporation insuring against the liability of employers for damages or compensation for personal injury to employees or indemnifying any employer for, or on account of any such liability shall keep a record thereof, and shall, within the first five days of each and every month, report in writing to the industrial accident board, informally or on blanks to be provided by said board for this purpose, every such injury to employees reported to it, every claim for damages or compensation for such injury filed with such person, firm, association, or corporation and any settlement or compromise of any such claim for damages or compensation whether made with such injured employee, his heirs, dependents, or legal representative.

Sec. 5. Every employer, physician, or insurance company, firm, or association, shall furnish to the industrial accident board all further information required by it in order to constitute a substantially complete and accurate history of each injury and the damages or compensation paid therefor.

Sec. 6. The record required to be kept in pursuance of the provisions of this act shall at all times be open to inspection of the industrial accident board or any member thereof, or any examiner appointed thereby. Any statement contained in such report shall not be admissible as evidence in any action arising out of the death or injury of any employee by reason of the accident reported.

Sec. 7. It shall be unlawful for any person, firm, corporation, agent, or officer of a firm or corporation to fail, neglect, or refuse to comply with any of the provisions of this act. Any person, firm, corporation, agent, or officer of a firm or corporation, that violates or omits to comply with any of the provisions of this act, shall be guilty of a misdemeanor for each and every offense and shall be, upon conviction thereof, punishable by fine of not less than \$10 or more than \$100, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

Sec. 8. Nothing in this act shall apply to employers of labor engaged in farming, dairying, agricultural, or horticultural pursuits, in poultry raising or domestic service.

Illinois.—The Illinois act of 1911 (approved June 10, 1911) provides as follows:

Sec. 1. That any employer covered by the provisions of this act in this state may elect to provide and pay compensation for injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from liability for the recovery of damages, except as herein provided. If, however, any such employer shall elect not to provide and pay the compensation to any employee who has elected to accept the provisions of this act, according to the provisions of this act he shall not escape liability for injuries sustained by such employee arising out of and in the course of his employment because—

(1) The employee assumed the risks of the employer's business.

(2) The injury or death was caused in whole or in part by the negligence of a fellow servant.

(3) The injury or death was proximately caused by the contributory negligence of the employee, but such contributory negligence shall be considered by the jury in reducing the amount of damages.

(a) Every such employer is presumed to have elected to provide and pay the compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the state bureau of labor statistics.

(b) Every employer within the provisions of this act failing to file such notice shall be bound hereby as to all his employees who shall elect to come within the provisions of this act until January 1st of the next succeeding year and for terms of each year thereafter: Provided, any such employer may elect to discontinue the payments of compensation herein provided only at the expiration of any such calendar year, by filing notice of his intention to discontinue such payments, with the state bureau of labor statistics, at least sixty days prior to the expiration of any such calendar year, and by posting such notice in the plant, shop, office, or place of work, or by personal service, in written or printed form, upon such employee, at least sixty days prior to the expiration of any such calendar year.

(c) In the event any employer elects to provide and pay compensation provided in this act, then every employee of such employer, as a part of his contract of hiring, or who may be employed at the time of the taking effect of this act and the acceptance of its provisions by the employer, shall be deemed to have accepted all the provisions of this act, and shall be bound thereby, unless within thirty days after such hiring and after the taking effect of this act he shall file a notice to the contrary with the secretary of the state bureau of labor statistics, whose duty it shall be to immediately notify the employer, and if so notified, the employer shall not be deprived of any of his common-law or statutory defenses, and until such notice to the contrary is given to the employer, the measure of liability of the employer for any injury shall be determined according to the compensation provisions of this act: Provided, however, that before any such employee shall be bound by the provisions of this act, his employer shall either furnish to such employee personally at the time of his hiring, or post in a conspicuous place at the plant or in the room or place

where such employee is to be employed, a legible statement of the compensation provisions of this act.

Sec. 2. The provisions of this act shall apply to every employer in the state engaged in the building, maintaining, or demolishing of any structure; in any construction or electrical work; in the business of carriage by land or water and loading and unloading in connection therewith (except as to carriers who shall be construed to be excluded herefrom by the laws of the United States relating to liability to their employees for personal injuries while engaged in interstate commerce, where such laws are held to be exclusive of all state regulations providing compensation for accidental injuries or death suffered in the course of employment); in operating general or terminal storehouses; in mining, surface mining, or quarrying; in any enterprise, or branch thereof, in which explosive materials are manufactured, handled or used in dangerous quantities; in any enterprise wherein molten metal or injurious gases or vapors or inflammable fluids are manufactured, used, generated, stored, or conveyed in dangerous quantities; and in any enterprise in which statutory regulations are now or shall hereafter be imposed for the guarding, using, or the placing of machinery or appliances, or for the protection and safeguarding of the employees therein, each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions, and means of prosecution of the work therein, extraordinary risks to life and limb of the employee engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to the employees therein.

Sec. 3. No common-law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this act, or to anyone wholly or partially dependent upon him or legally responsible for his estate: Provided, that when the injury to the employee was caused by the intentional omission of the employer to comply with statutory safety regulations, nothing in this act shall affect the civil liability of the employer. If the employer is a partnership, such omission must be that of one of the partners thereof, and if a corporation, that of any elective officer thereof.

Sec. 4. The amount of compensation which the employer who accepts the provisions of this act shall pay for injury to the employee which results in death shall be:

(a) If the employee leaves any widow, child, or children, or parent or other lineal heirs to whose support he had contributed within five years previous to the time of his death, a sum equal to four times the average annual earnings of the employee, but not less in any event than \$1,500, and not more in any event than \$3,500. Any weekly payments, other than necessary medical or surgical fees, shall be deducted in ascertaining such amount payable on death.

(b) If the employee leaves collateral heirs dependent upon his earnings, such a percentage of the sum provided in section (a) as the contributions which deceased made to the support of these dependents bore to his earnings.

(c) If the employee leaves no widow or child or children, parents, or lineal or collateral heirs dependent upon his earnings, a sum not to exceed \$150 for burial expenses.

(d) All compensation provided for in this section to be paid in case injury results in death, shall be paid in instalments equal to one half the average earnings, at the same intervals at which the wages or earnings of the employee were paid while he was living; or if this shall not be feasible, then the instalments shall be paid weekly.

(e) The compensation to be paid for injuries which result in death, as provided for in this section, shall be paid to the personal representative of the deceased employee and shall be distributed by such personal representative to the beneficiaries entitled thereto, in accordance with the laws of this state relating to the descent and distribution of personal property.

Sec. 5. The amount of compensation which the employer who accepts the provisions of this act shall provide and pay for injury to the employee resulting in disability shall be:

(a) Necessary first aid, medical, surgical, and hospital services, also medicine and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200, also necessary services of a physician or surgeon during such period of disability, unless such employee elects to secure his own physician or surgeon.

(b) If the period of disability lasts for more than six working days, and such fact is determined by the physician or physicians, as provided in § 9, compensation equal to one half of the earnings, but not less than \$5 nor more than \$12 per week, beginning on the eighth day of disability, and as long as the disability lasts, or until the amount of compensation paid equals the amount payable as a death benefit.

(c) If any employee, by reason of any accident arising out of and in the course of his employment, receive any serious and permanent disfigurement to the hands or face, but which injury does not actually incapacitate the employee from pursuing his usual or customary employment, so that it is possible to measure compensation in accordance with the scale of compensation and the methods of computing the same herein provided, such employee shall have the right to resort to the arbitration provisions of this act for the purpose of determining a reasonable amount of compensation to be paid to such employee, but not to exceed one quarter ($\frac{1}{4}$) of the amount of his compensation in case of death.

(d) If after the injury has been received it shall appear upon medical examination, as provided for in § 9, that the employee has been partially though permanently incapacitated from pursuing his usual and customary line of employment, he shall receive compensation equal to one half of the difference between the average amount which he earned before the accident, and the average amount which he is earning or is able to earn in some suitable employment or business after the accident, if such employment is secured.

(e) In the case of complete disability which renders the employee wholly and permanently incapable of work, compensation for the first eight years after the day the injury was received, equal to 50 per cent of his earnings, but not less than \$5 nor more than \$12 per week. If complete disability continues after the payment of a sum equal to the amount of the death benefit or after the expiration of the eight years, then a compensation during life, equal to 8 per cent of the death benefit which would have been payable had the accident resulted in death.

Such compensation shall not be less than \$10 per month, and shall be payable monthly.

(1) In case death occurs before the total of the payments made equals the amount payable as a death benefit, as provided in § 4, art. (a), then in case the employee leaves any widow, child, or children, or parents, or other lineal heirs, they shall be paid the difference between the compensation for death and the sum of such payment, but in no case shall this sum be less than \$500.

(2) In cases of complete disability, after compensation has been paid at the specified rate for a term of at least six months, the employee shall have the privilege of filing a petition in accordance with article (d) of § 4 of this act, asking for a lump sum payment of the difference between the sum of the payments received and the compensation to which he was entitled when such permanent disability had been definitely determined. For the purpose of this section, blindness or the total and irrecoverable loss of sight, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent paralysis of the legs or arms, and a fracture of the skull resulting in incurable imbecility or insanity, shall be considered complete and permanent disability: Provided, these specific cases of complete disability shall not, however, be construed as excluding other cases.

(3) In fixing the amount of the disability payments, regard shall be had to any payments, allowance, or benefit which the employee may have received from the employer during the period of his incapacity, except the expenses of necessary medical or surgical treatment. In no event, except in cases of complete disability as defined above, shall any weekly payment payable under the compensation plan in this section provided exceed \$12 per week, or extend over a period of more than eight years from the date of the accident. In case an injured employee shall be incompetent at the time when any right or privilege accrues to him under the provisions of this act, a conservator or guardian of the incompetent, appointed pursuant to law, may on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the employee himself had been competent and had claimed or exercised said right or privilege; and no limitations of time by this act provided, shall run so long as said incompetent employee had no conservator or guardian.

Sec. 5½. Any person entitled to compensation under this act, or any employer who shall be bound to pay compensation under this act, who shall desire to have such compensation, or any part thereof, paid in a lump sum, may petition any court of competent jurisdiction of the county in which the employee resided or worked at the time of disability or death, asking that such compensation be so paid, and if upon proper notice to the interested parties, and a proper showing made before such court, it appears to the best interest of the parties that such compensation be so paid, the court shall order payment of a lump sum, and where necessary, upon proper application being made, a guardian, conservator or administrator, as the case may be, shall be appointed for any person under disability who may be entitled to any such compensation, and an employer bound by the terms of this act, and liable to pay such compensation, may petition for such appointment where no such legal representatives have been appointed or acting for such party or parties so under disability.

Sec. 6. The basis for computing the compensation provided for in §§ 4 and 5 of this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages, or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings, which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average on those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In the case of injured employees who earn either no wage or less than three hundred times the usual daily wage or earnings of the adult day laborers in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wage.

(f) As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number shall be used, instead of three hundred, as a basis for computing the annual earnings, provided the minimum number of days which shall be used for the basis of the year's work shall be not less than two hundred.

(g) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment.

(h) In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

Sec. 7. The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employees in his employment subject to the provisions of this act, and it shall not be in any way reduced by contributions from employees.

Sec. 8. If it is proved that the injury to the employee resulted from his deliberate intention to cause such injury, no compensation with respect to that injury shall be allowed.

Sec. 9. Any employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself for examination at the expense of the employer, to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as

practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks, which examinations shall be for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of adjusting the compensation which may be due the employee from time to time for disability according to the provisions of §§ 4 and 5 of this act: Provided, however, that such examination shall be made in the presence of a duly qualified medical practitioner or surgeon provided and paid for by the employee, if such employee so desires, and in the event of a disagreement between said medical practitioners or surgeons as to the nature, extent or probable duration of said injury or disability, they may agree upon a third medical practitioner or surgeon, and, failing to agree upon such third medical practitioner or surgeon, the judge of the county court of the county where the employee resided or was employed at the time of the injury, shall within six days after petition filed in such court for that purpose, select a third medical practitioner or surgeon, and the majority report of such three physicians as to the nature, extent, and probable duration of such injury or disability shall be used for the purpose of estimating the amount of compensation payable under this act. If the employee refuses so to submit himself to examination, or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this act during such period.

Sec. 10. Any question of law or fact arising in regard to the application of this law in determining the compensation payable hereunder shall be determined either by agreement of the parties or by arbitration as herein provided. In case any such question arises which cannot be settled by agreement, the employee and the employer shall each select a disinterested party and the judge of the county court or other court of competent jurisdiction, of the county where the injured employee resided or worked at the time of the injury, shall appoint a third disinterested party, such persons to constitute a board of arbitrators for the purpose of hearing and determining all such disputed questions of law or fact arising in regard to the application of this law in determining the compensation payable hereunder; and it shall be the duty of both employee and employer to submit to such board of arbitrators, not later than ten days after the selection and appointment of such arbitrators, all facts or evidence which may be in their possession or under their control, relating to the questions to be determined by said arbitrators; and said board of arbitrators shall hear all the evidence submitted by both parties, and they shall have access to any books, papers, or records of either the employer or the employee showing any facts which may be material to the questions before them, and they shall be empowered to visit the place or plant where the accident occurred, to direct the injured employee to be examined by a regular practising physician or surgeon, and to do all other acts reasonably necessary for a proper investigation of all matters in dispute. A copy of the report of the arbitrators in each case shall be prepared and filed by them with the state bureau of labor statistics, and shall be binding upon both the employer and employee except for fraud and mistake: Provided, that either party to such arbitration shall have the right to appeal from such report or award of the arbitrators to the circuit court, or the court that appointed the third arbitrator, of the county where the injury oc-

curred by filing a petition in such court within twenty days after the filing of the report of the arbitrators, and upon filing a good and sufficient bond, in the discretion of the court, and upon such appeal the questions in dispute shall be heard *de novo*, and either party may have a jury upon filing a written demand therefor with his petition.

Sec. 11. Any person entitled to payment under the compensation provisions of this act from the employer shall have the same preferential claim therefor against the property of the employer as is now allowed by law for a claim by such person against such employer for unpaid wages or for personal services, such preference to prevail against wage claims of all other employees, not entitled to compensation for injuries, and the payments due under such compensation provisions shall not be subject to attachment, levy, execution, garnishment, or satisfaction of debts, except to the same extent and in the same manner as wages or earnings for personal service are now subject to attachment, levy, execution, garnishment, or satisfaction of debts under the laws of this state, and shall not be assignable. Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment. No claim of any attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon, unless the amount of the same be approved in writing by a judge of a court of record, which approval may be made in term time, or vacation.

Sec. 12. Any contract or agreement made by any employer or his agent or attorney with any employee or any other beneficiary of any claim under the provisions of this act within seven days after the injury shall be presumed to be fraudulent.

Sec. 13. No employee or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employee or beneficiary hereunder.

Sec. 14. No proceedings for compensation under the act shall be maintained unless notice of the accident has been given to the employer as soon as practicable after the happening thereof, and during such disability, and unless claim for compensation has been made within six months after the injury, "except that, in case of an accident resulting in temporary disability, notice of such accident must be given to the employer within thirty days after said accident," or in case of the death of the employee, or in the event of his incapacity, within six months after such death or incapacity, or in the event that payments have been made under the provisions of this act, within six months after such payments have ceased. No want or defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings by arbitration or otherwise by the employee, unless the employer proves that he is unduly prejudiced in such proceedings by such want, defect, or inaccuracy. Notice of the accident shall, in substance, apprise the employer of the claim of compensation made, and shall state the name and address of the employee injured, the approximate date and place of the accident, if known, and in simple language the cause thereof; which notice may be served personally or by registered mail, addressed to the employer at his last known residence or place of business: Provided, that the failure on the part of any person entitled to such compensation to give such notice shall not relieve the employer from his liability for such compensation, when the facts

and circumstances of such accident are known to such employer or his agent supervising work in which such employee was engaged at the time of the injury.

Sec. 15. This act shall not affect or disturb the continuance of any existing insurance, mutual aid, benefit, or relief association or department, whether maintained in whole or in part by the employer, or whether maintained by the employees, the payment of benefits of such association or department being guaranteed by the employer or by some person, firm, or corporation for him: Provided, the employer contributes to such association or department an amount sufficient to insure the employees or other beneficiary the full compensation herein provided, exclusive of the cost of the maintenance of such association or department without any expense to the employee. This act shall not prevent the organization and maintaining, under the insurance law of this state, of any benefit or insurance company for the purpose of insuring against the compensation provided for in this act, the expense of which is maintained by the employer. This act shall not prevent the organization or maintaining, under the insurance laws of this state, of any voluntary mutual aid, benefit, or relief association among employees for the payment of additional accident or sick benefits.

No existing insurance, mutual aid, benefit, or relief association or department shall, by reason of anything herein contained, be authorized to discontinue its operation without first discharging its obligations to any and all persons carrying insurance in the same or entitled to relief or benefits therein.

Any contract of employment, relief benefit, or insurance, or other device whereby the employee is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void, and any employer withholding from the wages of any employee any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine of not less than \$10 nor more than \$25 in each offense in the discretion of the court.

Sec. 16. Any person who shall become entitled to compensation under the provisions of this act shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company or association which may have insured such employer, against loss growing out of the compensation required by the provisions of this act to be paid by such employer, and in such case only, a payment of the compensation that has accrued to the person entitled thereto in accordance with the provisions of this act shall relieve such insurance company from such liability.

Sec. 17. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person, other than the employer, to pay damages in respect thereof:

(a) The employee or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation which he is entitled to under this act shall be reduced by the amount of damages recovered.

(b) If the employee or beneficiary has recovered compensation under this act, the employer by whom the compensation was paid, or the person who has been called upon to pay the indemnity under §§ 4 and 5 of this act, may be entitled to indemnity from the person so liable to pay damages as aforesaid,

and shall be subrogated to the rights of the employee to recover damages therefor.

Sec. 18. An agreement or award may, at any time after six months and before eighteen months from the date of filing, be reviewed, upon the application of either party, on the ground that the incapacity of the employee has subsequently increased or diminished. Such application shall be made to any court of competent jurisdiction, and unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the employee and report upon his condition; and upon his report, and after hearing all the evidence, the court may modify such agreement or award, as may be just, by ending, increasing, or diminishing the compensation, subject to the limitations hereinbefore provided.

Sec. 19. It shall be the duty of every employer within the provisions of this act to send to the secretary of the state bureau of labor statistics, in writing, an immediate report of all accidents or injuries arising out of or in the course of the employment and resulting in death; it shall also be the duty of every such employer to report, between the 15th and the 25th of each month, to the secretary of the state bureau of labor statistics, all accidents or injuries for which compensation has been paid under this act, which accidents or injuries entail a loss to the employee of more than one week's time, and in case the injury results in permanent disability, such report shall be made as soon as it is determined that such permanent disability has resulted or will result from such injury. All such reports shall state the date of the injury, including the time of day or night, the nature of the employer's business, the age, sex, conjugal condition of the injured person, the specific occupation of the injured person, the direct cause of the injury and the nature of the accident, the nature of the injury, the length of disability, and, in case of death, the length of disability before death, the wages of the injured person, whether compensation has been paid to the injured person, or to his legal representative or his heirs or next of kin, the amount of compensation paid, the amount paid for physicians,' surgeons,' and hospital bills, and by whom paid, and the amount paid for funeral or burial expenses, if known. The making of reports as provided herein shall release the employer covered by the provisions of this act, from making reports to any other officer of the state.

Sec. 20. Any person, firm, or corporation who undertakes to do or contracts with others to do, or have done for him, them, or it, any work embraced in § 2 of this act, requiring such dangerous employment of employees in, or about, premises where he, they, or it, as principal or principals, contract to do such work or any part thereof, and does not require that the compensation provided for in this act shall be insured to the employee or beneficiary by any such person, firm, or corporation undertaking to do such work, and any such person, firm, or corporation who creates or carries into operation any fraudulent scheme, artifice, or device to enable him, them, or it to execute such work without such person, firm, or corporation being responsible to the employee or beneficiaries entitled to such compensations under the provisions of this act, such person, firm, or corporation shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for, and be subject to all the provisions of this act.

Sec. 21. The term "employee" as used in this act shall be held to include only such persons as may be exposed to the necessary hazards of carrying on

any employment or enterprise referred to in § 2 of this act. Persons whose employment is of a casual nature, and who are employed otherwise than for the purpose of the employer's trade or business, are not included in the foregoing definition.

Sec. 22. Section 21 shall not be construed to include any employee engaged in any work of an incidental character unconnected with the dangers necessarily involved in carrying on any employment or enterprise referred to in § 2, or in any work of a clerical or administrative nature which does not expose the employee to the inherent hazards of any such employment or enterprise.

Sec. 23. Any wilful neglect, refusal, or failure to do the things required to be done by any section, clause, or provision of this act, on the part of the person or persons herein required to do them, or any violation of any of the provisions or requirements hereof, or any attempt to obstruct or interfere with any court officer, member of an arbitration board herein provided for, or with the secretary of the bureau of labor statistics or his deputy, in the discharge of the duties herein imposed upon any of them, or any refusal to comply with the terms of this act, shall be deemed a misdemeanor, punishable by a fine of not less than \$10 nor more than \$500, at the discretion of the court.

Sec. 23½. The right of action for damages caused by any such injury, at common law or any other statute in force prior to the taking of effect hereof, shall not be affected by this act, and every existing right of action for negligence or to recover damages for injury resulting in death is continued, and nothing in this act shall be construed as limiting the right of such action so accrued before the taking effect of this act.

Sec. 24. The invalidity of any portion of this act shall in no way affect the validity of any other portion thereof which can be given effect without such invalid part.

Sec. 25. This act shall take effect and be in force on and after the 1st day of May, 1912.

Kansas.—The Kansas act of 1911 provides as follows:

Sec. 1. If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act. Save as herein provided, no such employer shall be liable for any injury for which compensation is recoverable under this act: Provided, that (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he is employed; (b) if it is proved that the injury to the workman results from his deliberate intention to cause such injury, or from his wilful failure to use a guard or protection against accident required pursuant to any statute and provided for him, or a reasonable and proper guard and protection voluntarily furnished him by said employer, or solely from his deliberate breach of statutory regulations affecting safety of life or limb, or from his intoxication, any compensation in respect to that injury shall be disallowed.

Sec. 2. Where the injury was proximately caused by the individual negligence, either of commission or omission, of the employer, including such negligence of

the directors or of any managing officer or managing agent of such employer if a corporation, or of any of the partners if such employer is a partnership, or of any member if such employer is an association, but excluding the negligence of competent employees in the performance of their duties or of the employer's duty delegated to them, the existing liability of the employer shall not be affected by this act, but in such case the injured workman, or if death results from such injury, his dependents as herein defined, if they unanimously agree, otherwise his legal representative, may elect between any right of action against the employer upon such liability and the right to compensation under this act.

Sec. 3. Nothing in this act shall affect the liability of the employer or employee to a fine or penalty under any other statute.

Sec. 4. (a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business, or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in, the application of this act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. (b) Where the principal is liable to pay compensation under this section, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of this section, and shall have a cause of action therefor. (c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this act from the contractor instead of the principal. (d) This section shall not apply to any case where the accident occurred elsewhere than on or in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of such work under his control or management. (e) A principal contractor, when sued by a workman of a subcontractor, shall have the right to implead the subcontractor. (f) The principal contractor who pays compensation voluntarily to a workman of a subcontractor shall have the right to recover over against the subcontractor.

Sec. 5. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability against some person other than the employer to pay damages in respect thereof. (a) The workman may take proceedings against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to recover both damages and compensation; and (b) If the workman has recovered compensation, under this act, the person by whom the compensation was paid, or any person who has been called on to indemnify him under the section of this act relating to subcontracting, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the workman to recover damages therefor.

Sec. 6. This act shall apply only to employment in the course of the employer's

trade or business on, in, or about a railway, factory, mine, or quarry, electric, building, or engineering work, laundry, natural gas plant, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade, or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions, or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen. This act shall not apply in any case where the accident occurred before this act takes effect, and all rights which have accrued, by reason of any such accident, at the time of the publication of this act, shall be saved the remedies now existing therefor, and the court shall have the same power as to them as if this act had not been enacted.

Sec. 7. This act shall not be construed to apply to business or employments which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged.

Sec. 8. It is hereby determined that the necessity for this law and the reason for its enactment exist only with regard to employers who employ a considerable number of persons. This act, therefore, shall not apply to employers by whom fifteen or more workmen have been [employed] continuously for more than one month at the time of the accident, and who have elected or shall elect before the accident to come within the provision hereof: Provided, however, that employers having less than fifteen workmen may elect to come within the provisions of this act, in which case his employees shall be included herein, as hereinafter provided.

Sec. 9. In this act, unless the context otherwise requires: (a) "Railway" includes street railways and interurbans, and "employment on railways" includes work in depots, power houses, round houses, machine shops, yards, and upon the right of way, and in the operation of its engines, cars, and trains, and to employees of express companies while running on railroad trains. (b) "Factory" means any premises wherein power is used in manufacturing, making, altering, adapting, ornamenting, finishing, repairing, or renovating any article or articles for the purpose of trade or gain or of the business carried on therein, including expressly any brick yard, meat-packing house, foundry, smelter, oil refinery, lime-burning plant, steam-heating plant, electric-lighting plant, electric-power plant and water-power plant, powder plant, blast furnace, paper mill, printing plant, flour mill, glass factory, cement plant, artificial-gas plant, machine or repair shop, salt plant, and chemical manufacturing plant. (c) "Mine" means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries, and tunnels, and other ways, cuts, and openings connected therewith, including those in the course of being opened, sunk, or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment. (d) "Quarry" means any place, not a mine, where stone, slate, clay, sand, gravel, or other solid material is dug or otherwise extracted from the earth for the purpose of trade or bargain or of the employer's trade or business. (e) "Electrical work" means any kind of work in or directly connected with the construction, installation,

operation, alteration, removal, or repair of wires, cables, switchboards, or apparatus used for the transmission of electrical current. (f) "Building work" means any work in the erection, construction, extension, decoration, alteration, repair, or demolition of any building or structural appurtenance. (g) "Engineering work" means any work in the construction, alteration, extension, repair, or demolition of a railway (as hereinbefore defined), bridge, jetty, dike, dam, reservoir, underground conduit, sewer, oil or gas well, oil tank, gas tank, water tower, or water works (including standpipes and mains), any caisson work or work in artificially compressed air, any work in dredging, pile driving, moving buildings, moving safes, or in laying, repairing, or removing underground pipes and connections, the erection, installing, repairing, or removing of boilers, furnaces, engines, and power machinery (including belting and other connections), and any work in grading or excavating where shoring is necessary, or power machinery or blasting powder, dynamite, or other high explosives is in use (excluding mining and quarrying). (h) "Employer" includes any person or body of persons, corporate or unincorporate, and the legal representatives of a deceased employer, or the receiver or trustee of a person, corporation, association, or partnership. (i) "Workman" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer's trade or business. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents, as hereinafter defined, or to his legal representative, or where he is a minor or incompetent, to his guardian. (j) "Dependents" means such members of the workman's family as were wholly or in part dependent upon the workman at the time of the accident. And "members of a family" for the purposes of this act means only widow or husband, as the case may be, and children; or if no widow, husband, or children, then parents and grandparents, or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section parents include step-parents, children include step children, and grandchildren include step-grandchildren, and brothers and sisters include stepbrothers and stepsisters, and children and parents include that relation by legal adoption.

Sec. 10. In case an injured workman is mentally incompetent or a minor, or where death results from the injury, in case any of his dependents as herein defined is mentally incompetent or a minor, at the time when any right, privilege, or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian.

Sec. 11. The amount of compensation under this act shall be: (a) Where death results from injury: (1) If the workman leaves any dependents wholly dependent upon his earnings, an amount equal to three times his earnings for the preceding year but not exceeding \$3,600, and not less than \$1,200: Provided, such earnings shall be computed upon the basis of the scale which he received or would have been entitled to receive had he been at work during the thirty days next preceding the accident; and, if the period of the workman's employment by the said employer had been less than one year, then the amount of his earnings during the said year shall be deemed to be fifty-two times his

average weekly earnings during the period of his actual employment under said employer: Provided, that the amount of any payments made under this act and any lump sum paid hereunder for such injury from which death may thereafter result shall be deducted from such sum; and Provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case \$750. (2) If the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings, such proportion of the amount payable under the foregoing provisions of this section, as may be agreed upon or determined to be proportionate to the injury to the said dependents; and (3) If he leaves no dependents, the reasonable expense of his medical attendance and burial, not exceeding \$100. (b) Where total incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, equal to 50 per cent of his average weekly earnings computed as provided in § 12, but in no case less than \$6 per week or more than \$15 per week. (c) When partial incapacity for work results from injury, periodical payments during such incapacity, commencing at the end of the second week, shall not be less than 25 per cent, nor exceed 50 per cent, based upon the average weekly earnings computed as provided in § 12, but in no case less than \$3 per week or more than \$12 per week: Provided, however, that if the workman is under twenty-one years of age at the date of the accident, and the average weekly earnings are less than \$10, his compensation shall not be less than 75 per cent of his average earnings. No such payment for total or partial disability shall extend over a period exceeding ten years.

Sec. 12. For the purposes of the provisions of this act relating to "earnings" and "average earnings" of a workman, the following rules shall be observed: (a) "Average earnings" shall be computed in such manner as is best calculated to give the average rate per week at which the workman was being remunerated for the fifty-two weeks prior to the accident: Provided, that where by reason of the shortness of time during which the workman has been in the employment of his employer, or the casual nature or the terms of the employment, it is impracticable to compute the rate of remuneration, regard shall be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person employed, by a person in the same grade employed in the same class of employment and in the same district. (b) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his "earnings" and his "average earnings" shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident. (c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by his absence of work due to illness or any other unavoidable cause. (d) Where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed upon him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings. (e) In fixing

the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity. (f) In the case of partial incapacity the payments shall be computed to equal, as closely as possible, 50 per cent of the difference between the amount of the "average earnings" of the workman before the accident, to be computed as herein provided, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, subject, however, to the limitations hereinbefore provided.

Sec. 13. The payments shall be made at the same time, place, and in the same manner as the wages of the workman were payable at the time of the accident, but a judge of any district court having jurisdiction upon the application of either party may modify such regulation in a particular case as to him may seem just.

Sec. 14. Where death results from the injury, and the dependents of the deceased workman as herein defined have agreed to accept compensation, and the amount of such compensation and the apportionment thereof between them has been agreed to or otherwise determined, the employer may pay such compensation to them accordingly (or to an administrator if one be appointed) and thereupon be discharged from all further liability for the injury. Where only the apportionment of the agreed compensation between the dependents is not agreed to, the employer may pay the amount into any district court having jurisdiction or to the administrator of the deceased workman, with the same effect. Where the compensation has been so paid into court or to an administrator, the proper court, upon the petition of such administrator or any of such dependents, and upon such notice and proof as it may order shall determine the distribution thereof, among such dependents. Where there are no dependents, medical and funeral expenses may be paid and distributed in like manner.

Sec. 15. The payments due under this act, as well as any judgment obtained thereunder, shall not be assignable or subject to levy, execution, or attachment, except for medicine, medical attention and nursing, and no claim of any attorney at law for services rendered in securing such indemnity or compensation or judgment shall be an enforceable lien thereon, unless the same has been approved in writing by the judge of the court where said case was tried; but if no trial was had, then by any judge of the district court of this state to whom such matter has been regularly submitted, on due notice to the party or parties in interest of such submission.

Sec. 16. Employers affected by this act shall report annually to the state commissioner and factory inspector such reasonable particulars in regard thereto as he may require, including particulars as to all releases of liability under this act and any other law. The penalty for failure to report or for false report shall invalidate any such release of liability.

Sec. 17. (a) After an injury to the employee, if so requested by his employer, the employee must submit himself for examination at some reasonable time to a reputable physician selected by the employer, and from time to time thereafter during the pendency of his claim for compensation, or during the receipt by him for payment under this act, but he shall not be required to so submit himself, more than once in two weeks, unless in accordance with such orders as may be made by the proper court or judge thereof. Either party may upon demand require a report of any examination made by the physician of the other

party upon payment of a fee of \$1 therefor. (b) If the employee requests he shall be entitled to have a physician of his own selection present at the time to participate in such examinations. (c) Unless there has been a reasonable opportunity thereafter for such physician selected by the employee to participate in the examination in the presence of the physician selected by the employer, the physician selected by the employer shall not be permitted afterwards to give evidence of the condition of the employee in a dispute as to the injury. (d) Except as provided herein in this act there shall be no other disqualification or privilege preventing the testimony of a physician who actually makes an examination.

Sec. 18. In case of a dispute as to the injury, the committee, or arbitrator as hereinafter provided, or the judge of the district court, shall have the power to employ a neutral physician of good standing and ability, whose duty it shall be, at the expense of the parties, to make an examination of the injured person, as the court may direct, on the petition of either or both the employer and employee or dependents.

Sec. 19. If the employer or the employee has a physician make such an examination, and no reasonable opportunity is given to the other party to have his physician make examination, then, in case of a dispute as to the injury, the physician of the party making such examination shall not give evidence before the court unless a neutral physician either has examined or then does examine the injured employee and give testimony regarding the injuries.

Sec. 20. If the employee shall refuse examination by physician selected by the employer, with the presence of a physician of his own selection, and shall refuse an examination by the physician appointed by the court, he shall have no right to compensation during the period from refusal until he, or someone in his behalf, notifies the employer or the court that he is willing to have such examination.

Sec. 21. A physician making an examination shall give to the employer and to the workman a certificate as to the condition of the workman, but such certificate shall not be competent evidence of that condition unless supported by his testimony if his testimony would have been admissible.

Sec. 22. Proceedings for the recovery of compensation under this act shall not be maintainable unless written notice of the accident, stating the time, place, and particulars thereof, and the name and address of the person injured, have been given within ten days after the accident, and unless a claim for compensation has been made within six months after the accident, or in case of death, within six months from the date thereof. Such notice shall be delivered by registered mail, or by delivery to the employer. The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced, or if such want or defect was occasioned by mistake, physical or mental incapacity, or other reasonable cause, and the failure to make a claim within the period above specified shall not be a bar, if such failure was occasioned by a mistake, physical or mental incapacity, or other reasonable cause.

Sec. 23. Compensation due under this act may be settled by agreement. Every such agreement, other than a release, shall be in the form hereinafter provided.

Sec. 24. If compensation be not so settled by agreement: (a) If any committee representative of the employer and the workman exists, organized for

the purpose of settling disputes under this act, the matter shall, unless either party objects by notice in writing delivered or sent by registered mail to the other party before the committee meets to consider the matter, be settled in accordance with its rules by such committee or by an arbitrator selected by it.

(b) If either party so objects, or there is no such committee, or the committee or the arbitrator to whom it refers the matter fails to settle it within sixty days from the date of the claim, the matter may be settled by a single arbitrator agreed on by the parties, or appointed by any judge of a court where an action might be maintained. The consent to arbitration shall be in writing and signed by the parties, and may limit the fees of the arbitrator and the time within which the award must be made. And unless such consent and the order of appointment expressly refers other questions, only the question of the amount of compensation shall be deemed to be in issue.

Sec. 25. The arbitrator shall not be bound by technical rules of procedure or evidence, but shall give the parties reasonable opportunity to be heard and act reasonably and without partiality. He shall make and file his award, with the consent to arbitration attached, in the office of the clerk of the proper district court within the time limited in the consent, or, if no time limit is fixed therein, within sixty days after his selection, and shall give notice of such filing to the parties by mail.

Sec. 26. The arbitrator's fees shall be fixed by the consent to arbitration, or be agreed to by the parties before the arbitration, and if not so fixed or agreed to, they shall not exceed \$10 per day, for not to exceed ten days, and disbursements for expense. The arbitrator shall tax or apportion the costs of such fees in his discretion, and shall add the amount taxed or apportioned against the employer to the first payment made under the award, and he shall note the amount of his fees on the award, and shall have a lien therefor on the first payments due under the award.

Sec. 27. Every agreement for compensation and every award shall be in writing, signed and acknowledged by the parties or by the arbitrator or secretary of the committee hereinbefore referred to, and shall specify the amount due and unpaid by the employer to the workman up to the date of the agreement or award, and, if any, the amount of the payments thereafter to be paid by the employer to the workman, and the length of time such payments shall continue.

Sec. 28. It shall be the duty of the employer to file or cause to be filed every release of liability hereunder, every agreement for an award of compensation, or modifying an agreement for or award of compensation, under this act, if not filed by the committee or arbitrator, to which he is a party, or a sworn copy thereof, in the office of the district court in the county in which the accident occurred, within sixty days after it is made; otherwise it shall be void as against the workman. The said clerk shall accept, receipt for, and file any such release, agreement, or award, without fee, and record and index it in the book kept for that purpose. Nothing herein shall be construed to prevent the workman from filing such agreement or award.

Sec. 29. At any time within one year after an agreement or award has been so filed, a judge of a district court having jurisdiction may, upon the application of either party, cancel such agreement or award, upon such terms as may be just, if it be shown to his satisfaction that the workman has returned to work, and is earning approximately the same or higher wages as or than he

did before the accident, or that the agreement or award has been obtained by fraud or undue influence, or that the committee or arbitrator making the award acted without authority, or was guilty of serious misconduct, or that the award is grossly inadequate or grossly excessive, or if the employee absents himself so that a reasonable examination of his condition cannot be made, or has departed beyond the boundaries of the United States or Canada.

Sec. 30. At any time after the filing of an agreement or award and before judgment has been granted thereon, the employer may stay proceedings thereon by filing in the office of the clerk of the district court wherein such agreements or award is filed: (a) A proper certificate of a qualified insurance company that the amount of the compensation to the workman is insured by it: (b) A proper bond undertaking to secure the payment of the compensation. Such certificate or bond shall first be approved by a judge of the said district court.

Sec. 31. At any time after an agreement or award has been filed, the workman may apply to the said district court for judgment against the employer for a lump sum equal to 80 per cent of the amount of payments due and unpaid and prospectively due under the agreement or award; and, unless the agreement or award be stayed, modified, or canceled, or the liability thereunder be redeemed or otherwise discharged, the court shall examine the workman under oath, and if satisfied that the application is made because of doubt as to the security of his compensation, shall compute the sum and direct judgment accordingly, as if in an action: Provided, that if the employer shall give a good and sufficient bond, approved by the court, no execution shall issue on such judgment so long as the employer continues to make payments in accordance with the original agreement or award undiminished by the discount.

Sec. 32. An agreement or award may be modified at any time by a subsequent agreement; or, at any time after one year from the date of filing; it may be reviewed, upon the application of either party on the ground that the incapacity of the workman has subsequently increased or diminished. Such application shall be made to the said district court; and, unless the parties consent to arbitration, the court may appoint a medical practitioner to examine the workman and report to it; and upon his report and after hearing the evidence of the parties, the court may modify such agreement or award, as may be just, by ending, increasing, or diminishing the compensation, subject to the limitations hereinbefore provided.

Sec. 33. Where any payment has been continued for not less than six months the liability therefor may be redeemed by the employer by the payment to the workman of a lump sum of an amount equal to 80 per cent of the payments which may become due according to the award, such amount to be determined by agreement, or, in default thereof, upon application, to a judge of a district court having jurisdiction. Upon paying such amount the employer shall be discharged from all further liability on account of the injury, and be entitled to a duly executed release, upon filing which or other due proof of payment, the liability upon any agreement or award shall be discharged of record.

Sec. 34. Where the payment of compensation to the workman is insured, by a policy or policies, at the expense of the employer, the insurer shall be subrogated to the rights and duties, under this act, of the employer, so far as appropriate.

Sec. 35. All references hereinbefore to a district court of the state of **Kansas**

having jurisdiction of a civil action between the parties shall be construed as relating to the then existing Code of Civil Procedure. Such courts shall make all rules necessary and appropriate to carry out the provisions of this act.

Sec. 36. A workman's right to compensation under this act may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar, demand a jury trial. The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award. Where death results from injury, the action shall be brought by the dependent or dependents entitled to the compensation, or by the legal representative of the deceased for the benefit of the dependents as herein defined; and in such action the judgment may provide for the proportion of the award to be distributed to or between the several dependents; otherwise such proportions shall be determined by the proper probate court. An action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action of compensation under this act. No action or proceeding provided for in this act shall be brought or maintained outside of the state of Kansas, and notice thereof may be given by publication against nonresidents of the state in the manner now provided by article 7 of chapter 95, General Statutes of Kansas of 1909, so far as the same may be applicable, and by personal service of a true copy of the first publication within twenty-one days after the date of the said first publication, unless excused by the court upon proper showing that such service cannot be made.

Sec. 37. The cause of action shall be deemed in every case, including a case where death results from the injury, to have accrued to the injured workman at the time of the accident; and the time limited in which to commence an action for compensation therefor shall run as against him, his legal representatives, and dependents from that date.

Sec. 38. Contingent fees of attorneys for services and proceedings under this act shall in every case be subject to approval by the court.

Sec. 39. If the superintendent of insurance, by and with the advice and written approval of the attorney general, certifies that any scheme of compensation, benefit, or insurance for the workman of an employer in any employment to which this act applies, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favorable to the workmen and their dependents than the corresponding scales contained in this act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this act of their equivalents, the employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this act; and thereupon the employer shall be liable only in accordance with that scheme; but, save as aforesaid, this act shall not apply notwithstanding any contract to the contrary made after this act becomes a law.

Sec. 40. No scheme shall be so certified which does not contain suitable pro-

visions for the equitable distribution of any moneys or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already accrued, if and when such certificate is revoked or the scheme otherwise terminated.

Sec. 41. If at any time the scheme no longer fulfils the requirements of this article, or is not fairly administered, or other valid and substantial reasons therefor exist, the superintendent of insurance, by and with the attorney general, shall revoke the certificate, and the scheme shall thereby be terminated.

Sec. 42. Where a certified scheme is in effect, the employer shall answer all such inquiries and furnish all such accounts in regard thereto as may be required by the superintendent.

Sec. 43. The superintendent of insurance may make all rules and regulations necessary to carry out the purposes of the four preceding sections.

Sec. 44. All employers as defined by this act, who shall elect to come within the provisions of this act and of all acts amendatory hereof, shall do so by filing a statement to such effect with the secretary of state of this state at any time after taking effect of this act, which election shall be binding upon such employer for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or of any succeeding year, file in the office of the secretary of state a notice in writing to the effect that he withdraws his election to be subject to the provisions of this act. Notice of such election or withdrawal shall be forthwith posted by such employer in conspicuous places in and about his place of business.

Sec. 45. Every employee entitled to come within the provisions of this act shall be presumed to have done so unless he serve written notice, before injury, upon his employer that he elects not to accept thereunder, and thereafter any such employee desiring to change his election shall only do so by serving written notice thereof upon his employer. Any contract wherein an employer requires of an employee as a condition of employment that he shall elect not to come within the provisions of this act shall be void.

Sec. 46. In any action to recover damages for a personal injury sustained within this state by an employee (entitled to come within the provisions of this act) while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of due care of the employer or of any officer, agent, or servant of the employer, where such employer is within the provisions hereof, it shall not be a defense to any employer (as herein in this act defined) who shall not have elected, as hereinbefore provided, to come within the provisions of this act: (a) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that such employee was guilty of contributory negligence, but such contributory negligence of said employee shall be considered by the jury in assessing the amount of recovery.

Sec. 47. In an action to recover damages for a personal injury sustained within this state by an employee (entitled to come within the provisions of this act) while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground

of want of due care of the employer or of any officer, agent, or servant of the employer, and where such employer has elected to come and is within the provisions of this act as hereinbefore provided, it shall be a defense for such employer in all cases where said employee has elected not to come within the provisions of this act: (a) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (b) that the injury or death was caused in whole or in part by the want of due care of a fellow servant; (c) that said employee was guilty of contributory negligence: Provided, however, that none of these defenses shall be available where the injury was caused by the wilful or gross negligence of such employer, or of any managing officer, or managing agent of said employer, or where, under the law existing at the time of the death or injury, such defenses are not available.

Sec. 48. Nothing in this act shall be construed to amend or repeal § 6999 of the General Statutes of Kansas of 1909, or House bill No. 240 of the Session of 1911, the same being "An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases, and Repealing All Acts and Parts of Acts so Far as the Same are in Conflict Herewith."

Sec. 49. This act shall take effect and be in force from and after its publication in the statute book, and the 1st day of January, 1912.

Massachusetts.—The Massachusetts act (Laws of 1911, chap. 751¹ is given, with a memorandum in brackets of changes by the amendment (Laws 1912, chap. 571):

PART I.

Sec. 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was negligent;
2. That the injury was caused by the negligence of a fellow employee;
3. That the employee had assumed the risk of the injury.

Sec. 2. The provisions of § 1 shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

Sec. 3. The provisions of § 1 shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber.

Sec. 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not apply to employees of a subscriber while this act is in effect.

Sec. 5. An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said

¹ Pronounced constitutional, before its passage, in Opinion of Justices (1911) 209 Mass. 607, 96 N. E. 308.

notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent. [Subject to approval Industrial Board. L. 1912, c. 666.]

PART II.

Sec. 1. If an employee who has not given notice of his claim of common-law rights of action, as provided in Part I, § 5, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury.

Sec. 2. If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation.

Sec. 3. If the employee is injured by reason of the serious and wilful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the subscriber shall repay to the association the extra compensation paid to the employee. If a claim is made under this section the subscriber shall be allowed to appear and defend against such claims only.

Sec. 4. No compensation shall be paid under this act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury.

Sec. 5. During the first two weeks after the injury, the association shall furnish reasonable medical and hospital services, and medicines when they are needed.

Sec. 6. If death results from the injury, the association shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one half his average weekly wages, but not more than \$10 nor less than \$4 a week, for a period of three hundred weeks from the date of the injury. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

Sec. 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

- (a) A wife upon a husband with whom she lives at the time of his death.
- (b) A husband upon a wife with whom he lives at the time of her death.
- (c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there

being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

Sec. 8. If the employee leaves no dependents, the association shall pay the reasonable expense of his last sickness and burial, which shall not exceed \$200.

Sec. 9. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to one half his average weekly wages, but not more than \$10 nor less than \$4 a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor the amount more than \$3,000.

Sec. 10. While the incapacity for work resulting from the injury is partial, the association shall pay the injured employee a weekly compensation equal to one half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than \$10 a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury.

Sec. 11. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensations:

(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the reduction to one-tenth of normal vision in both eyes with glasses, one half of the average weekly wages of the injured person, but not more than \$10 nor less than \$4 a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the reduction to one tenth of normal vision in either eye with glasses, one half the average weekly wages of the injured person, but not more than \$10 nor less than \$4 a week, for a period of fifty weeks.

(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one half the average weekly wages of the injured person, but not more than \$10 nor less than \$4 a week, for a period of twenty-five weeks.

(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one half the average weekly wages of the injured person, but not more than \$10 nor less than \$4 a week, for a period of twelve weeks.

Sec. 12. No savings or insurance of the injured employee, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the association be considered in fixing the compensation under this act.

Sec. 13. The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are due. If the payment is made to the legal representative of the

deceased employee it shall be paid by him to the dependents or other persons entitled thereto under this act.

Sec. 14. If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

Sec. 15. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place, and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf or by a person to whom payments may be due under this act or by a person in his behalf. Any form of written communication signed by any person who may give the notice as above provided, which contains the information that the person has been so injured, giving the time, place, and cause of the injury, shall be considered a sufficient notice.

Sec. 17. The notice shall be served upon the association, or an officer or agent thereof, or upon the subscriber, or upon one subscriber, if there are more subscribers than one, or upon any officer or agent of a corporation if the subscriber is a corporation, by delivering the same to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

Sec. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, or cause of the injury, unless it is shown that it was the intention to mislead and the association was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury.

Sec. 19. After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if so requested by the association or subscriber, submit himself to an examination by a physician or surgeon authorized to practise medicine under the laws of the commonwealth, furnished and paid for by the association or subscriber. The employee shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

Sec. 20. No agreement by an employee to waive his rights to compensation under this act shall be valid.

Sec. 21. No payment under this act shall be assignable or subject to attachment, or be liable in any way for any debts.

Sec. 22. Whenever any weekly payment has been continued for not less than

six months, the liability therefor may in unusual cases be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board.

Sec. 23. The claim for compensation shall be in writing, and shall state the time, place, cause, and nature of the injury; it shall be signed by the person injured or by a person in his behalf, or, in the event of his death, by his legal representative or by a person in his behalf, or by a person to whom payments may be due under this act or by a person in his behalf, and shall be filed with the industrial accident board. The failure to make a claim within the period prescribed by § 15 shall not be a bar to the maintenance of proceedings under this act, if it is found that it was occasioned by mistake or other reasonable cause.

PART III.

Sec. 1. There shall be an industrial accident board consisting of five members, to be appointed by the governor, by and with the advice and consent of the council, one of whom shall be designated by the governor, as chairman. The term of office of members of this board shall be five years, except that when first constituted one member shall be appointed for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter one member shall be appointed every year for the full term of five years.

Sec. 2. The salaries and expenses of the board shall be paid by the commonwealth. The salary of the chairman shall be \$5,000 a year, and the salary of the other members shall be \$4,500 a year each. The board may appoint a secretary at a salary of not more than \$3,000 a year, and may remove him. It shall also be allowed an annual sum, not exceeding \$10,000, for clerical service and traveling and other necessary expenses. The board shall be provided with an office in the state house or in some other suitable building in the city of Boston, in which its records shall be kept.

Sec. 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to subpoena witnesses, administer oaths, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. The fees for attending as a witness before the industrial accident board shall be \$1.50 a day; for attending before an arbitration committee 50 cents a day; in both cases 5 cents a mile for travel out and home.

The superior court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

Sec. 4. If the association and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the industrial accident board, and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III. § 11. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

Sec. 5. If the association and the injured employee fail to reach an agreement in regard to compensation under this act, either party may notify the

industrial accident board, who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named, respectively, by the two parties. If the subscriber has appeared under the provisions of Part II., § 3, the member named by the association shall be subject to his approval. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

The arbitrators appointed by the parties shall be sworn by the chairman as follows: "I do solemnly swear that I will faithfully perform my duty as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party. So help me God."

Sec. 6. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its members on this committee within seven days after notification, as above provided, or after a vacancy has occurred, the board or any member thereof shall fill the vacancy and notify the parties to that effect.

Sec. 7. The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the city or town where the injury occurred, and the decision of the committee, together with a statement of the evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it, shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall be enforceable under the provisions of Part III., § 11.

Sec. 8. The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be \$5 and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

Sec. 9. The arbitrators named by or for the parties to the dispute shall each receive \$5 as a fee for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the association, which shall deduct an amount equal to one third of the sum from any compensation found due the employee.

Sec. 10. If a claim for a review is filed, as provided in Part III., § 7, the board shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto, and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings, and notify the parties thereof. No party shall, as a matter of right, be entitled to a second hearing on any question of fact.

Sec. 11. Any party in interest may present certified copies of an order or decision of the board, a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the board, and all papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance

therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though duly rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact, or where the decree is based upon a decision of an arbitration committee or a memorandum of agreement, and that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the industrial accident board ending, diminishing or increasing a weekly payment under the provisions of Part III., § 12, the court shall revoke or modify the decree to conform to such decision.

Sec. 12. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the association or of the employee; and on such review it may be ended, diminished, or increased, subject to the maximum and minimum amounts above provided, if the board finds that the condition of the employee warrants such action.

Sec. 13. Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

Sec. 14. If the committee of arbitration, industrial accident board, or any court before whom any proceedings are brought under this act, determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought, prosecuted, or defended them.

Sec. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may, at his option, proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both; and if compensation be paid under this act, the association may enforce in the name of the employee, or its own name and for its own benefit, the liability of such other person.

Sec. 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board. The decisions of the industrial accident board shall for all purposes be enforceable under the provisions of Part III., § 11.

Sec. 17. If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or subcontractors were subscribers. The association, however, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section, and if the association has paid compensation under the terms of this section, it may enforce in the name of the employee, or in its own name and for the benefit of the association, the liability of such other person.

This section shall not apply to any contract of an independent or subcontractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the subscriber, nor to any case where the injury occurred elsewhere than on, in, or about the premises on which the contractor has undertaken to execute the work for the subscriber, or which are under the control or management of the subscriber.

Sec. 18. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for the purpose. Upon the termination of the disability of the injured employee or, if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex, and occupation of the injured employee, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than \$50 for each offense.

PART IV.

Sec. 1. The Massachusetts Employees' Insurance Association is hereby created a body corporate with the powers provided in this act, and with all the general corporate powers incident thereto.

Sec. 2. The governor shall appoint a board of directors of the association, consisting of fifteen members, who shall serve for a term of one year, or until their successors are elected by ballot by the subscribers at such time and for such term as the by-laws shall provide.

Sec. 3. Until the first meeting of the subscribers the board of directors shall have and exercise all the powers of the subscribers, and may adopt by-laws not inconsistent with the provisions of this act, which shall be in effect until amended or repealed by the subscribers.

Sec. 4. The board of directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, a treasurer, and such other officers as the by-laws shall provide.

Sec. 5. Seven or more of the directors shall constitute a quorum for the transaction of business.

Vacancies in any office may be filled in such manner as the by-laws shall provide.

Sec. 6. Any employer in the commonwealth may become a subscriber.

Sec. 7. The board of directors shall, within thirty days of the subscription of twenty-five employers, call the first meeting of the subscribers by a notice in writing mailed to each subscriber at his place of business not less than ten days before the date fixed for the meeting.

Sec. 8. In any meeting of the subscribers each subscriber shall be entitled to one vote, and if a subscriber has five hundred employees to whom the association

is bound to pay compensation he shall be entitled to two votes, and he shall be entitled to one additional vote for each additional five hundred employees to whom the association is bound to pay compensation, but no subscriber shall cast, by his own right or by the right of proxy, more than twenty votes.

Sec. 9. No policy shall be issued by the association until not less than one hundred employers have subscribed, who have not less than ten thousand employees to whom the association may be bound to pay compensation.

Sec. 10. No policy shall be issued until a list of the subscribers, with the number of employees of each, together with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the association shall have certified under oath that every subscription in the list so filed is genuine and made with an agreement by every subscriber that he will take the policy subscribed for by him within thirty days of the granting of a license to the association by the insurance commissioner to issue policies.

Sec. 11. If the number of subscribers falls below one hundred, or the number of employees to whom the association may be bound to pay compensation falls below ten thousand, no further policies shall be issued until other employers have subscribed who, together with existing subscribers, amount to not less than one hundred who have not less than ten thousand employees, said subscriptions to be subject to the provisions contained in the preceding section.

Sec. 12. Upon the filing of the certificate provided for in the two preceding sections the insurance commissioner shall make such investigation as he may deem proper and, if his findings warrant it, grant a license to the association to issue policies.

Sec. 13. The board of directors shall distribute the subscribers into groups in accordance with the nature of the business and the degree of the risk of injury. Subscribers within each group shall annually pay in cash, or notes absolutely payable, such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year.

Sec. 14. The association may, in its by-laws and policies, fix the contingent mutual liability of the subscribers for the payment of losses and expenses not provided for by its cash funds; but such contingent liability of a subscriber shall not be less than an amount equal to and in addition to the cash premium.

Sec. 15. If the association is not possessed of cash funds above its unearned premiums sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses, upon the subscribers liable to assessment therefor, in proportion to their several liability. Every subscriber shall pay his proportional part of any assessments which may be laid by the association, in accordance with law and his contract, on account of injuries sustained and expenses incurred while he is a subscriber.

Sec. 16. The board of directors may, from time to time, by vote fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred. All premiums, assessments, and dividends shall be fixed by and for groups as heretofore provided in accordance with the experience of each group, but all the funds.

of the association and the contingent liability of all the subscribers shall be available for the payment of any claim against the association.

Sec. 17. Any proposed premium, assessment, dividend, or distribution of subscribers shall be filed with the insurance department, and shall not take effect until approved by the insurance commissioner after such investigation as he may deem necessary. (May withdraw approval. L. 1912, c. 666.)

Sec. 18. The board of directors shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of subscribers, and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours. Any subscriber or employee aggrieved by any such rule or regulation may petition the industrial accident board for a review, and it may affirm, amend, or annul the rule or regulation.

Sec. 19. If any officer of the association shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

Sec. 20. Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him that he has provided for payment to injured employees by the association.

Sec. 21. Every subscriber shall give notice in writing or print to every person with whom he is about to enter into a contract of hire, that he has provided for payment to injured employees by the association. If an employer ceases to be a subscriber he shall, on or before the day on which his policy expires, give notice thereof, in writing or print to all persons under contract with him. In case of the renewal of the policy no notice shall be required under the provisions of this act. He shall file a copy of said notice with the industrial accident board. The notices required by this and the preceding section may be given in the manner therein provided, or in such other manner as may be approved by the industrial accident board.

Sec. 22. If a subscriber who has complied with all the rules, regulations, and demands of the association is required by any judgment of a court of law to pay to an employee any damages on account of personal injury sustained by such employee during the period of subscription, the association shall pay to the subscriber the full amount of such judgment and the cost assessed therewith, if the subscriber shall have given the association notice in writing of the bringing of the action upon which the judgment was recovered, and an opportunity to appear and defend the same.

Sec. 23. The provisions of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven and of acts in amendment thereof shall apply to the association, so far as such provisions are pertinent and not in conflict with the provisions of this act, except that the corporate powers shall not expire because of failure to issue policies or make insurance.

Sec. 24. The board of directors appointed by the governor under the provisions of Part IV., § 2, may incur such expenses in the performance of its duties as shall be approved by the governor and council. Such expenses shall be paid from the treasury of the commonwealth and shall not exceed in amount the sum of \$15,000.

PART V.

Sec. 1. If an employee of a subscriber files any claim with or accepts any payment from the association on account of personal injury, or makes any agreement, or submits any question to arbitration, under this act, such action shall constitute a release to the subscriber of all claims or demands at law, if any, arising from the injury.

Sec. 2. The following words and phrases, as used in this act, shall, unless a different meaning is plainly required by the context, have the following meaning:—"Employer" shall include the legal representative of a deceased employer. "Employee" shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession, or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents, and other persons to whom compensation may be payable. "Dependents" shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury. "Average weekly wages" shall mean the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. "Association" shall mean the Massachusetts Employees Insurance Association. "Subscriber" shall mean an employer who has become a member of the association by paying a year's premium in advance and receiving the receipt of the association therefor, provided that the association holds a license issued by the insurance commissioner as provided in Part IV., § 12.

Sec. 3. Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by Part II. of this act, and when such liability company issues a policy conditioned to pay such compensation the holder of such policy shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to the provisions of Parts I., II., III., and V. of § 22 of Part IV. of this act, and shall file with the insurance department its classifications of risks and premiums relating thereto, and any subsequent proposed classifications or premiums, none of which shall take effect until the insurance commissioner has approved the same as adequate for the risks to which they respectively apply.

Sec. 4. Sections one hundred and thirty-six to one hundred and thirty-nine,

inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine are hereby repealed.

Sec. 5. The provisions of this act shall not apply to injuries sustained prior to the taking effect thereof.

Sec. 6. Part IV. of this act shall take effect on the first day of January, nineteen hundred and twelve; section one to three inclusive of Part III. shall take effect on the tenth day of May, nineteen hundred and twelve; the remainder thereof shall take effect on the first day of July, nineteen hundred and twelve.

Michigan.—The Michigan statute (Laws of 1912, No. 3) is as follows:

PART I.

Sec. 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense:

(a) That the employee was negligent, unless and except it shall appear that such negligence was wilful;

(b) That the injury was caused by the negligence of a fellow employee.

(c) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

Sec. 2. The provisions of § 1 shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

Sec. 3. The provisions of § 1 shall not apply to actions to recover damages for the death of, or for personal injuries sustained by employees of any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided.

Sec. 4. Any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of § 1; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or injury compensation is recoverable under this act, except as to employees who have elected, in the manner hereinafter provided, not to become subject to the provisions of this act.

Sec. 5. The following shall constitute employers subject to the provisions of this act:

1. The state and each county, city, township, incorporated village, and school district therein;

2. Every person, firm, and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the

provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

Sec. 6 Such election on the part of the employers mentioned in subdivision 2 of the preceding section shall be made by filing with the industrial accident board hereinafter provided for, a written statement to the effect that such employer accepts the provisions of this act, and that he adopts, subject to the approval of said board, one of the four methods provided for the payment of the compensation hereinafter specified. The filing of such statement and the approval of said board shall operate, within the meaning of the preceding section, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least thirty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act: Provided, however, That such employer so electing to become subject to the provisions of this act shall, within ten days after the approval by said board of his election filed as aforesaid, post in a conspicuous place in his plant, shop, minor place of work, or if such employer be a transportation company, at its several stations and docks, notice in the form as prescribed and furnished by the industrial accident board to the effect that he accepts and will be bound by the provisions of this act.

Sec. 7. The term "employee" as used in this act shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village, or school district therein: Provided, that one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the state, through its representatives, shall not be considered an employee of the state, county, city, township, incorporated village, or school district which made the contract;

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state, who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

Sec. 8. Any employee as defined in subdivision 1 of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employee as defined in subdivision 2 of the preceding section shall be deemed to have accepted and shall be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

1. The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

2. Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in

writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made before such employer became subject to the provisions of this act, such employee shall have given to his employer notice in writing that he elects not to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act. An employee who has given notice to his employer in writing as aforesaid, that he elects not to be subject to the provisions of this act, may waive such claim by a notice in writing, which shall take effect five days after it is delivered to the employer or his agent.

PART II.

Sec. 1. If an employee who has not given notice of his election not to be subject to the provisions of this act, as provided in Part I., § 8, or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined.

Sec. 2. If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act.

Sec. 3. No compensation shall be paid under this act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury: Provided, however, that if such disability continues for eight weeks or longer, such compensation shall be computed from the date of the injury.

Sec. 4. During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed.

Sec. 5. If death results from the injury, the employer shall pay, or cause to be paid, subject, however, to the provisions of § 12 hereof, in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to one half his average weekly wages, but not more than \$10 nor less than \$4 a week for a period of three hundred weeks from the date of the injury. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

Sec. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she lives at the time of his death;
(b) A husband upon a wife with whom he lives at the time of her death;
(c) A child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency. No person shall be considered a dependent, unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother or sister.

Sec. 7. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees. In case of the death of one such dependent his proportion of such compensation shall be payable to the surviving dependents *pro rata*. Upon the death of all such dependents compensation shall cease. No person shall be excluded as a dependent who is a nonresident alien. No dependent of an injured employee shall be deemed, during the life of such employee, a party in interest to any proceeding by him for the enforcement of collection of any claim for compensation, nor as respects the compromise thereof by such employee.

Sec. 8. If the employee leaves no dependents the employer shall pay, or cause to be paid as hereinafter provided, the reasonable expense of his last sickness and burying, which shall not exceed \$200.

Sec. 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one half his average weekly wages, but not more than \$10 nor less than \$4 a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed \$4,000.

Sec. 10. While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than \$10 a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to wit:

For the loss of a thumb, 50 per centum of the average weekly wages during sixty weeks;

For the loss of a first finger, commonly called index finger, 50 per centum of average weekly wages during thirty-five weeks;

For the loss of a second finger, 50 per centum of average weekly wages during thirty weeks;

For the loss of a third finger, 50 per centum of average weekly wages during twenty weeks;

For the loss of a fourth finger, commonly called little finger, 50 per centum of average weekly wages during fifteen weeks;

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one half of such thumb or finger, and compensation shall be one half the amounts above specified;

The loss of more than one phalange shall be considered as the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand;

For the loss of a great toe, 50 per centum of average weekly wages during thirty weeks;

For the loss of one of the toes other than a great toe, 50 per centum of average weekly wages during ten weeks;

The loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe, and compensation shall be one half of the amount above specified;

The loss of more than one phalange shall be considered as the loss of the entire toe;

For the loss of a hand, 50 per centum of average weekly wages during one hundred and fifty weeks;

For the loss of an arm, 50 per centum of average weekly wages during two hundred weeks;

For the loss of a foot, 50 per centum of average weekly wages during one hundred and twenty-five weeks;

For the loss of a leg, 50 per centum of average weekly wages during one hundred and seventy-five weeks;

For the loss of an eye, 50 per centum of average weekly wages during one hundred weeks;

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of § 9.

The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as above stated.

Sec. 11. The term "average weekly wages" as used in this act is defined to be one fifty-second part of the average annual earnings of the employee. If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employee has not worked in such employment during substantially the

whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class, working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident, in the employment in which he was working at such time. The fact that an employee has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury or death his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the later injury in the employment in which he was working at such time, and shall be arrived at according to and subject to the limitations of the provisions of this section. The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

Sec. 12. The death of the injured employee prior to the expiration of the period within which he would receive such weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

If the injury so received by such employee was the proximate cause of his death, and such deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this act to such deceased employee, to make the total compensation for the injury and death exclusive of medical and hospital services and medicines furnished as provided in § 4 hereof, equal to the full amount which such dependents would have been entitled to receive under the provisions of section five hereof in case the accident had resulted in immediate death, and such benefits shall be payable in weekly instalments in the same manner and subject to the same terms and conditions in all respects as payments made under the provisions of said § 5.

Sec. 13. No savings or insurance of the injured employee, nor any contribution made by him to any benefit fund or protective association independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than those paid or

caused to be paid by the employer as herein provided, be considered in fixing the compensation under this act.

Sec. 14. If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege.

Sec. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or, in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place, and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

Sec. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

Sec. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury.

Sec. 19. After an employee has given notice of an injury, as provided by this act, and from time to time thereafter during the continuance of his disability, he shall, if so requested by the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be. The employee shall have the right to have a physician provided and paid for by himself present at the examination. If he refuses to submit himself for the examination, or in any way obstructs the same, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited. Any physician who shall make or be present at any such examination may be required to testify under oath as to the results thereof.

Sec. 20. No agreement by an employee to waive his rights to compensation under this act shall be valid.

Sec. 21. No payment under this act shall be assignable or subject to attachment or garnishment, or be held liable in any way for any debts. In case of insolvency every liability for compensation under this act shall constitute a first lien upon all the property of the employer liable therefor, paramount to all other

claims or liens except for wages and taxes, and such liens shall be enforced by order of the court.

Sec. 22. Whenever any weekly payment has been continued for not less than six months, the liability therefor may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of the industrial accident board, and said board may at any time direct in any case, if special circumstances be found which in its judgment require the same, that the deferred payments be commuted on the present worth thereof at five per cent per annum to one or more lump sum payments, and that such payments shall be made by the employer or the insurance company carrying such risk, or commissioner of insurance, as the case may be.

PART III.

Sec. 1. There is hereby created a board which shall be known as the industrial accident board, consisting of three members to be appointed by the governor, by and with the consent of the senate, one of whom shall be designated by the governor as chairman. Appointments to fill vacancies may be made during recesses of the senate, but shall be subject to confirmation by the senate at the next ensuing session of the legislature. The term of office of members of this board shall be six years, except that when first constituted one member shall be appointed for two years, one for four years, and one for six years. Thereafter one member shall be appointed every second year for the full term of six years. No more than two members of this board shall belong to the same political party.

Sec. 2. The salary of each of the members so appointed by the governor shall be \$3,500 per year. The board may appoint a secretary at a salary of not more than \$2,500 a year, and may remove him. The board shall be provided with an office in the capitol, or in some other suitable building in the city of Lansing, in which its records shall be kept, and it shall also be provided with necessary office furniture, stationery, and other supplies. It shall provide itself with a seal for the authentication of its orders, awards and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Michigan—Seal." It shall employ such assistants and clerical help as it may deem necessary and fix the compensation of all persons so employed: Provided, that the average compensation paid to such employee shall not exceed \$1,000 per annum for each person employed, and all such clerical assistants shall be subject to existing laws regulating the grading and compensation of department clerks. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board before payment is made.

All such salaries and expenses, when audited and allowed by the board of state auditors, shall be paid by the state treasurer out of the general fund, upon warrant of the auditor general.

Sec. 3. The board may make rules not inconsistent with this act for carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The board or any member thereof shall have the power to administer oaths, subpoena witnesses, and to examine such

parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Sec. 4. The board shall cause to be printed and furnish free of charge to any employer or employee such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of any employer who shall file a statement of election under this act, and the date of the filing thereof and its approval by such board, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of said election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board; and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause such notice of the fact to be given by requiring said employer to post such notice as hereinbefore provided; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employees.

Sec. 5. If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employee reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the industrial accident board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act.

Sec. 6. If the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, and the employee fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board, who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named respectively by the two parties.

Sec. 7. It shall be the duty of the industrial accident board, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The board shall designate one of its members to act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, the board or any member thereof shall fill the vacancy and notify the parties to that effect.

Sec. 8. The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held at the locality where the injury occurred, and the decision of the committee shall be filed with the industrial accident board. Unless a claim for a review is filed by either party within seven days, the decision shall stand as the decision

of the industrial accident board: Provided, that said industrial accident board may, for sufficient cause shown, grant further time in which to claim such review.

Sec. 9. The industrial board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be \$5 and traveling expenses, but the board may allow additional reasonable amounts in extraordinary cases.

Sec. 10. The arbitrators named by or for the parties to the dispute shall each receive \$5 a day for his services, but the industrial accident board or any member thereof may allow additional reasonable amounts in extraordinary cases. The fees of such arbitrators and other costs of such arbitration, not exceeding, however, the taxable costs allowed in suits at law in the circuit courts of this state, shall be fixed by the board and paid by the state as the other expenses of the board are paid. The fees and the payment thereof of all attorneys and physicians for services under this act shall be subject to the approval of the industrial accident board.

Sec. 11. If a claim for review is filed, as provided in part three, section eight, the industrial accident board shall promptly review the decision of the committee of arbitration and such records as may have been kept of its hearings, and shall also if desired hear the parties, together with such additional evidence as they may wish to submit, and file its decision therein, with the records of such proceedings. Such review and hearing may be held in its office at Lansing or elsewhere, as the board shall deem advisable.

Sec. 12. The findings of fact made by said industrial accident board acting within its powers shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: Provided, that application is made by the aggrieved party within thirty days after such determination by certiorari, mandamus, or by any other method permissible under the rules and practice of said court or the laws of this state, and to make such further orders in respect thereto as justice may require.

Sec. 13. Either party may present a certified copy of the decision of such industrial accident board approving agreements of settlement as provided in part III., § 5, or of the decision of such committee of arbitration when no claim for review is made as provided in Part 3, § 8, or of the decision of such industrial accident board when a claim for review is filed as provided in Part III., § 11, providing for payment of compensation under this act, to the circuit court for the county in which such accident occurred, whereupon said court shall, without notice, render a judgment in accordance therewith against said employer and also against any insurance company carrying such risk under the provisions of this act; which judgment, until and unless set aside, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

Sec. 14. Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer or the insurance company carrying such risks, or the commissioner of insurance as the case may be, or the employee; and on such review it may be ended, diminished, or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action.

Sec. 15. Where the injury for which compensation is payable under this act

was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person.

Sec. 16. All questions arising under this act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the industrial accident board.

Sec. 17. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of his establishment or place of work, the name, age, sex, and occupation of the injured employee, and shall state the time, the nature and cause of the injury, and such other information as may be required by the board. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than \$50 for each offense.

PART IV.

Sec. 1. Every employer filing his election to become subject to the provisions of this act, as hereinbefore set forth, shall have the right to specify at the time of doing so, subject to the approval of said industrial accident board, which of the following methods for the payment of such compensation he desires to adopt, to wit:

First. Upon furnishing satisfactory proof to said board of his solvency and financial ability to pay the compensation and benefits hereinbefore provided for, to make such payments directly to his employees, as they may become entitled to receive the same under the terms and conditions of this act; or—

Second. To insure against such liability in any employers' liability company authorized to take such risks in the state of Michigan; or—

Third. To insure against such liability in any employers' insurance association organized under the laws of the state of Michigan; or—

Fourth. To request the commissioner of insurance of the state of Michigan to assume the administration of the disbursement of such compensation exclusive of that provided for in Part II., § 4 herein, and the collection of the premiums and assessments necessary to pay the same, as provided in Part V. hereof. Said board, however, shall have the right, from time to time to review and alter its decision in approving the election of such employer to adopt any one of the foregoing methods of payment, if in its judgment such action is necessary or desirable to secure and safe-guard such payments to employees.

Sec. 2. Nothing herein shall affect any existing contract for employers' liability insurance or affect the organization of any mutual or other insurance company, or any arrangement now existing between employers and employees, providing for the payment to such employees, their families, dependents, or rep-

representatives, sick, accident, or death benefits, in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name in the manner provided in this act the liability of any insurance company or of any employers' association organized under the laws of the state of Michigan, or the commissioner of insurance, who may, in whole or in part, have insured the liability for such compensation: Provided, however, that payment in whole or in part of such compensation by either the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, shall, to the extent thereof be a bar to recovery against the other, of the amount so paid.

Sec. 3. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract for insurance, unless such company shall have been approved by the commissioner of insurance as provided by law.

Sec. 4. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at 3 per centum per annum, with such trust company of this state as shall be designated by the employee, or by his dependents, in case of his death, and such liability exists in their favor, or in default of such designation by him, or them, after ten days' notice in writing from the employer, with such trust company of this state as shall be designated by the industrial accident board; or—

2. By the purchase of an annuity, within the limitation provided by law, in any insurance company granting annuities and licensed in this state, which may be designated by the employee or his dependents, or the industrial accident board, as provided in subsection one of this section.

PART V.

Sec. 1. Whenever five or more employees who have become subject to the provisions of this act, and who have on their pay rolls an aggregate number of not less than three thousand employees, shall in writing request the commissioner of insurance so to do, he shall assume charge of levying and collection from such premium and dividends as may from time to time be necessary to pay the sums which shall become due their employees, or dependents of their employees, as compensation under the provisions of this act, and also the expense of conducting the administration of such funds; and shall disburse the same to the persons entitled to receive such compensation under the provisions of this act: Provided, however, that neither the commissioner of insurance nor the state of Michigan shall become or be liable or responsible for the payment of claims

for compensation under the provisions of this act beyond the extent of the funds so collected and received by him as hereinafter provided.

Sec. 2. The commissioner of insurance shall immediately, upon assuming the administration of the collection and disbursement of the moneys referred to in the preceding section, cause to be created in the state treasury a fund to be known as "accident fund." Each such employer shall contribute to this fund to the extent of such premiums or assessments as the commissioner shall deem necessary to pay the compensation accruing under this act to employees of such employers or to their dependents, which premiums and assessments shall be levied in the manner and proportion hereinafter set forth. The commissioner of insurance shall give a good and sufficient bond in the sum of \$25,000, executed by some surety company authorized to do business in the state of Michigan, covering the collection and disbursement of all moneys that may come into his hands under the provisions of this act. The premium on said bond shall be paid out of the general funds of the state on an order of the auditor general. Said bond must be approved by the board of state auditors.

Sec. 3. It is the intention that the amounts raised for such fund shall ultimately become neither more nor less than self-supporting, and the premiums or assessments levied for such purpose shall be subject to readjustment from time to time by the commissioner of insurance as may become necessary.

Sec. 4. The commissioner of insurance may classify the establishments or works of such employers in groups in accordance with the nature of the business in which they are engaged and the probable risk of injury to their employees under existing conditions. He shall determine the amount of the premiums or assessments which such employers shall pay to said accident fund, and may prescribe when and in what manner such premiums and assessments shall be paid, and may change the amount thereof both in respect to any or all of such employers from time to time, as circumstances may require, and the condition of their respective plants, establishments, or places of work in respect to the safety of their employees may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable, and just as among such employers. At the beginning of each fiscal year it shall be the duty of the commissioner of insurance to call for the required payment of premiums in such amounts as shall, together with any balance in the accident fund, in his judgment, and subject to the approval of said industrial accident board, be sufficient to enable him to pay all sums which may become due and payable to the employees of any such employer who has become subject to the provisions of Part V. of this act, and also the expenses of administering such funds during the following year.

Sec. 5. If any employer shall make default in the payment of any contribution, premium, or assessment required as aforesaid by the commissioner of insurance, the sum due shall be collected by an action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In case any injury happens to any of the workmen of such employer during the period of any default in the payment of any such premium, assessment, or contribution, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman, or by his dependents in case death results from such accident, as if he had not elected to become subject to

this act. In case, however, the amount actually collected in by such injured workman or his dependents shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of said accident fund. If the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section shall have the choice, to be exercised before suit, of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund.

Sec. 6. Any employer subject to the provisions of Part V. of this act, who has complied with all the rules, regulations, and demands of the industrial accident board and the commissioner of insurance, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: Provided, however, that he shall give written notice of such withdrawal to said commissioner of insurance at least thirty days before the expiration of such period: and Provided further, that if at the time of such withdrawal liability may exist against employer for compensation to employees who have been theretofore killed or injured, as hereinbefore provided, such employer shall either relieve himself and the commissioner of insurance from such liability in the manner provided in Part IV., § 4 of this act, or shall otherwise protect and indemnify said commissioner of insurance against such liability in such reasonable manner as he may require.

Sec. 7. In case any controversy shall arise between the commissioner of insurance and any employer subject to the provisions of Part V. of this act, relative to any rule or regulation adopted by said commissioner of insurance, or any decision made by him in respect to the collection, administration, and disbursement of such funds, or in case any controversy shall arise between any employee claiming compensation under the provisions of this act and said commissioner of insurance, all such controversies of every kind and nature shall be subject to review in like manner and with the same force and effect in all respects as is heretofore provided in respect to differences arising through the administration of such funds by the employer, or by a liability insurance company or by an employers' mutual insurance association.

Sec. 8. The books, records, and pay rolls of each employer subject to the provisions of Part V. of this act shall always be open to inspection by the commissioner of insurance, or his duly authorized agent or representative, for the purpose of ascertaining the correctness of the amount of the pay roll reported, the number of men employed, and such other information as said commissioner may require in the administration of said funds. Refusal on the part of any such employer to submit said books, records and pay rolls for such inspection, shall subject the offending employer to a penalty of \$50 for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of a misdemeanor.

Sec. 9. The commissioner of insurance shall issue proper receipts for all moneys so collected and received from employers, as aforesaid, shall take receipts for all sums paid to employees for compensation under the provisions of this act, and shall keep full and complete records of all business transacted by him in the administration of such funds. He may employ such deputies and as-

sistants and clerical help as may be necessary, and as the board of state auditors may authorize, for the proper administration of said funds and the performance of the duties imposed upon him by the provisions of this act, at such compensation as may be fixed by said board of state auditors, and may also remove them. The commissioner of insurance and such deputies and assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board, but all such salaries and expenses so authorized by the provisions of this act shall be charged to and paid out of said accident fund. He shall include in his annual report a full and correct statement of the administration of such fund, showing its financial status and outstanding obligations, the claims and the amount paid on each claim, claims not paid, claims contested and why, and general statistics in respect to all business transacted by him under the provisions of this act.

Sec. 10. Disbursements from said accident fund shall be made only upon warrants approved by the board of state auditors upon vouchers therefor transmitted to it by the commissioner of insurance. If at any time there shall not be sufficient money in said fund wherewith to pay the same, the employer on account of whose workmen it was that such warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid, with interest thereon at the legal rate, from the date of such payment to the date such next following contribution becomes payable, and if the amount of the credit shall exceed the amount of the contribution, he shall be repaid such excess.

Sec. 11. If this act shall be thereafter repealed, all moneys which are in the accident fund at the time of such repeal shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard, however, to the obligation incurred and existing to pay compensation under the provisions of this act.

PART VI.

Sec. 1. If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risk, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

Sec. 2. If the provisions of this act relating to compensation for injuries to or death of workmen shall be repealed or adjudged invalid or unconstitutional, the period intervening between the occurrence of an injury or death and such repeal, or the final adjudication of invalidity, shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death, but the amount of any compensation which may have been paid for any such injury shall be deducted from any judgment for damages recovered on account of such injury.

Sec. 3. This act shall not affect any cause of action existing or pending before it went into effect.

Sec. 4. The provisions of this act shall apply to employers and workmen en-

gaged in intrastate commerce, and also to those engaged in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state, may, subject to the approval of the industrial accident board, and so far as not forbidden by any act of Congress, voluntarily accept and become bound by the provisions of this act in like manner and with the same force and effect in all respects as is hereinbefore provided for other employers and their workmen.

Sec. 5. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed.

Sec. 6. The legislature intends that Part V. of this act shall be deemed separate from the other parts thereof, so that if said Part V. should fail or be adjudged invalid or unconstitutional it shall in no way affect any other part of this act.

Sec. 7. To carry out the provisions of this act there is hereby appropriated for the expenses of the industrial accident board for the fiscal year ending June thirtieth, nineteen hundred thirteen, and annually thereafter, the sum of \$25,000. The auditor general shall add to and incorporate into the state tax the sum of \$25,000 annually, which said sum shall be included in the state taxes apportioned by the auditor general on all taxable property of the state, to be levied, assessed, and collected as other state taxes, and when so assessed and collected to be paid into the general fund to reimburse said fund for the appropriation made by this act.

Sec. 8. The provisions of this act shall take effect and be in force from and after September first, nineteen hundred twelve.

The statute of Michigan authorizing the formation of mutual liability insurance companies is as follows:

Sec. 1. Any number of persons, firms, partnership associations, or corporations, not less than five, who have become subject to the provisions of the laws of Michigan relating to employers' liability and workmen's compensation, and who own or operate mills, factories, manufacturing establishments of any and every kind, buildings, stores, hotels, and mercantile establishments, or any combination of manufacturing and mercantile business, mines, quarries, blast furnaces, railroads, and transportation companies, telegraph and telephone companies, or who are engaged in the production or supplying of gas and electricity for lighting, fuel, power, or other purposes; printing, publishing and book-making, or in carrying on any other lawful business in the state of Michigan, may, subject to the approval of the industrial accident board of Michigan, associate together and form an incorporated company for the purpose of mutual insurance of its members against liability for any and all payments which may become due and payable to their employees under the provisions of law for death benefits, disability benefits, or otherwise, as hereinbefore set forth: Provided, however, that the persons, firms, or corporations so associating themselves together for the organization of such company shall have on their pay rolls at that time not less than five thousand employees: and Provided further,

that the industrial accident board of Michigan may in its discretion limit the employers forming or joining in the organization of any such company to those engaged in industrial operations of the same general character, or in operations in which the risk and hazards incurred by their employees are more or less similar in nature and extent.

Sec. 2. Such employers so associating shall prepare in triplicate articles of association as hereinafter specified, which shall first be submitted to the industrial accident board and the commissioner of insurance for their approval, and when approved, one copy thereof shall be filed in the office of the commissioner of insurance, one copy in the office of the secretary of state and the other copy with the county clerk in the county where the principal office of such company will be maintained. Such articles of association shall be signed by all the incorporators, and shall be acknowledged by them, or by their duly authorized officers or agents, before some officer of the state duly authorized to take acknowledgment of deeds.

Sec. 3. Such articles of association shall set forth:

First. The names of the persons, firms, partnership associations, and corporations associating in the first instance, their respective residences, the nature of the business in which they are engaged, and the number of persons employed therein by each of them;

Second. That each and all of such incorporators have elected, with the approval of the industrial accident board, to become subject to the provisions of this act, and are forming this corporation for the purpose of mutually insuring their members against liability for any and all payments which may become due and payable to their employees under the provisions of this act;

Third. The name by which such corporation shall be known;

Fourth. The period for which the company is incorporated, which shall not exceed thirty years;

Fifth. The number of directors, which shall be not less than five, nor more than fifteen, and the names of the directors for the first year;

Sixth. The place where the office of the company shall be located, which shall be within the state of Michigan.

Sec. 4. Any company formed under this act shall be deemed a body corporate and politic in fact and in name, and shall be subject to all the provisions of the statutes in relation to corporations, so far as they are applicable.

Sec. 5. The incorporators of any company organized under this act shall have power to make such by-laws not inconsistent with the constitution or laws of this state, as may be deemed necessary for the government of its officers and members, and the conduct of its affairs, the admission of new members, and regulations governing the assessment and collection of premiums and assessments; but such by-laws shall not become operative until a true copy thereof shall have been filed with and approved by the industrial accident board.

Sec. 6. Upon the approval of the articles of association of such company by the industrial accident board and the commissioner of insurance, and upon filing the same with the commissioner of insurance, with the secretary of state and with the county clerk of the county where the principal office of said company will be kept, the commissioner of insurance shall grant a license to such company to issue policies.

Sec. 7. The board of directors shall determine the amount of the premiums

of assessments which the members of such company shall pay for such insurance, in accordance with the nature of the business in which they are engaged, and the probable risk of injury to their employees under existing conditions. The board may also prescribe when and in what manner such premiums shall be paid, and may change the amount thereof both in respect to any or all of its members from time to time, as circumstances may require and the conditions of their respective plants, establishments, or places of work in respect to the safety of their employees may justify, but all such premiums or assessments shall be levied on a basis that shall be fair, equitable, and just as among such members; and it shall be the duty of such board of directors at the beginning of each fiscal year, to call for the required payment of premiums in such amount as shall, in the judgment of said industrial accident board, be sufficient to enable such company to pay all sums which may become due and payable during the following year, to the employees or any of its members under the provisions of this act, and also the expenses of conducting its business.

Sec. 8. The company shall in its by-laws and policies fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds. Such contingent liability of a member shall not be less than an amount equal to the liability imposed by this act and of the act to provide compensation for the accidental injury or death of employees.

Sec. 9. If the company is not possessed of cash funds so that it has unearned premiums for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon the members liable to assessment therefor in proportion to their several liability. Every members shall pay his proportional part of any assessment which may be laid by the board of directors, in accordance with the law and his contract, on account of injuries sustained and expenses incurred while he is a member of such company.

Sec. 10. The board of directors may, from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year after retaining sufficient sums to pay all the compensation which may be payable on account of injuries sustained and expenses incurred. All premiums, assessments, and dividends shall be fixed and determined in accordance with the experience of said company, but all the funds of the company, and the contingent liability of all the members thereof, shall be available for the payment of any claim against the company.

Sec. 11. Any proposed premium or assessment required of, or any dividend or distribution made to, the members, shall be filed with the industrial accident board, and shall not take effect until approved by said board after such investigation as it may deem necessary.

Sec. 12. The board of directors may make and enforce reasonable rules and regulations, not in conflict with the laws of this state, for the prevention of injuries on the premises of members, and for this purpose the inspectors of the company shall have free access to all such premises during regular working hours. Any member neglecting to provide suitable safety appliances as provided by law or as required by the board of directors may be expelled by a majority vote of all the members. Any member, or employee of any member, aggrieved by any such rule or regulation, may petition the industrial accident board for review, and it may affirm, amend, or annul the rule or regulation.

Sec. 13. Any member of said company, who has complied with all its rules, regulations, and demands, may withdraw therefrom at the expiration of the period of one year for which he has elected to become subject to the provisions of this act: Provided, however, that he shall give written notice of such withdrawal to said company at least thirty days before the expiration of such period: and Provided further, that if at the time of such withdrawal liability may exist against such member and against said company for compensation to employees who have been theretofore killed or injured as hereinbefore provided, such member shall either relieve himself and said company from such liability in the manner provided in part four, section four of this act, or shall otherwise protect and indemnify said company against such liability in such reasonable manner as may be required by the board of directors.

Sec. 14. The business year of every company organized, existing, or doing business in this state, under and by virtue of the provisions of this act, shall close on the thirty-first day of December in each year, and every such company shall within sixty days thereafter prepare, under oath of its president and secretary, and file in the office of the commissioner of insurance of this state, and also with said industrial accident board, a detailed statement showing its assets and how invested, liabilities, receipts from premiums and all other sources, an itemized account of all expenditures, salaries of officers, number of policies or certificates in force, amount insured thereby, claims paid, and amount paid on each claim, claims reported but not paid, claims contested and why, and shall answer such other questions as the commissioner of insurance, who shall furnish blanks for that purpose, may require, in order to ascertain its true financial condition. The commissioner shall publish such annual statements in detail in his annual report.

Sec. 15. If any officer of the company shall falsely make oath to any certificate required to be filed with the insurance commissioner, he shall be guilty of perjury.

Sec. 16. Any such company formed under this act shall have power to amend its articles of association and by-laws at its regular annual meeting or at special meetings called and held as provided in its by-laws, but said amendments shall, before they become operative, be approved and filed in the same manner as the original articles and by-laws.

Sec. 17. Any such company formed under this act shall have power to own, hold, and acquire such real and personal property as shall be necessary for the transaction of its business.

Sec. 18. Any company formed under this act may sue and be sued in any court of law or equity, with the same rights and obligations as a natural person, and in addition to the powers hereinbefore enumerated, shall possess and exercise all such rights and powers as are necessarily incidental to the exercise of the powers expressly granted herein.

Montana.—The Montana statute (Laws of 1909, chap. 67)² provides as follows:

Sec. 1. All workmen, laborers, and employees employed in and around any

² Pronounced unconstitutional on account of some formal defects, but treated as a valid exercise of the police power in *Cunningham v. Northwestern Improv. Co.* (1911) 44 Mont. 180, 119 Pac. 554.

coal mines, or in and around any coal washers in which coal is treated, except office employees, superintendents, and general managers, shall be insured, in accordance with the provisions of this act, against accidents occurring in the course of their occupations.

Sec. 2. All corporations, partnerships, associations, or persons engaged in the business of operating any coal mine or coal washers in the state of Montana shall pay to the auditor of the state, within five days after the monthly wages at the particular mine shall have been paid, 1 cent per ton on the tonnage of coal mined and shipped, or sold locally, or having been mined is ready for shipment or sale during the month for which the wages were paid; and all persons mentioned in § 1, employed in and about coal mines, shall allow to be deducted from their gross monthly earnings 1 per cent thereof, the deduction to be made by the agent, manager, or foreman of any corporation, association, partnership, person, or persons engaged in the business of operating any coal mine or coal washer, and paid to the state auditor within five days after such monthly wages have been paid.

Sec. 3. The agent, manager, foreman, or accountant of any corporation, partnership, association, persons, or persons engaged in mining coal in Montana, shall, on or before the fifth day succeeding the pay day at his respective mine, make report under oath to the state auditor as to the tonnage mined and subject to the payment of 1 per cent per ton thereon; and stating the gross earnings subject to the 1 per cent deduction as provided in this act, accompanied by a certified check in full for the amount of the tax provided in § 2 of this act. It shall be unlawful for any person, employer, employee, corporation, partnership, association, or union to make any contract waiving, avoiding, or affecting the full legal effect of this act.

Sec. 4. It is hereby made the duty of the state auditor to receive all moneys as provided for in this act, and to send the proper acknowledgment to the person making such remittance. The auditor shall pay all moneys so received by him to the state treasurer, who shall keep such sums in safe custody in a distinct fund to be known as the employers and employees' co-operative insurance and total permanent disability fund. The state treasurer must invest the surplus of this fund in safe and convertible state, county, or city bonds, or bonds of the United States. All interest accruing from such investments shall be accredited to this insurance fund. The bond of the state treasurer shall be liable for such funds, and it shall be his duty to keep accurate accounts of the receipts and disbursements of such money.

Sec. 5. The auditor of state shall keep full statistics of the operation of this function of this department in the event of death by accident of an employee insured under this act, who shall have come to his death in the course of his employment and by causes arising therein. The auditor of state, upon being satisfied by adequate evidence of such death, shall issue a warrant upon the state treasurer to persons dependent upon the deceased, these warrants to issue in the following order: (1) To surviving wife and child, or children, in equal shares, and if neither wife or child, or children be alive, then (2) to surviving parents who are dependent, or partially so, upon the deceased; if none, then (3) to such other relative of the deceased as survive him and are dependent upon him, in the sum of three thousand (\$3,000) dollars.

A workman receiving injuries which permanently incapacitate him from the

performance of work shall receive a compensation monthly, not to exceed one dollar (\$1) a day for each working day. Compensation for permanent injury shall not be allowed until after the expiration of twelve weeks from the time such injuries were sustained, provided that the medical practitioner examines and pronounces the injury as being permanent; compensation may then be allowed from commencement of disability. The auditor of state, however, may, when in his judgment he deems it advisable, use so much of the funds as is necessary in the procuring of a medical practitioner, for the purpose of examination or treatment under this act; for such injuries as herein mentioned compensation shall continue during disability, or until settlement if effected as provided for in § 9 of this act. Total or permanent disability shall consist of the loss of both legs or both arms, the total loss of eyesight or paralysis, or other conditions incapacitating him from work, caused by accident, or injuries received during employment as specified by this act: Provided, that, if death, as a result of the injury, ensues at a period not longer than one year from date of accident the sum of three thousand dollars (\$3,000) shall be paid the deceased workman's dependents as hereinbefore provided. The representatives of a foreigner, except the widow or dependent children, who were not living within the country at the time of the accident, shall have no claim for the compensation provided for in this act. Such foreign person shall file their foreign address, if married, and the office of their employer with whom they are employed, and duplicate thereof, with the state auditor, giving the wife's name and dependent children, and such other identification as may be required by the auditor of state. Loss of any limb or eye, caused by accident to a workman while employed as provided for in this act, shall be compensated for in the sum of one thousand (\$1,000) dollars: Provided, that in the event there shall be no funds available in the fund to pay the auditor's warrant when drawn, the same shall draw interest out of the fund at the rate of 1 per cent per annum until such warrant is called for payment by the treasurer, which shall be as soon as the fund is sufficient to pay the same, with its interest when due.

Sec. 6. Where a workman is entitled to monthly payments under this act, he shall file with the auditor of state his application for such, together with a certificate from the county physician of the county wherein he resides, attested before a notary public.

Sec. 7. If any person or persons, company or corporation who is then paying into this insurance fund shall believe that any person or persons are obtaining, or having made application to obtain, benefits thereunder improperly or fraudulently, and shall file his written request that such person's claim be investigated, the state auditor must, upon the receipt of such request, request the secretary of the state board of health to make an examination for the purpose of this act, and his certificate as to the condition of the person or persons with reference to their rights to benefit under this act shall be conclusive evidence as to his condition.

Sec. 8. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation under this act shall be suspended until such examination takes place, and shall absolutely cease unless he submits himself for an examination within one month after being required to do so.

Sec. 9. When any monthly payment has been made to a workman for any

period whatever, the liability under this act may, on the application by, or on behalf of the workman, be redeemed by the payment of a lump sum, which in no instance shall be in excess of the amount specified as death indemnity, and all monthly payments made prior shall be deducted from such settlement.

Sec. 10. The auditor of state shall report in January of each year to the governor, of the experience and business of this function of his department, and shall have plenary power to determine all disputed cases which may arise in its administration, not herein provided for, and to recommend in his report the rates or premium necessary in order to preserve such fund, and shall order paid such indemnification as herein provided. He shall have power to define the insurance provisions of this act by regulations not inconsistent therewith, and shall prescribe the character of the monthly or other reports required of the parties liable hereunder, and the character of the proofs of deaths, or total permanent disability, and shall have power to make all other orders and rules necessary to carry out the true intent of this act.

Sec. 11. No money paid or payable in respect of insurance or monthly compensation under this act shall be capable of being assigned, charged, taken in execution, or attached, nor shall the same pass to any other persons by operation of law; and the acceptance of pecuniary benefit under the provisions of this act shall operate to release the person or persons, corporation, partnerships, or associations causing such injuries or death for which benefits are so claimed, who shall have paid the assessment provided in § 2 of this act, and also the employer, officers, and agents thereof from all liability and claim arising from such injuries or death. The commencement of a suit to recover for such injuries or death shall operate as a forfeiture of the right to benefit under this act.

Sec. 12. A manager, agent, foreign, accountant, person or persons who represent any corporation, partnership, association, person, or persons engaged in the mining or management of any coal mines or coal washers in Montana, or person or persons liable for the payment herein provided for, who shall violate the intent of this act by inaccurate reports of tonnage of coal produced by them, or the earnings of employees in their employ, or who in any manner hinders or obstructs the auditor of state in ascertaining facts bearing upon any case provided for in this act, or who may refuse correctly to make out such reports as are required by this act, or as requested by the auditor of state, or submit to its provisions, when liable therefor, or who shall fraudulently obtain benefits hereunder shall be fined for each offense the sum of not less than one hundred (\$100) dollars nor more than five hundred (\$500) dollars, and imprisonment in the county jail for a period of not less than one month nor more than six months, or by both such fine and imprisonment.

The proceeds of all fines shall be forwarded to the state treasurer and by him credited to the insurance fund.

Sec. 13. This act to be in full force and effect from and after the first day of October, nineteen hundred and ten, benefits to commence four months thereafter.

Nevada.—The Nevada act (Laws of 1911, chap. 183) provides as follows:

Sec. 1. If in any employment to which this act applies personal injury dis-
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abling a workman from his regular service for more than ten days, or death by accident, arising out of and in the course of employment is caused to a workman, the workman so injured, or in case of death, the member of his family, as hereinafter defined, shall be entitled to receive from his employer, and the said employer shall be liable to pay, the compensation provided for in this act: Provided, that recovery hereunder shall not be barred where such employee may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employees injury; and it shall not be a defense: (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (2) that the injury or death was caused, in whole or in part, by the want of ordinary or reasonable care of a fellow servant. No contract, rule, or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

Sec. 2. "Employer" includes any body of persons, corporate or incorporate, and the legal personal representative of a deceased employer. "Workman" includes every person who is engaged in an employment to which this act applies, whether by way of manual labor or otherwise, and where his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependents or other person to whom compensation is payable. "Dependents" means wife, father, mother, husband, sister, brother, child or grandchild: Provided, that they were wholly or partly dependent upon the earnings of the workman at the time of his death.

Sec. 3. This act shall apply to workmen engaged in manual or mechanical labor in the following employments within this state, each of which is hereby determined to be especially dangerous, in which from the nature, condition, or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily, or substantially unavoidable, and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

(a) The erection or demolition of any bridge or building in which there is, or in which the plans or specifications require, iron or steel framework;

(b) The operation of elevators, elevating machines, or derricks, or hoisting apparatus used within or on the outside of any bridge or building for the conveying of material in connection with the erection or demolition of such bridge or building;

(c) Work on scaffolds of any kind elevated 20 feet or more above the ground, water, or floor beneath, in the erection, construction, painting, alteration, or repair of buildings, bridges, or structures;

(d) Construction, operation, alteration, or repair of wires, cables, switchboards, or apparatus charged with electric current;

(e) The operation on railroads of locomotives, engines, trains, motors, or cars propelled by gravity, steam, electricity, or other mechanical power, or the

construction or repairs of railroad tracks and roadbeds over which such locomotives, engines, trains, motors, or cars are operated;

(f) Construction, operation, alteration, or repairs of locomotives, engines, trains, motors, or cars in or about the shops, roundhouses, or other places, where the same is done;

(g) Construction, operation, alteration, or repairs to mills, smelters, or mines, including every shaft or pit in the course of being sunk, and every cross cut, drift, station, whinze, level, or inclined planes through which workmen pass to and from work, and all works, machinery, tramways, ladders, or passages, both below ground and above ground, in and adjacent to any mine;

(h) All work necessitating dangerous proximity to gun-powder, blasting powder, dynamite, or any other explosives, where the same are used as instrumentalities of the industry;

(i) The construction of tunnels.

The employers to whom this act shall apply shall be any person or persons, association, such industry as aforesaid.

Sec. 4. Notice of accidents must be given partnership or corporation carrying on any to the employer as soon as practicable after the happening thereof, and the claim for compensation with respect to such accident within six months from the occurrence of such accident causing the injury, or in case of death, within six months from the time of death: Provided, always, that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defense by the want, defect, or inaccuracy, and that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, if known, the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person upon whom it is to be served, or the notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered. Where the employer is a body of persons, natural or artificial, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at the office, or, if there be more than one office, any one of the offices of such body.

Sec. 5. The amount of compensation in case death results from injury, or for death accruing within five years as a result of injury, shall be:

(a) If the workman leave any person or persons who at the time of the accident were wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of \$2,000, whichever of these sums is the greater, but not exceeding in any case \$3,000: Provided, that the total sum of any weekly payments made under this act shall be deducted from such sum; and if the period

of the workman's employment by the same employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be nine hundred and thirty-six times his average daily earnings during the period of his actual employment under the same employer;

(b) If the workman leave only person or persons who at the time of the accident were partly dependent upon his earnings, a sum equal to 50 per cent of the amount payable under the foregoing provisions of this section;

(c) If the workman leave no person at the time of the accident who was dependent upon his earnings, the reasonable expenses of his medical attendance and burial, not exceeding in all \$300.

Whatever sum is payable under this section in case of death of the injured workman shall be paid to his legal representatives for the benefit of such dependents, and if he leaves no such dependents, then to the public administrator, for the benefit of the person or persons to whom the expenses of medical attendance and burial are due.

Sec. 6. The amount of compensation in case of total or partial disability resulting from injury shall be:

(a) A weekly payment during the disability, beginning within ten days after the injury, 60 per cent of his average weekly earnings in such employment during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, so long as there is complete disability; and that proportion of the said percentage which the depleted earning capacity for that service bears to the total disability when the injury is only partial, but in no events shall the total of all payments under this act exceed the sum of \$3,000;

(b) In addition to the foregoing payments, if the injured person lose both feet or both hands, or one foot and one hand, or both eyes or one eye and one foot or one hand, he shall receive, during a full period of five years, 40 per cent of his average weekly earnings, or if he lose one foot, one hand or one eye, the additional compensation therefor shall be 15 per cent of his average weekly earnings, the amount of such earnings to be computed in the same manner as the foregoing 60 per cent: Provided, that in no case shall all the payments received herein exceed in any month the whole wages earned when the injury occurs, nor shall the added percentages continue longer than to make all payments aggregate \$3,000.

Sec. 7. Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. A copy of the report of the examining physician shall be furnished to the workman. If a dispute then exists as to the workman's condition or amount of weekly compensation such dispute shall be determined by arbitration under this act, or by judicial procedure as hereinafter provided: Provided, also, that any and all disputes arising under this act may be first submitted to a board of arbitration, and in case of failure to settle it, resort may be had to courts of justice.

Sec. 8. Arbitration proceedings shall be as follows: The employer and the workman may each choose one arbitrator, the two arbitrators thus chosen shall

choose a third, and the three arbitrators shall hear the facts of the dispute within three months after having been chosen, and within two weeks thereafter, render a decision, which, if unanimous, shall be final and binding on both parties.

Sec. 9. On failure of the board of arbitration to reach an adjustment of the dispute above referred to, either party may apply to a court of competent jurisdiction, and have an adjudication as in any other controversy. And the findings and judgment of the court shall be conclusive on all parties concerned. Said courts may compel the attendance of witnesses and the production of evidence, as in all other cases, provided for by law, and the judgment of said court may continue and diminish or increase the weekly payments, subject to the maximum provided in this act. The prevailing party in any action, brought under the provisions of this act, shall be entitled to his costs of suit and reasonable attorney's fees: Provided, that nothing in this act shall operate to defeat the constitutional right of appeal.

Sec. 10. If any employer who shall be the principal enters into a contract with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, the said principal shall be liable to pay to any workman employed in the execution of the work, any compensation under this act, which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from the principal, then reference to the principal shall be substituted for reference to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workman under the contractor or employer by whom he is immediately employed. Where such principal is liable to pay compensation he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section. Nothing in this section shall be construed as preventing a workman from recovering compensation under this act, from the contractor or subcontractor, instead of the principal; nor shall this section apply in any case where the accident shall occur elsewhere than on or in or about the premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

Sec. 11. Nothing in this act contained shall be held or deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for death or accidental injury. But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation of damages for or on account of such death or injury. The right of election or choice of remedies shall be exercised solely by such workman or his representatives.

Sec. 12. A claim for compensation for the injury or death of any employee or any reward or judgment entered thereon shall be entitled to a preference over the other debts of the employer if and to the same extent as the wages of such employee shall be so preferred, but this section shall not impair the lien of any judgment entered upon any award.

Sec. 13. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an

assignment of any assignable cause of action in tort which the employee or his personal representative may have against any other party for such injury or death, and such employer may enforce in his own name the liability of such other party.

Sec. 14. Nothing in this act contained shall be construed as impairing the right of parties interested after the injury or death of an employee to compromise or settle upon such terms as they may agree upon any liability which may be claimed to exist under this act on account of such injury or death, nor as conferring upon the dependents of any injured employee any interest which he may not divert by such settlement or for which he or his estate shall in the event of such settlement by him be accountable to such dependents or any of them.

Sec. 15. This act shall take effect July 1, 1911.

New Hampshire.—The New Hampshire act (Laws 1911, chap. 163) is as follows:

Sec. 1. This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions, or means of prosecution of such work, or dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid. (a) The operation on steam or electric railroads of locomotives, engines, trains, or cars, or the construction, alteration, maintenance, or repair of steam railroad tracks or roadbeds over which such locomotives, engines, trains, or cars are or are to be operated. (b) Work in any shop, mill, factory, or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor. (c) The construction, operation, alteration, or repair of wires or lines of wires, cables, switch-boards, or apparatus charged with electric currents. (d) All work necessitating dangerous proximity to gunpowder, blasting powder, dynamite, or any other explosives, where the same are used as instrumentalities of the industry, or to any steam boiler owned or operated by the employer: Provided, injury is occasioned by the explosion of any such boiler or explosive. (e) Work in or about any quarry, mine, or foundry. As to each of said employments it is deemed necessary to establish a new system of compensation for accidents to workmen.

Sec. 2. If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, by failure of the employer to comply with any statute, or with any order made under authority of law, or by the negligence of the employer or any of his or its officers, agents, or employees, or by reason of any defect or insufficiency due to his, its, or their negligence in the condition of his or its plant, ways, works, machinery, cars, engines, equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him, or, in case of his death, to his personal representatives for all damages now recoverable under the provisions of chapter 191 of the Public Statutes. The workman shall not be held

to have assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed. The damages provided for by this section shall be recovered in an action on the case for negligence.

Sec. 3. The provisions of § 2 of this act shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this act as contained in the succeeding sections, and shall have satisfied the commissioner of labor of his financial ability to comply with its provisions, or shall have filed with the commissioner of labor a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this act. Such bond shall be enforced by the commissioner of labor for the benefit of all persons to whom such employer may become liable under this act in the same manner as probate bonds are enforced. The commissioner may, from time to time, order the filing of new bonds, when in his judgment such bonds are necessary; and after thirty days from the communication of such order to any employer, such employer shall be subject to the provisions of § 2 of this act until such order has been complied with. The employer may at any time revoke his acceptance of the provisions of the succeeding sections of this act by filing with the commissioner of labor a declaration to that effect, and by posting copies of such declaration in conspicuous places about the place where his workmen are employed. Any person aggrieved by any decision of the commissioner under this section may apply by petition to any justice of the superior court for a review of such decision and said justice on notice and hearing shall make such order affirming, reversing or modifying such decision as justice may require; and such order shall be final. Such employer shall be liable to all workmen engaged in any of the employments specified in § 1, for any injury arising out of and in the course of their employment, in the manner provided in the following sections of this act. Provided, that the employer shall not be liable in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed, and Provided, that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the intoxication, violation of law, or serious or wilful misconduct of the workman. Provided, further, that the employer shall at the election of the workman, or his personal representative, be liable under the provisions of § 2 of this act for all injury caused in whole or in part by wilful failure of the employer to comply with any statute, or with any order made under authority of law.

Sec. 4. The right of action for damages caused by any such injury, at common law, or under any statute in force on January one, nineteen hundred and eleven, shall not be affected by this act, but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this act, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this

act against the employer therefor, he shall be barred from all benefit of this act in regard thereto.

Sec. 5. No proceeding for compensation under this act shall be maintained unless notice of the accident as hereinafter provided has been given to the employer as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and during such disability, and unless claim for compensation has been made within six months from the occurrence of the accident, or in case of the death of the workman, or in the event of his physical or mental incapacity, within six months after such death or the removal of such physical or mental incapacity, or in the event that weekly payments have been made under this article, within six months after such payments have ceased, but no want or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings unless the employer proves that he is prejudiced by such want, defect, or inaccuracy. Notice of the accident shall apprise the employer of the claim for compensation under this article, and shall state the name and address of the workman injured, and the date and place of the accident. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business.

Sec. 6. (1) The amount of compensation shall be, in case death results from injury: (a) If the workman leaves any widow, children, or parents, resident of this state, at the time of his death, then wholly dependent on his earnings, a sum to compensate them for loss, equal to one hundred and fifty times the average weekly earnings of such workman when at work on full time during the preceding year during which he shall have been in the employ of the same employer, or if he shall have been in the employment of the same employer for less than a year, then one hundred and fifty times his average weekly earnings on full time for such less period. But in no event shall such sum exceed \$3,000. Any weekly payments made under this act shall be deducted from the sum so fixed. (b) If such widow, children, or parents at the time of his death are in part only dependent upon his earnings, such proportion of the benefits provided for those wholly dependent as the amount of the wage contributed by the deceased to such partial dependents at the time of injury bore to the total wage of the deceased. (c) If he leaves no such dependents, the reasonable expenses of his medical attendance and burial, not exceeding \$100. Whatever sum may be determined to be payable under this act in case of death of the injured workman shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the persons to whom the expenses of medical attendance and burial are due.

(2) Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, not exceeding 50 per centum of his average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been in the employment of the same employer for less than a year, then a weekly payment of not exceeding one half the average weekly earnings on full time for such less period. In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average earnings of

the workman before the accident and the average amount he is able to earn thereafter as wages in the same employment or otherwise. In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise after the accident, but shall amount to one half of such difference. In no event shall any compensation paid under this act exceed the damage suffered, nor shall any weekly payment payable under this act in any event exceed \$10 a week or extend over more than three hundred weeks from the date of the accident. Such payment shall continue for such period of three hundred weeks. Provided total or partial disability continue during such period. No such payment shall be due or payable for any time prior to the giving of the notice required by § 5 of this act.

Sec. 7. Any workman entitled to receive weekly payments under this act is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the workman, within two weeks after the injury, and thereafter at intervals not oftener than once in a week. If the workman refuses to submit to such examination, or obstructs the same, his right to weekly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

Sec. 8. In case an injured workman shall be mentally incompetent at the time when any right or privilege accrues to him under this act, the guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such right or privilege with the same force and effect as if the workman himself had been competent and had claimed or exercised any such right or privilege, and no limitation of time in this act provided for shall run so long as said incompetent workman has no guardian.

Sec. 9. Any question as to compensation which may arise under this act shall be determined by agreement or by an action at equity, as hereinafter provided. In case the employer fail to make compensation as herein provided, the injured workman, or his guardian, if such be appointed, or his executor or administrator, may then bring an action to recover compensation under this act in any court having jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties. Such action shall be by petition in equity, which may be made returnable at the appropriate term of the superior court or may be filed in the office of the clerk of the superior court and presented in term time or vacation to any justice of said court, who on reasonable notice shall hear the parties and render judgment thereon. The judgment in such action if in favor of the plaintiff shall be for a lump sum equal to the amount of payments then due and prospectively due under this act. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the probate court in which such executor or administrator is appointed, in accordance with this act.,

on petition of any party interested, on such notice as such court may direct. Any employer who has declared his intention to act under the compensation features of this act shall also have the right to apply by similar proceedings to the superior court or to any justice thereof for a determination of the amount of the weekly payments to be paid the injured workman, or of a lump sum to be paid the injured workman in lieu of such weekly payments; and either such employer or workman may apply to said superior court or to any justice thereof in similar proceeding for the determination of any other question that may arise under the compensation feature of this act; and said court or justice, after reasonable notice and hearing, may make such order as to the matter in dispute and taxable costs as justice may require.

Sec. 10. Any person entitled to weekly payments under this act against any employer shall have the same preferential claim therefor against the assets of the employer as is allowed by law for a claim by such person against such employer for unpaid wages or personal services. Weekly payments due under this act shall not be assignable or subject to levy, execution, attachment or satisfaction of debts. Any right to receive compensation under this act shall be extinguished by the death of the person entitled thereto.

Sec. 11. No claim of any attorney at law for any contingent interest in any recovery under this act for services in securing such recovery or for disbursements shall be an enforceable lien on such recovery, unless the account of the same be approved in writing by a justice of the superior court or, in case the same be tried in any court, by the justice presiding at such trial.

Sec. 12. Every employer subject to the provisions of this act shall from time to time make to the commissioner of labor such returns as to its operation as said commissioner may require upon blanks to be furnished by said commissioner. Any employer failing to make such returns when required by said commissioner shall, until such returns are made, be subject to the provisions of § 2 of this act.

Sec. 13. This act shall take effect January first, nineteen hundred and twelve.

New Jersey.—The New Jersey act (Laws 1911, chap. 95) is as follows:

Sec. I., 1. Employee entitled to compensation for accidental injury. Fact determined by jury. When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer in the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not wilfully negligent at the time of receiving such injury, and the question of whether the employee was wilfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence.

2. Certain pleas abolished. The right to compensation as provided by § I. 1, of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employee; or that the injured employee assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished.

3. Contract not to bar liability. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer under this act for injury caused to an employee of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition. This paragraph shall apply only to actions arising under section I.

4. Application of act in case of death. The provisions of paragraphs 1, 2, and 3 shall apply to any claim for the death of an employee arising under an act entitled "An Act to Provide for the Recovery of Damages in Cases Where the Death of a Person is Caused by Wrongful Act, Neglect, or Default," approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto.

5. Burden of proof on defendant. In all actions at law brought pursuant to section I. of this act, the burden of proof to establish wilful negligence in the injured employee shall be upon the defendant.

6. Claim against compensation. Proviso. No claim for legal services or disbursements pertaining to any demand made or suit brought under the provisions of this act shall be an enforceable lien against the amount paid as compensation, unless the same be approved in writing by the judge or justice presiding at the trial, or in case of settlement without trial, by the judge of the circuit court of the district in which such issue arose: Provided, that if notice in writing be given the defendant of such claim for legal services or disbursements, the same shall be a lien against the amount paid as compensation, subject to determination of the amount and approval hereinbefore provided.

Sec. II. 7. Compensation under agreement. Exceptions. When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II. of this act, compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employee, according to the schedule contained in paragraph 11, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

8. Agreement deemed surrender of rights to other method. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in section II. of this act, and an acceptance of all the provisions of section II. of this act, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

9. Employment subject to this act. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II. of this act, and

unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II. of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II. of this act and have agreed to be bound thereby. In the employment of minors, section II. shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

10. Termination of contract. The contract for the operation of the provisions of section II. of this act may be terminated by either party upon sixty days' notice in writing prior to any accident.

11. Following is the schedule of compensation:

(a) Schedule of payments. Temporary disability. Proviso. For injury producing temporary disability, 50 per centum of the wages received at the time of injury, subject to a maximum compensation of \$10 per week and a minimum of \$5 per week: Provided, that if at the time of injury the employee receives wages of less than \$5 per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(b) Complete disability. Proviso. For disability total in character and permanent in quality, 50 per centum of the wages received at the time of injury, subject to a maximum compensation of \$10 per week and a minimum of \$5 per week: Provided, that if at the time of injury the employee receives wages of less than \$5 per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not however, beyond four hundred weeks.

(c) Partial disability. For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit:

Thumb. For the loss of a thumb, 50 per centum of daily wages during sixty weeks.

First finger. For the loss of a first finger, commonly called index finger, 50 per centum of daily wages during thirty-five weeks.

Second finger. For the loss of a second finger, 50 per centum of daily wages during thirty weeks.

Third finger. For the loss of a third finger, 50 per centum of daily wages during twenty weeks.

Fourth finger. For the loss of a fourth finger, commonly called little finger, 50 per centum of daily wages during fifteen weeks.

Phalange. The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one half of such thumb, or finger, and compensation shall be one half the amounts above specified.

More than one phalange. Proviso. The loss of more than one phalange shall be considered as the loss of the entire finger or thumb: Providing, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, 50 per centum of daily wages during thirty weeks.

Other toes. For the loss of one of the toes other than a great toe, 50 per centum of daily wages during ten weeks.

Phalange of toe. For the loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe, and compensation shall be one half of the amount above specified.

More than one phalange. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. For the loss of a hand, 50 per centum of daily wages during one hundred and fifty weeks.

Arm. For the loss of an arm, 50 per centum of daily wages during two hundred weeks.

Foot. For the loss of a foot, 50 per centum of daily wages during one hundred and twenty-five weeks.

Leg. For the loss of a leg, 50 per centum of daily wages during one hundred and seventy-five weeks.

Eye. For the loss of an eye, 50 per centum of daily wages during one hundred weeks.

Both hands, etc. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (b).

In other cases. In all other cases in this class the compensation shall bear such relation to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. Should the employer and employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of paragraph 20 hereof.

Maximum and minimum amount. The amounts specified in this clause are all subject to the same limitations as to maximum and minimum as are stated in clause (a).

12. Basis of computation in case of death. In case of death compensation shall be computed but not distributed on the following basis:

(1) Actual dependents.

If orphan or orphans, a minimum of 25 per centum of wages of deceased, with 10 per centum additional for each orphan in excess of two, with a maximum of 60 per centum.

If widow alone, 25 per centum of wages.

If widow and one child, 40 per centum of wages.

If widow and two children, 45 per centum of wages.

If widow and three children, 50 per centum of wages.

If widow and four children, 55 per centum of wages.

If widow and five children or more, 60 per centum of wages.

If widow and father or mother, 50 per centum of wages.

If grandparents, grandchildren, or minor, or incapacitated brothers or sisters, 25 per centum of wages.

Distribution of compensation in case of death. Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this state providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will.

(2) No dependents.

Sickness and burial. Expense of last sickness and burial not exceeding \$200.

Orphans and minors. In computing compensation to orphans or other children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

Weekly compensation. Proviso. Duration. The compensation in case of death shall be subject to a maximum compensation of \$10 per week and a minimum of \$5 per week: Provided, that if at the time of injury the employee receives wages of less than \$5 per week, then the compensation shall be the full amount of such wages per week. This compensation shall be paid during three hundred weeks.

Aliens excepted. Compensation under this schedule shall not apply to alien dependents not residents of the United States.

13. No compensation first two weeks. No compensation shall be allowed for the first two weeks after injury received, except as provided by paragraph 14, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in paragraph fifteen.

14. Medical and hospital services supplied first two weeks. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services and medicines, as and when needed, not to exceed \$100 in value, unless the employee refuses to allow them to be furnished by the employer.

15. As to notification of employer. Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee or someone on his behalf, or some of the dependents, or some one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employee, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed.

16. Service of notice. The notice referred to may be served personally upon the employer, or upon any agent of the employer upon whom a summons may be served in a civil action, or by sending it through the mail to the employer at the last known residence or business place thereof within the state, and shall be substantially in the following form:

Form of notice. Sufficiency of notice.

To (name of employer):

You are hereby notified that a personal injury was received by (name of employee injured), who was in your employ at (place) while engaged as (nature-

of employment) on or about the () day of (), nineteen hundred and (), and that compensation will be claimed therefor.

Signed,

().

but no variation from this form shall be material if the notice is sufficient to advise the employer that a certain employee, by name, received an injury in the course of his employment on or about a specified time, at or near a certain place. Notice served at the office of, or on the person who was the employer's immediate superior, shall be a compliance with this act.

17. Examination of employee as to physical condition. After an injury, the employee, if so requested by his employer, must submit himself for examination at some reasonable time and place within the state, and as often as may be reasonably requested, to a physician or physicians authorized to practise under the laws of this state. If the employee requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employee to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect of the period of suspension.

18. In case of dispute, question submitted to court. In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the court of common pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding.

19. Payment in case of death. In case of death, where no executor or administrator is qualified, the said judge shall, by order, direct payment to be made to such person as would be appointed administrator of the estate of such decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

20. Procedure in dispute. Procedure in case of dispute shall be as follows:

Petition to court. Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner.

Notice of hearing. Answer filed. Upon the presentation of such petition the same shall be filed with the clerk of the court of common pleas, and the judge shall fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition shall be served as summons in a civil action, and may be served within four days thereafter upon the adverse party. Within seven days after the service of such no-

tice the adverse party shall file an answer to said petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition.

Hear witnesses. Determination. Subsequent proceedings. As to costs. At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the common pleas court, and judgment shall be entered thereon in the same manner as in causes tried in the court of common pleas, and shall contain a statement of facts as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the supreme court to review questions of law by certiorari. Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed, and collected as are allowed, taxed, and collected for like services in the common pleas court.

21. Amount may be commuted. The amounts payable periodically as compensation may be commuted to one or more lump sum payments by the judge of the court of common pleas having jurisdiction, as set forth in the preceding paragraph, upon the application of either party, in his discretion, provided the same be in the interest of justice. Unless so approved, no compensation payments shall be commuted.

Agreement or award may be modified. An agreement or award of compensation may be modified at any time by a subsequent agreement, or at any time after one year from the time when the same became operative it may be reviewed upon the application of either party on the ground that the incapacity of the injured employee has subsequently increased or diminished. In such case the provisions of paragraph 17 with reference to medical examination shall apply.

22. Compensation a preferential lien. Claims not assignable. The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this act shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment.

Sec. III. 23. What constitutes wilful negligence. For the purposes of this act, wilful negligence shall consist of (1) deliberate act or deliberate failure to act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication, operating as the proximate cause of injury.

Use of certain words. Wherever in this act the singular is used the plural shall be included; where the masculine gender is used, the feminine and neuter shall be included.

Synonyms. "Employer" is declared to be synonymous with "master" and includes natural persons, partnerships, and corporations; "employees" is synonymous with "servant," and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments.

As to amputations. Amputation between the elbow and the wrist shall be

considered as the equivalent of the loss of a hand, and amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot.

24. As to constitutionality of any provision. Relation of sections of act. In case for any reason any paragraph or any provision of this act shall be questioned in any court, and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, except that sections I. and II. are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I. of this act shall not apply in cases where section II. becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law.

25. Rights of action in previous cases. Every right of action for negligence, or to recover damages for injuries resulting in death, existing before this act shall take effect, is continued, and nothing in this act contained shall be construed as affecting any such right of action, nor shall the failure to give the notice provided for in section II. paragraph 15 of this act be a bar to the maintenance of a suit upon any right or action existing before this act shall take effect.

26. Repealer. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

27. Effective. This act shall take effect on the fourth day of July next succeeding its passage and approval.

Later a supplementary act was passed (Acts of 1911, chap. 368):

1. Every contract of hiring, verbal, written, or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

The following act (Laws 1911, chap. 241) was also passed:

1. The governor is hereby authorized to appoint six citizens of this state as an employers' liability commission, who shall hold their offices for the term of two years and until their successors are appointed and qualified. They shall receive no compensation for their services, but their actual traveling expenses incurred upon the business of the commission shall be paid by the state treasurer, upon warrants approved by the president of the said commission. The commission shall have power to choose one of their number as president and one of their number as secretary, and shall have power to appoint a clerk. The expenses of the commission, the salary of the secretary and of the clerk shall be paid from appropriations made for that purpose in any annual or supplemental appropriation bill. It shall be the duty of the commission to observe in detail, so far as possible, the operations throughout the state of the recent act of the legislature commonly known as "the employers' liability act," entitled "An Act

Prescribing the Liability of an Employer to Make Compensation of Injuries Received by an Employee in the Course of Employment, Establishing an Elective Schedule of Compensation and Regulating Procedure for the Determination of Liability and Compensation Thereunder," approved April fourth, one thousand nine hundred and eleven.

2. From and after the fourth day of July next, when the said law becomes operative, every employer of labor within the state of New Jersey shall report to said commission upon the occurrence of any injury to any of his employees the name and nationality of the employee so injured, the nature and extent of such injury, whether said injured employee and the employer at the time of said injury were subject to the provisions of section one or section two of said act, and the amount of compensation when determined, together with such other facts relating to such injury as the commission may request. The information thus received shall be tabulated, from time to time, and the records thereof shall be the private records of the commission; they shall not be made public or open to inspection unless in the opinion of the commission the public interests shall require it and they shall not be used as evidence against any employer in any suit or action at law brought by any employee for the recovery of damages. The commission shall hold meetings, from time to time, as they may deem necessary, and shall present to each session of the legislature a report showing the operations under the said act during the preceding year, together with any suggestions or recommendations which they may deem necessary or proper for the improvement of the said act, in order to accomplish with the greatest efficiency the purposes of said act.

3. This act shall take effect immediately.

New York.—The New York statute (Laws of 1910, chap. 674, Labor Law, art. 14a) provided for compensation for injuries received in certain dangerous occupations, in the absence of serious or wilful misconduct on the part of the workman. This was pronounced unconstitutional as imposing liability on a master in the absence of negligence on his part.³

Ohio.—The Ohio act (102 Ohio L. 524)⁴ provides as follows:

Sec. 1. There is hereby created a state liability board of awards, to be composed of three members, not more than two of whom shall belong to the same political party, to be appointed by the governor, within thirty days after the passage of this act, one of which members shall be appointed for the term of two years, one member for four years and one member for six years, and thereafter as their terms expire the governor shall appoint one member for the term of six years. Vacancies shall be filled by appointment by the governor for the unexpired term.

Sec. 2. Each member of the board shall devote his entire time to the duties of his office, and shall not hold any position of trust or profit, or engage in any

³ *Ives v. South Buffalo R. Co.* (1911) *ex rel. Yaple v. Creamer* (1912) 85 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 431, Ann. Cas. 1912B, 156. N. E. 602.

⁴ Pronounced constitutional in *State*

occupation or business interfering or inconsistent with his duty as such member or serve on or under any committee of any political party.

Sec. 3. Each member of the board shall receive an annual salary of \$5,000, payable in the same manner as salaries of state officers are paid.

Sec. 4. The board shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions shall be open to the public, and shall stand and be adjourned without further notice thereof on its records. All proceedings of the board shall be shown on its record of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award made with respect thereto, and all voting shall be had by the calling of each member's name by the secretary, and each vote shall be recorded as cast.

Sec. 5. A majority of the board shall constitute a quorum for the transaction of business, and a vacancy shall not impair the right of the remaining members to exercise all the powers of the full board so long as a majority remains. Any investigations, inquiry or hearing which the board is authorized to hold, or undertake, may be held or undertaken by or before any one member of the board. All investigations, inquiries, hearings, and decisions of the board, and every order made by a member thereof, when approved and confirmed by a majority of the members, and so shown on its record of proceedings, shall be deemed to be the order of the board.

Sec. 6. The board shall keep and maintain its office in the city of Columbus, and shall provide a suitable room or rooms, necessary office furniture, supplies, books, periodicals, and maps. All necessary expenses shall be audited and paid out of the state treasury. The board may hold sessions at any place within the state.

Sec. 7. The board may employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers, and other assistants, and fix their compensation. Such employments and compensation shall be first approved by the governor, and shall be paid out of the state treasury. The members of the board, actuaries, accountants, inspectors, examiners, experts, clerks, stenographers, and other assistants that may be employed shall be entitled to receive from the state treasury their actual and necessary expenses while traveling in the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the expense, and allowed by the board.

Sec. 8. The board shall adopt reasonable and proper rules to govern its procedure, regulate and provide for the kind and character of notices, and the services thereof, in cases of accident and injury to employees, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to benefits of compensation from the state insurance fund, hereinafter provided for, the forms of application of those claiming to be entitled to benefits or compensation therefrom, the method of making investigations, physical examinations and inspections, and prescribe the time within which adjudications and awards shall be made.

Sec. 9. Every employer shall furnish the board, upon request, all information required by it to carry out the purposes of this act. The board, or any member thereof, or any person employed by the board for that purpose, shall have the right to examine under oath any employer or officer, agent or employee thereof.

Sec. 10. Every employer receiving from the board any blank, with directions

to fill the same, shall cause the same to be properly filled out as to answer fully and correctly all questions therein propounded, and if unable to do so shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the board within the period fixed by the board for such return.

Sec. 11. Each member of the board, the secretary, and every inspector or examiner appointed by the board shall, for the purposes contemplated by this act, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony.

Sec. 12. In case of disobedience of any person to comply with the order of the board, or subpoena issued by it as one of its inspectors, or examiners, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or refuse to permit an inspection as aforesaid, the probate judge of the county in which the person resides, on application of any member of the board, or any inspector or examiner appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoenas issued from such court on a refusal to testify therein.

Sec. 13. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board or an inspector or examiner, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid from the state treasury in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers approved by any two members of the board. No witness subpoenaed at the instance of a party other than the board or an inspector shall be entitled to compensation from the state treasury unless the board shall certify that his testimony was material to the matter investigated.

Sec. 14. In an investigation, the board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by the law for like depositions in civil actions in the court of common pleas.

Sec. 15. A transcribed copy of the evidence and proceedings, or any specific part thereof, or any investigation, by a stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript of the testimony on the investigation, or of a particular witness, or of a specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and subscribed, may be received in evidence by the board with the same effect as if such stenographer were present and testified to the facts so certified. A copy of such transcript shall be furnished on demand to any party upon the payment of the fee therefor, as provided for transcript in courts of common pleas.

Sec. 16. The board shall prepare and furnish blank forms, and provide in its rules for their distribution so that the same may be readily available, of application for benefits or compensation from the state insurance fund, notices to employers, proofs of injury or death, or medical attendance, of employment and wage earnings, and such other blanks as may be deemed proper and advisable,

and it shall be the duty of insured employers to constantly keep on hand a sufficient supply of such blanks.

Sec. 17. The state liability board of awards shall classify employments with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total pay roll and number of employees in each of said classes of employment, sufficiently large to provide an adequate fund for the compensation provided for in this act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year.

Sec. 18. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employees as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employees of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employees, and shall adopt rules and regulations with respect to the collection, maintenance, and disbursement of said fund.

Sec. 19. The treasurer of state shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him, but upon vouchers signed by any two members of the state liability board of awards.

Sec. 20. The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for.

Sec. 20.-1. Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall pay into the state insurance fund the premiums provided by this act, shall not be liable to respond in damages at common law or by statute, save as herein-after provided, for injuries or death of any such employee, wherever occurring, during the period covered by such premiums, provided the injured employee has remained in his service with notice that his employer has paid into the state insurance fund the premiums provided by this act; the continuation in the service of such employer with such notice, shall be deemed a waiver by the employee of his right of action as aforesaid.

Each employer paying the premiums provided by this act into the state insurance fund shall post in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such payment; and the same, when so posted, shall constitute sufficient notice to his employees of the fact that he has made such payment; and of any subsequent payments he may make after such notices have been posted.

Sec. 20-2. For the purpose of creating such state insurance fund, each employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, and his employees in this state, having elected to accept the provisions of this act, shall pay, on or before January 1, 1912, and semiannually thereafter, the premiums of liability risk in the classes of employment as may be determined and published by the state liability board of awards. The said employers for themselves and their employees shall make such payments to the state treasurer of Ohio, who shall receive and place the same to the credit of such state insurance fund. The premiums provided for in this act shall be paid by the employer and employees in the following propor-

tions, to wit: 90 per cent of the premium shall be paid by the employer and 10 per cent by the employees. Each employer is authorized to deduct from the pay roll of his employees 10 per cent of the said premiums for any premium period in proportion to the pay roll of such employees; no deduction shall be made except for that portion of the premium period antedating such pay roll. Each employer shall give a receipt to each employee showing the amount which has been deducted and paid into the state insurance fund.

Sec. 21. The state liability board of awards shall disburse the state insurance fund to such employees of employers as have paid into said fund the premiums applicable to the classes to which they belong, that have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued.

Sec. 21-1. All employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not pay into the state insurance fund the premiums provided by this act, shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents, or employees, and also to the personal representatives of such employees where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common-law defenses:

The defense of the fellow servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

Sec. 21-2. But where a personal injury is suffered by an employee, or when death results to an employee from personal injuries while in the employ of an employer in the course of employment, and such employer has paid into the state insurance fund the premium provided for in this act, and in case such injury has arisen from the wilful act of such employer, or any of such employer's officers or agents or from the failure of such employer, or any of such employer's officers or agents, to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee, or his legal representatives in case death results from the injury, may, at his option, either claim compensation under this act or institute proceedings in the courts for his damage on account of such injury, and such employer shall not be liable for any injury to any employee, or to his legal representative in case death results, except as provided in this act.

Every employee, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings in any court. Every employee or his legal representative in case death results, who exercises his option to institute proceedings in court as provided in § 21-2 waives his right to any award; except as provided in § 36 of this act.

Sec. 23. The board shall disburse and pay from the fund, for such injury, to such employees, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however in any case, to exceed the sum of \$200 in addition to such award to such employee.

Sec. 24. In case death ensues from the injury, reasonable funeral expenses, not to exceed \$150 shall be paid from the fund, in addition to such award to such employee.

Sec. 25. No benefit shall be allowed for the first week after the injury is received, except the disbursement provided for in the next two preceding sections.

Sec. 26. In case of temporary or partial disability, the employee shall receive 66⅔ per cent of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of \$12 per week, and not less than a minimum of \$5 per week, if the employee's wages were less than \$5 per week, then he shall receive his full wages; but not to continue for more than six years from the date of the injury, nor to exceed \$3,400 in amount from that injury.

Sec. 27. In case of permanent total disability the award shall be 66⅔ per cent of the average weekly wage, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of \$12 per week, and not less than a minimum of \$5 per week, if the employee's wages were less than \$5 per week, then he shall receive his full wages.

Sec. 28. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

1. If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in §§ 23 and 24.

2. If there are wholly dependent persons at the time of the death, the payment shall be 66⅔ per cent of the average weekly wage and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of \$3,400, nor less than a minimum of \$1,500.

3. If there are partly dependent persons at the time of the death, the payment shall be 66⅔ per cent of the average weekly wage and to continue for all of such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of \$3,400.

Sec. 29. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor.

Sec. 30. The dependent or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board.

Sec. 31. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

Sec. 32. If it is established that the injured employee was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

Sec. 33. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with

respect to former findings or orders with respect thereto, as, in its opinion, may be justified.

Sec. 34. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

Sec. 35. Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents.

Sec. 36. The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. In such a proceeding, the prosecuting attorney of the county, without additional compensation, shall represent the state liability board of awards, and he shall be notified by the clerk forthwith of the filing of such appeal.

Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant; and, if they determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board.

The costs of such proceeding, including a reasonable attorneys' fee to the claimant's attorney, to be fixed by the trial judge, shall be taxed against the unsuccessful party. Either party shall have the right to prosecute error as in the ordinary civil cases.

Sec. 36-1. Such board shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act.

Sec. 37. The board may make necessary expenditures to obtain statistical and other information to establish the classes provided for in § 17. The salaries and compensation of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks, and other assistants, and all other expenses of the board herein authorized, including the premium to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers, signed by two of the members of such board, presented to the auditor of state, who shall issue his warrant therefor as in other cases.

Sec. 38. No provision of this act relating to the amount of compensation shall be considered by or called to the attention of the jury on the trial of any action to recover damages as herein provided.

Sec. 39. Annually on or before the 15th day of November, such board, under the oath of at least two of its members, shall make a report to the governor which shall include a statement of the number of awards made by it, and a general statement of the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the disbursements from the expense fund, and the condition of its respective funds, together with any other matters which such board deems it proper to call to the attention of the governor, including any recommendations it may have to make.

Sec. 40. The expense of such board in carrying out the provisions of this act shall be paid until January 1, 1912, out of the general revenue of the state not otherwise appropriated. Such expense shall not exceed \$25,000 in addition to the salaries of members of such board.

Sec. 41. The expenses of such board in carrying out the provisions of this act shall be paid from January 1st, 1912, to January 1st, 1913, out of the general revenue fund of the state not otherwise appropriated. Such expense shall not exceed \$100,000 in addition to the salary of the members.

Rhode Island.—The Rhode Island act (approved April 29, 1912) is as follows:

ARTICLE I.

Sec. 1. In an action to recover damages for personal injury sustained by accident by an employee arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense (a) that the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury.

Sec. 2. The provisions of this act shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries, sustained by employees engaged in domestic service or agriculture.

Sec. 3. The provisions of this act shall not apply to employers who employ five or less workmen or operatives regularly in the same business, but such employers may, by complying with the provisions of § 5 of this article become subject to the provisions of this act.

Sec. 4. The provisions of § 1 of this article shall not apply to actions to recover damages for personal injuries, or for death resulting from personal injuries sustained by employees of an employer who has elected to become subject to the provisions of this act as provided in § 5 of this article.

Sec. 5. Such election on the part of the employer shall be made by filing with the commissioner of industrial statistics a written statement to the effect that he accepts the provisions of this act, and by giving reasonable notice of such election to his workmen by posting and keeping continuously posted copies of such statement in conspicuous places about the place where his workmen are employed, the filing of which statement and the giving of which notice shall operate to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year, each, unless such employer shall, at least sixty days prior to the ex-

piration of such first or any succeeding year, file with said commissioner a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of this act and shall give reasonable notice to his workmen as above provided. Blank forms of election and withdrawal as herein provided, shall be furnished by said commissioner.

Sec. 6. An employee of an employer who shall have elected to become subject to the provisions of this act as provided in § 5 of this article shall be held to have waived his right of action at common law to recover damages for personal injuries, if he shall not have given his employer at the time of his contract of hire notice in writing that he claimed such right, and within ten days thereafter have filed a copy thereof with the commissioner of industrial statistics, or, if the contract of hire was made before the employer so elected, if the employee shall not have given the said notice and filed the same with said commissioner within ten days after notice by the employer, as above provided, of such election; and such waiver shall continue in force for the term of one year, and thereafter without further act on his part, for successive terms of one year, each, unless such employee shall, at least sixty days prior to the expiration of such first or any succeeding year, file with the said commissioner a notice in writing to the effect that he desires to claim his said right of action at common law, and within ten days thereafter shall give notice thereof to his employer. A minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act, and no other person shall have any cause of action or right to compensation for an injury to such minor employee except as expressly provided in this act; but if said minor shall have a parent living or a guardian, such parent or guardian, as the case may be, may give the notice and file a copy of the same as herein provided by this section, and such notice shall bind the minor in the same manner that adult employees are bound under the provisions of this act. In case no such notice is given, such minor shall be held to have waived his right of action at common law to recover damages for personal injuries. Any employee or the parent or guardian of any minor employee, who has given notice to the employer that he claimed his right of action at common law, may waive such claim by a notice in writing, which shall take effect five days after the delivery to the employer or his agent.

Sec. 7. The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this act while it is in effect.

ARTICLE II.

Sec. 1. If an employee who has not given notice of his claim of common-law rights of action, or who has given such notice and has waived the same, as provided in § 6 of article I, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation, as herein-after provided, by the employer who shall have elected to become subject to the provisions of this act.

Sec. 2. No compensation shall be allowed for the injury or death of an employee where it is proved that his injury or death was occasioned by his wilful

intention to bring about the injury or death of himself or of another, or that the same resulted from his intoxication while on duty.

Sec. 3. Contingent fees of attorneys for services under this act shall be subject to the approval of the superior court.

Sec. 4. No compensation except as provided by § 12 of this article shall be paid under this act for any injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if such incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury.

Sec. 5. During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, and medicines when they are needed, the amount of the charge for such services to be fixed, in case of the failure of the employer and employee to agree, by the superior court.

Sec. 6. If death results from the injury, the employer shall pay the dependents of the employee wholly dependent upon his earnings for support at the time of his injury a weekly payment equal to one half his average weekly wages, earnings or salary, but not more than \$10 nor less than \$4 a week, for a period of three hundred weeks from the date of the injury: Provided, however, that, if the dependent of the employee to whom the compensation shall be payable upon his death is the widow of such employee, upon her death the compensation thereafter payable under this act shall be paid to the child or children of the deceased employee including adopted and stepchildren, under the age of eighteen years, or over said age but physically or mentally incapacitated from earning, dependent upon the widow at the time of her death. In case there is more than one child thus dependent, the compensation shall be divided equally among them. If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of the injury a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employee to such partial dependents bears to the annual earnings of the deceased at the time of injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury. Provided, however, that, if the deceased leaves no dependents at the time of the injury, the employer shall not be liable to pay compensation under this act, except as specifically provided in § 9 of this article.

Sec. 7. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:—

(a) A wife upon a husband with whom she lives or upon whom she is dependent at the time of his death.

(b) A husband upon a wife with whom he lives or upon whom he is dependent at the time of her death.

(c) A child or children, including adopted and stepchildren, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, upon the parent with whom he is or they are living or upon whom he or they are dependent at the time of the death of such parent, there being no

surviving dependent parent. In case there is more than one child thus dependent, the compensation hereunder shall be divided equally among them.

In all other cases, questions of entire or partial dependency shall be determined in accordance with the fact as the fact may have been at the time of the injury. In such other cases, if there is more than one person wholly dependent, the compensation shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof during the period in which compensation is paid to persons wholly dependent. If there is no one wholly dependent and more than one person partly dependent, the compensation shall be divided among them according to the relative extent of their dependency.

Sec. 8. No person shall be considered a dependent unless he is a member of the employee's family or next of kin wholly or partly dependent upon the wages, earnings, or salary of the employee for support at the time of the injury.

Sec. 9. If the employee dies as a result of the injury, leaving no dependents at the time of the injury, the employer shall pay, in addition to any compensation provided for in this act the reasonable expense of his last sickness and burial, which shall not exceed \$200.

Sec. 10. While the incapacity for work resulting from the injury is total, the employer shall pay the injured employee a weekly compensation equal to one half his average weekly wages, earnings, or salary, but not more than \$10 nor less than \$4 a week; and in no case shall the period covered by such compensation be greater than five hundred weeks from the date of the injury. In the following cases it shall, for the purposes of this section, be conclusively presumed that the injury resulted in permanent total disability, to wit: The total and irrecoverable loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the legs or arms, and an injury to the skull resulting in incurable imbecility or insanity.

Sec. 11. While the incapacity for work resulting from the injury is partial, the employer shall pay the injured employee a weekly compensation equal to one half the difference between his average weekly wages, earnings, or salary, before the injury and the average weekly wages, earnings or salary which he is able to earn thereafter, but not more than \$10 a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury.

Sec. 12. In case of the following specified injuries the amounts named in this section shall be paid in addition to all other compensation provided for in this act.

(a) For the loss by severance of both hands at or above the wrist, or both feet at or above the ankle, or the loss of one hand and one foot, or the entire and irrecoverable loss of the sight of both eyes, one half of the average weekly wages, earnings or salary of the injured person, but not more than \$10 nor less than \$4 a week, for a period of one hundred weeks.

(b) For the loss by severance of either hand at or above the wrist, or either foot at or above the ankle, or the entire and irrecoverable loss of the sight of either eye, one-half the average weekly wages, earnings or salary of the injured person, but not more than \$10 nor less than \$4 a week, for a period of fifty weeks.

(c) For the loss by severance at or above the second joint of two or more fingers, including thumbs, or toes, one half the average weekly wages, earnings or salary of the injured person but not more than \$10 nor less than \$4 a week, for a period of twenty-five weeks.

(d) For the loss by severance of at least one phalange of a finger, thumb, or toe, one half the average weekly wages, earnings, or salary of the injured person, but not more than \$10 nor less than \$4 a week, for a period of twelve weeks.

Sec. 13. The "average weekly wages, earnings, or salary" of an injured employee shall be computed as follows:—

(a) If the injured employee has worked in the same employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his "average weekly wages" shall be three hundred times the average daily wages, earnings or salary which he has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment, divided by fifty-two. But where the employee is employed concurrently by two or more employers, for one of whom he works at one time and for another of whom he works at another time, his "average weekly wages" shall be computed as if the wages, earnings or salary received by him from all such employers were wages, earnings or salary earned in the employment of the employer for whom he was working at the time of the accident.

(b) If the injured employee has not so worked in such employment during substantially the whole of such immediately preceding year, his "average weekly wages" shall be three hundred times the average daily wages, earnings, or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighboring place, has earned in such employment during the days when so employed and working the number of hours constituting a full working day in such employment divided by fifty-two.

(c) In cases where the foregoing methods of arriving at the "average weekly wages, earnings, or salary" of the injured employee cannot reasonably and fairly be applied, such "average weekly wages" shall be taken at such sum as, having regard to the previous wages, earnings or salary of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality, shall reasonably represent the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.

(d) Where the employer has been accustomed to pay to the employee a sum to cover any special expense incurred by said employee by the nature of his employment, the sum so paid shall not be reckoned as part of the employee's wages, earnings, or salary.

(e) The fact that an employee has suffered a previous injury, or received compensation therefor, shall not preclude compensation for a later injury or for death; but in determining the compensation for the later injury or death, his "average weekly wages" shall be such sum as will reasonably represent his weekly earning capacity at the time of the later injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

Sec. 14. No savings or insurance of the injured employee, independent of this act, shall be taken into consideration in determining the compensation to be paid hereunder, nor shall benefits derived from any other source than the employer be considered in fixing the compensation under this act.

Sec. 15. The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representatives; or, if he has no legal representative, to his dependents entitled thereto, or, if he leaves no such dependents, to the person to whom the expenses for the burial and last sickness are due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act. All payments of compensation under this act shall cease upon the death of the employee from a cause other than or not induced by the injury for which he is receiving compensation.

Sec. 16. In case an injured employee is mentally incompetent, or, where death results from the injury, in case any of his dependents entitled to compensation hereunder are mentally incompetent or minors at the time when any right, privilege or election accrues to him or them under this act, his conservator, guardian, or next friend may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time in this act provided shall run so long as such incompetent or minor has no conservator or guardian.

Sec. 17. No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or, in case of the death of the employee, or in the event of his physical or mental incapacity, within one year after death or the removal of such physical or mental incapacity.

Sec. 18. Such notice shall be in writing, and shall state in ordinary language the nature, time, place, and cause of the injury, and the name and address of the person injured, and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his legal representative, or by a dependent, or by a person in behalf of either.

Sec. 19. Such notice shall be served upon the employer, or upon one employer, if there are more employers than one, or, if the employer is a corporation, upon any officer or agent upon whom process may be served, by delivering the same to the person on whom it is to be served, or by leaving it at his last known residence or place of business, or by sending it by registered mail addressed to the person to be served, or, in the case of a corporation, to the corporation itself, at his or its last known residence or place of business; and such mailing of the notice shall constitute completed service.

Sec. 20. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the nature, time, place, or cause of the injury, or the name and address of the person injured, unless it is shown that it was the intention to mislead and the employer was in fact misled thereby. Want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury, or that failure to give such notice was due to accident, mistake, or unforeseen cause.

Sec. 21. The employee shall, after an injury, at reasonable times during the

continuance of his disability, if so requested by his employer, submit himself to an examination by a physician or surgeon authorized to practise medicine under the laws of the state, furnished and paid for by the employer. The employee shall have the right to have a physician, provided and paid for by himself, present at such examination.

Any justice of the superior court may, at any time after an injury, on the petition of the employer or employee, appoint a competent and impartial physician or surgeon to act as a medical examiner, and the reasonable fees of such medical examiner as fixed by the justice appointing him shall be paid by the party moving for such appointment.

Such medical examiner being first duly sworn to the faithful performance of his duties before the justice appointing him or clerk of the court shall thereupon, and as often as necessary, examine such injured employee in order to determine the nature, extent, and probable duration of the injury. Such medical examiner shall file a report of every examination made of such employee in the office of the clerk of the superior court having jurisdiction of the matter as provided in § 16 of article III. of this act, and such report shall be produced in evidence in any hearing or proceeding to determine the amount of compensation due such employee under the provisions of this act. If such employee refuses to submit himself for any examination provided for in this act, or in any way obstructs any such examination, his rights to compensation shall be suspended and his compensation during such period of suspension may be forfeited.

Sec. 22. No agreement by an employee except as provided in article IV. to waive his rights to compensation under this act shall be valid.

Sec. 23. No claims for compensation under this act, or under any alternative scheme permitted by article IV. of this act, shall be assignable, or subject to attachment, or liable in any way for any debts.

Sec. 24. The claim for compensation under this act, or under any alternative scheme permitted by article IV. of this act, and any decree on any such claim, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted to the same amount as the wages of labor are now preferred by the laws of this state; but nothing herein shall be constructed as impairing any lien which the employee may have acquired.

Sec. 25. In case payments have continued for not less than six months either party may, upon due notice to the other party, petition the superior court for an order commuting the future payments to a lump sum. Such petition shall be considered by the superior court, and may be summarily granted where it is shown to the satisfaction of the court that the payment of a lump sum in lieu of future weekly payments will be for the best interest of the person or persons receiving or dependent upon such compensation, or that the continuance of weekly payments will, as compared with lump-sum payments, entail undue expense or undue hardship upon the employer liable therefor, or that the person entitled to compensation has removed or is about to remove from the United States. Where the commutation is ordered the superior court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at 5 per centum per annum with annual rests. Upon paying such

amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filing which, or other due proof of payment, the liability of such employer under any agreement, award, findings, or decree shall be discharged of record.

ARTICLE III.

Sec. 1. If the employer and the employee reach an agreement in regard to compensation under this act, a memorandum of such agreement, signed by the parties, shall be filed in the office of the clerk of the superior court having jurisdiction of the matter as provided in § 16 of this article. The clerk shall forthwith docket the same in a book kept for that purpose, and shall thereupon present said agreement to a justice of the superior court, and when approved by the justice the agreement shall be enforceable by said superior court by any suitable process, including executions against goods, chattels, and real estate, and including proceedings for contempt for wilful failure or neglect to obey the provisions of said agreement. No appeal shall lie from the agreement thus approved unless upon allegation that such agreement had been procured by fraud or coercion. Such agreement shall be approved by the justice only when its terms conform to the provisions of this act.

When death has resulted from the injury and the dependents of the deceased employee entitled to compensation are, or the apportionment thereof among them is, in dispute, such agreement may relate only to the amount of compensation.

Sec. 2. If the employer and employee fail to reach an agreement in regard to compensation under this act, either employer or employee, and when death has resulted from the injury and the dependents of the deceased employee entitled to compensation are, or the apportionment thereof among them is in dispute, any person in interest may file in the office of the clerk of the superior court having jurisdiction of the matter as provided in § 16 of this article, a petition in the nature of a petition in equity setting forth the names and residences of the parties, the facts relating to employment at the time of the injury, the cause, extent and character of the injury, the amount of wages, earnings, or salary received at the time of the injury, and the knowledge of the employer or notice of the occurrence of the injury and such other facts as may be necessary and proper for the information of the court, and shall state the matter in dispute and the claims of the petitioner with reference thereto.

Sec. 3. Within four days after the filing of the petition, a copy thereof, attested by the petitioner or his attorney, shall be served upon the respondent in the same manner as a writ of summons in a civil action.

Sec. 4. Within ten days after the filing of the petition, the respondent shall file an answer to said petition, together with a copy thereof for the use of the petitioner, which shall state the claims of the respondent with reference to the matter in dispute as disclosed by the petition. No pleadings other than petition and answer shall be required to bring the cause to a hearing for final determination. The superior court may grant further time for filing the answer and allow amendments of said petition and answer at any stage of the proceedings. If the respondent do not file an answer, the cause shall proceed without formal default or decree *pro confesso*. If the respondent be an infant

or person under disability, the superior court shall appoint a guardian *ad litem* for such infant or person under disability. Such guardian *ad litem* may be appointed on any court day after service of the copy referred to in § 3 of this article, upon motion of any party after notice given as required for motions made in the superior court, and opportunity to said infant or person under disability to be heard in regard to the choice of such guardian *ad litem*. The guardian *ad litem* so appointed shall file the answer required by this section.

Sec. 5. The petition shall be in order for assignment for hearing on the motion day which occurs next after fifteen days from the filing of the petition. Upon the days upon which said petition shall be in order for hearing it shall take precedence of other cases upon the calendar, except cases for tenements let or held at will or by sufferance.

Sec. 6. The justice to whom said petition shall be referred by the court shall hear such witnesses as may be presented by each party, and in summary manner decide the merits of the controversy. His decision shall be filed in writing with the clerk, and a decree shall be entered thereon. Such decree shall be enforceable by said superior court by any suitable process, including executions against goods, chattels, and real estate, and including proceedings for contempt for wilful failure or neglect to obey the provisions of said decree. Such decree shall contain findings of fact, which, in the absence of fraud, shall be conclusive. The superior court may award as costs the actual expenditures, or such part thereof as to the court shall seem meet, but not including counsel fees, and shall include such costs in its decree. The superior court may refuse to award costs, and no costs shall be awarded against an infant or person under disability or against a guardian *ad litem*.

Sec. 7. Any person aggrieved by the final decree of the superior court under this act may appeal to the supreme court upon any question of law or equity decided adversely to the appellant by said final decree or by any proceeding or ruling prior thereto appearing of record, the appellant having first had his objections noted to any adverse rulings made during the progress of the trial at the time such rulings were made, if made in open court and not otherwise of record.

The appellant shall take the following steps:

(a) Within ten days after entry of said final decree he shall file a claim of appeal and, if a transcript of the testimony and rulings or any part thereof be desired, a written request therefor.

(b) Within such time as the justice of the superior court who heard the petition, or, in case of his inability to act from any cause within such time as any other justice thereof shall fix, whether by original fixing of the time, or by extension thereof, or by a new fixing after any expiration thereof, the appellant shall file reasons of appeal stating specifically all the questions of law or equity decided adversely to him which he desires to include in his reasons of appeal, together with a transcript of as much of the testimony and rulings as may be required. The supreme court may allow amendments of said reasons of appeal. Upon the filing of said reasons of appeal and transcript, the clerk of the superior court shall present the transcript to the justice who heard the cause for allowance. The justice after hearing and examination, shall restore the transcript to the files of the clerk with a certificate of his action thereon made within twenty days after filing the transcript, unless the twentieth day

shall fall in vacation, in which event the certificate may be filed at any time before the first Monday in the following month of October.

If the transcript be not allowed by the justice who heard the cause within the time prescribed, or objection to his allowance be made by any party, the correctness of the transcript may be determined by the supreme court by petition filed within thirty days after filing the transcript, unless the thirtieth day shall fall in vacation, in which event the correctness of the transcript may be determined by petition filed on or before the tenth day after the first Monday in the following month of October. In all other respects than in time of filing the same course shall be followed as provided in § 21 of chapter 298 of the General Laws for establishing the truth of exceptions.

Sec. 8. Upon the restoration of the transcript to the files, or, if there be no transcript, then upon the filing of the reasons of appeal, the clerk of the superior court shall certify the cause and all papers to the supreme court.

Sec. 9. The claim of an appeal shall suspend the operation of the decree appealed from, but, in case of default in taking the procedure required, such suspension shall cease and the superior court upon motion of any party shall proceed as if no claim of appeal had been made, unless it be made to appear to the superior court that the default no longer exists.

Sec. 10. Any court day in the supreme court shall be a motion day for the purpose of hearing a motion to assign the appeal for hearing.

Sec. 11. The supreme court after hearing any appeal shall determine the same, and affirm, reverse, or modify the decree appealed from, and may itself take, or cause to be taken by the superior court, such further proceedings as shall seem just. If a new decree shall be necessary, it shall be framed by the supreme court for entry by the superior court. Thereupon the cause shall be remanded to the superior court for such further proceedings as shall be required.

Sec. 12. No process for the execution of a final decree of the superior court from which an appeal may be taken shall issue until the expiration of ten days after the entry thereof, unless all parties against whom such decree is made waive an appeal by a writing filed with the clerk or by causing an entry thereof to be made on the docket.

Sec. 13. If, in the course of the proceedings in any cause, any question of law shall arise which in the opinion of the superior court is of such doubt and importance, and so affects the merits of the controversy, that it ought to be determined by the supreme court before further proceedings, the superior court may certify such question to the supreme court for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties.

Sec. 14. At any time before the expiration of two years from the date of the approval of an agreement, or the entry of a decree fixing compensation, but not afterwards, and before the expiration of the period for which compensation has been fixed by such agreement or decree, but not afterwards, any agreement, award, findings, or decree may be from time to time reviewed by the superior court upon the application of either party, after due notice to the other party, upon the ground that the incapacity of the injured employee has subsequently ended, increased, or diminished. Upon such review the court may increase, diminish, or discontinue the compensation from the date of the application for review, in accordance with the facts, or make such other order as the justice of

the case may require, but shall order no change of the status existing prior to the application for review. The finding of the court upon such review shall be served on the parties and filed with the clerk of the court having jurisdiction, in like time and manner and subject to like disposition as in the case of original decrees: Provided that an agreement for compensation may be modified at any time by a subsequent agreement between the parties approved by the superior court in the same manner as original agreements in regard to compensation are required to be approved by the provisions of § 1 of article III. of this act.

Sec. 15. The superior court shall prescribe forms and make suitable orders as to procedure adapted to secure a speedy, efficient, and inexpensive disposition of all proceedings under this act; and in making such orders said court shall not be bound by the provisions of the General Laws relating to practice. In the absence of such orders, special orders shall be made in each case.

Sec. 16. Proceedings shall be brought either in the county where the accident occurred or in the county where the employer or employee lives or has a usual place of business. The court where any proceeding is brought shall have power to grant a change of venue.

Sec. 17. No proceedings under this act shall abate because of the death of the petitioner, but may be prosecuted by his legal representative or by any person entitled to compensation by reason of said death, under the provisions of this act.

Sec. 18. An employee's claim for compensation under this act shall be barred unless an agreement or a petition, as provided in this article, shall be filed within two years after the occurrence of the injury, or, in case of the death of the employee, or, in the event of his physical or mental incapacity, within two years after the death of the employee or the removal of such physical or mental incapacity.

Sec. 19. If an employee receiving a weekly payment under this act shall cease to reside in the state, or, if his residence at the time of the accident is in an adjoining state, the superior court, upon the application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, order such payment to be made monthly or quarterly instead of weekly.

Sec. 20. All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the superior court.

Sec. 21. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may take proceedings both against that person to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to receive both damages and compensation; and if the employee has been paid compensation under this act, the person by whom the compensation was paid shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and, to the extent of such indemnity, shall be subrogated to the rights of the employee to recover damages therefor.

ARTICLE IV.

Sec. 1. Any employer may enter into an agreement with his employees in any employment to which this act applies to provide a scheme of compensation, benefit, or insurance, in lieu of the compensation provided for in this act, subject to the approval of the superior court. Such approval shall be granted only on condition that the scheme proposed provides as great benefits as those provided by this act; and, if the scheme provides for contributions by employees, it shall confer additional benefits at least equivalent to these contributions. If such a scheme meets with the approval of said court, the clerk shall issue a certificate enabling the employer to contract with any or all of his employees in employments to which this act applies to substitute such scheme for the provisions of this act for a period of not more than five years.

Sec. 2. No scheme which provides for contributing by employees shall be so certified which does not contain suitable provisions for the equitable distribution of any money or securities held for the purpose of the scheme, after due provision has been made to discharge the liabilities already incurred, if and when such certificate is revoked or the scheme otherwise terminated.

Sec. 3. If at any time the scheme no longer fulfils the requirements of this article, or is not fairly administered, or any other valid and substantial reason therefor exists, the superior court, on reasonable notice to the interested parties, shall revoke the certificate and the scheme shall thereby be terminated.

ARTICLE V.

Sec. 1. In this act, unless the context otherwise requires:

(a) "Employer" includes any person, copartnership, corporation, or voluntary association, and the legal representative of a deceased employer.

(b) "Employee" means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer, and whose remuneration does not exceed \$1,800 a year. It does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to his dependents as hereinbefore defined, or to his legal representative, or, where he is a minor, or incompetent, to his conservator or guardian.

Sec. 2. Nothing in this act shall affect the liability of the employer to a fine or penalty under any other statute.

Sec. 3. The provisions of this act shall not apply to injuries sustained, or accidents which occur, prior to the taking effect hereof.

Sec. 4. If any section of this act shall be declared unconstitutional or invalid, such unconstitutionality or invalidity shall in no way affect the validity of any other portion thereof which can be given reasonable effect without the part so declared unconstitutional or invalid.

Sec. 5. In all cases where an employer and employee shall have elected to become subject to the provisions of this act, the provisions of § 14 of chapter 283 of the General Laws shall not apply while this act is in effect.

Sec. 6. All acts and parts of acts inconsistent herewith are hereby repealed.

Sec. 7. This act may be cited as "workmen's compensation act."

Sec. 8. This act shall take effect on the first day of October, nineteen hundred and twelve.

Washington.—The Washington act (Laws of 1911, chap. 74) ⁵ is as follows:

Sec. 1. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman, and that little only at large expense to the public. The remedy of the workman has been uncertain, slow, and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The state of Washington therefore, exercising herein its police and sovereign powers, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents, is hereby provided, regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided.

Sec. 2. There is a hazard in all employment, but certain employments have come to be and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extra hazardous" wherever used in this act, to wit:

Factories, mills, and workshops where machinery is used; printing, electrotyping, photo-engraving, and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; laundries operated by power; quarries; engineering works; logging, lumbering, and ship building operations; logging, street, and interurban railroads; buildings being constructed, repaired, moved, or demolished; telegraph, telephone, electric light, or power plants or lines, steam heating or power plants, steamboats, tugs, ferries, and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in § 4.

Sec. 3. In the sense of this act words employed mean as here stated, to wit: "Factories" mean undertakings in which the business of working at com-

⁵ Pronounced constitutional in *State* (1911) 65 Wash. 156, 37 L.R.A. (N.S.) *ex rel. Davis-Smith Co. v. Clausen* 466, 117 Pac. 1101.

modities is carried on with power-driven machinery, either in manufacture, repair, or change, and shall include the premises, yard, and plant of the concern.

"Workshop" means any plant, yard, premises, room, or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing, or ornamenting, finishing, or adapting for sale or otherwise any article or part of article, machine, or thing, over which premises, room, or place the employer of the person working therein has the right of access or control.

"Mill" means any plant, premises, room, or place where machinery is used, any process of machinery, changing, altering, or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses, and bunkers.

"Mine" means any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined underground.

"Quarry" means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel, or rock is cut or taken for manufacturing, building, or construction.

"Engineering work" means any work of construction, improvement, or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals; electric, steam, or water power plants; telegraph and telephone plants and lines; electric light or power lines, and includes any other works for the construction, alteration, or repair of which machinery driven by mechanical power is used.

Except when otherwise expressly stated, "employer" means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extra hazardous work.

"Workman" means every person in this state who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the

average salary or wage named in such pay roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman.

"Dependent" means any of the following named relatives of a workman whose death results from any injury, and who leaves surviving no widow, widower, or child under the age of sixteen years, *viz.*; invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens, other than father or mother, not residing within the United States at the time of the accident, are not included.

"Beneficiary" means a husband, wife, child, or dependent of a workman, in whom shall vest a right to receive payment under this act.

"Invalid" means one who is physically or mentally incapacitated from earning.

The word "child," as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury.

The words "injury" or "injured," as used in this act, refer only to an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Sec. 4. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with the following schedule, sum equal to a percentage of his total pay roll for that year, to wit (the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard):

Construction Work.

Tunnels; bridges; trestles; sub-aqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire escapes; sewers; house moving; house wrecking.....	.065
Iron, or steel frame structures or parts of structures .....	.080
Electric light or power plants or systems; telegraph or telephone systems; pile driving; steam railroads .....	.050
Steeple, towers or grain elevators, not metal framed; dry-docks without excavation; jetties; breakwaters; chimneys; marine railways; water-works or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters .....	.050
Steam heating plants; tanks, water towers or windmill not metal frames .....	.040
Shaft sinking .....	.060
Concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin works; gas works, or systems; marble, stone or brick work; road making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smokestacks or chimneys .....	.050
Excavations not otherwise specified; blast furnace .....	.040

Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings .....	.035
Ship or boat building or wrecking with scaffolds; floating docks .....	.045
Carpenter work not otherwise specified .....	.035
Installation of steam boilers or engines; placing wire in conduits; installing dynamos; putting up belts for machinery; marble, stone or tile setting, inside work; mantel setting; metal ceiling work; mill or shipwrighting; painting of buildings or structures; installation of automatic sprinklers; ship or boat rigging; concrete laying in floors, foundations or street paving; asphalt laying; covering steam pipes or boilers; installation of machinery not otherwise specified .....	.030
Drilling wells; installing electrical apparatus or fire alarm systems in buildings; house heating or ventilating systems; glass setting; building hothouses; lathing; paper hanging; plastering; inside plumbing; wooden stair building; road making .....	.020

Operation (including repair work) of.

(All combinations of material take the higher rate when not otherwise provided.)

Logging railroads; railroads; dredges; interurban electric railroads using third rail system; dry or floating docks .....	.050
Electric light or power plants; interurban electric railroads not using third rail system; quarries .....	.040
Street railways, all employees; telegraph or telephone systems; stone crushing; blasting furnaces; smelters; coal mines; gas works; steamboats; tugs; ferries .....	.030
Mines, other than coal; steam heating or power plants .....	.025
Grain elevators; laundries; waterworks; paper or pulp mills; garbage works .....	.020

Factories Using Power-Driven Machinery.

Stamping tin or metal .....	.045
Bridge work; railroad car or locomotive making or repairing; cooperage; logging with or without machinery; saw mills; shingle mills; staves; veneer; box; lath; packing cases; sash, door or blinds; barrel; keg; pail; basket; tub; wooden ware or wooden fibre ware; rolling mills; making steam shovels or dredges; tanks; water towers; asphalt; building material not otherwise specified; fertilizer; cement; stone with or without machinery; kindling wood; masts and spars with or without machinery; canneries, metal stamping extra; creosoting works; pile treating works .....	.025
Excelsior; iron, steel, copper, zinc, brass or lead articles or wares not otherwise specified; working in wood not otherwise specified; hardware; tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware; peat fuel; bricketts .....	.020
Breweries; bottling works; boiler works; foundries; machine shops not otherwise specified .....	.020

Cordage; working in food stuffs, including oils, fruits and vegetables; working in wool, cloth, leather, paper, broom, brush, rubber or textiles not otherwise specified .....	.015
Making jewelry, soap, tallow, lard, grease, condensed milk .....	.015
Creameries; printing; electrotyping; photo-engraving; lithographing...	.015

Miscellaneous Work.

Stevedoring; longshoring .....	.030
Operating stock yards, with or without railroad entry; packing houses..	.025
Wharf operation; artificial ice, refrigerating or cold storage plants; tan- neries; electric systems not otherwise specified .....	.020
Theater stage employees .....	.015
Fire works manufacturing .....	.050
Powder works .....	.100

The application of this act as between employers and workmen shall date from and include the first day of October, 1911. The payment for 1911 shall be made prior to the day last named, and shall be preliminarily collected upon the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts shall be made upon the basis of the actual pay roll. Any shortage shall be made good on or before February 1st, following. Every employer who shall enter into business at any intermediate day shall make his payment for the initial year or portion thereof before commencing operation; its amount shall be calculated upon his estimated pay roll, an adjustment shall be made on or before February 1st of the following year in the manner above provided.

For the purpose of such payments, accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one fourth of the premium of the next succeeding year, and one twelfth thereof at the close of each month after December, 1911: Provided, any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund.

The fund thereby created shall be termed the "accident fund," which shall be devoted exclusively to the purpose specified for it in this act.

In that the intent is that the fund created under this section shall ultimately become neither more or less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.

It shall be unlawful for the employer to deduct or obtain any part of the premium required by this section to be by him paid from the wages or earnings

of his workmen or any of them, and the making or attempt to make any such deduction shall be a gross misdemeanor. If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate shall be subject to restoration to the schedule rate. Any such change in classification of risks or premium rates, or any change caused by change in the class of work, occurring during the year, shall, at the time of the annual adjustment, be adjusted by the department in proportion to its duration in accordance with the schedule of this section. If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year.

For the purposes of such payment and making good of deficit, the particular classes of industry shall be as follows:

Class 1. Tunnels; sewer; shaft sinking; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples, towers or grain elevators not metal framed; tanks, water towers, windmills not metal framed.

Class 3. Sub-aqueous works; canal other than irrigation or docks with or without blasting; pile driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structures or parts of structures; fire escapes; erecting fireproof doors or shutters; blast furnace; concrete chimneys; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin work; marble, stone or brick work; roof work; slate work; plumbing work; metal smoke stack or chimneys; advertising signs; ornamental metal work in buildings; carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations, glass setting; building hot houses; lathing; paper hanging; plastering; wooden star building.

Class 6. Electric light and power plants or system; telegraph or telephone systems; cable or electric railways with or without rock or blasting; water-works or system; steam heating plants; gas works or system; installation of steam boilers or engines; placing wires in conduits; installing dynamos; putting up belts for machinery; installation of automatic sprinklers; covering steam pipes or boilers; installation of machinery not otherwise specified; installing electrical apparatus or fire alarm system in buildings; house heating or ventilating systems.

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying.

Class 9. Ship or boat building with scaffolds; ship wrighting; ship or boat rigging; floating docks.

Class 10. Logging; saw mills; shingle mills; lath mills; masts and spars with or without machinery.

Class 12. Dredges; dry or floating docks.

Class 13. Electric light or power plants or systems; steam heat or power plants or systems; electric systems not otherwise specified.

Class 14. Street railways.

Class 15. Telegraph systems; telephone systems.

Class 16. Coal mines.

Class 17. Quarries; stone crushing; mines other than coal.

Class 18. Blast furnaces; smelters; rolling mills.

Class 19. Gas works.

Class 20. Steamboats; tugs; ferries.

Class 21. Grain elevators.

Class 22. Laundries.

Class 23. Water works.

Class 24. Paper or pulp mills.

Class 25. Garbage works; fertilizer.

Class 26. Stamping tin or metal.

Class 27. Bridge work; making steam shovels or dredges; tanks; water towers.

Class 28. Railroad car or locomotive making or repairing.

Class 29. Cooperage; staves; veneer; box packing cases; sash [,] door or blinds; barrel; keg; pail; basket; tub; wood ware or wood fibre ware; kindling wood; excelsior; working in wood not otherwise specified.

Class 30. Asphalt.

Class 31. Cement; stone with or without machinery; building material not otherwise specified.

Class 32. Canneries of fruits or vegetables.

Class 33. Canneries of fish or meat products.

Class 34. Iron, steel, copper, zinc, brass or lead articles or wares; hardware; boiler works; foundries; machine shops not otherwise specified.

Class 35. Tile; brick; terra cotta; fire clay; pottery; earthenware; porcelain ware.

Class 36. Peat fuel; bricketts.

Class 37. Breweries; bottling works.

Class 38. Cordage; working in wool, cloth, leather, paper, brush, rubber or textile not otherwise specified.

Class 39. Working in food stuffs, including oils, fruits, vegetables.

Class 40. Condensed milk; creameries.

Class 41. Printing, electrotyping; photo-engraving; engraving; lithographing; making jewelry.

Class 42. Stevedoring; longshoring; wharf operation.

Class 43. Stock yards; packing houses; making soap, tallow, lard, grease; tanneries.

Class 44. Artificial ice, refrigerating or cold storage plants.

Class 45. Theatre stage employees.

Class 46. Fireworks manufacturing; powder works.

Class 47. Cresoting works; pile treating works.

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate

of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards. If an employer besides employing workmen in extra hazardous employment shall also employ workmen in employment not extra hazardous, the provisions of this act shall apply only to the extra hazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary; wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise.

Sec. 5. Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

(a) Where death results from the injury the expenses of burial shall be paid in all cases, not to exceed \$75.00 in any case, and

(1) If the workman leaves a widow or invalid widower, a monthly payment of \$20 shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur; and the surviving spouse shall also receive \$5 per month for each child of the deceased under the age of sixteen years at the time of the occurrence of the injury until such minor child shall reach the age of sixteen years, but the total monthly payment under this paragraph (1) of subdivision (a) shall not exceed \$35. Upon remarriage of a widow she shall receive, once and for all, a lump sum equal to twelve times her monthly allowance, *viz.*: the sum of \$240, but the monthly payment for the child or children shall continue as before.

(2) If the workman leaves no wife or husband, but a child or children under the age of sixteen years, a monthly payment of \$10 shall be made to each such child until such child shall reach the age of sixteen years, but the total monthly payment shall not exceed \$35, and any deficit shall be deducted proportionately among the beneficiaries.

(3) If the workman leaves no widow, widower, or child under the age of sixteen years, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to 50 per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed \$20 per month. If any dependent is under the age of sixteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent shall reach the age of sixteen years. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years.

(4) In the event a surviving spouse receiving monthly payments shall die, leaving a child or children under the age of sixteen years, the sum he or she shall be receiving on account of such child or children shall be thereafter, until such child shall arrive at the age of sixteen years, paid to the child increased 100 per cent, but the total to all children shall not exceed the sum of \$35 per month.

(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful occupation.

When permanent total disability results from the injury the workman shall receive monthly during the period of such disability:

(1) If unmarried at the time of the injury, the sum of \$20.

(2) If the workman have a wife or invalid husband, but no child under the age of sixteen years, the sum of \$25. If the husband is not an invalid, the monthly payment of \$25 shall be reduced to \$15.

(3) If the workman have a wife or husband and a child or children under the age of sixteen years, or, being a widow or widower, have any such child or children, the monthly payment provided in the preceding paragraph shall be increased by \$5 for each such child until such child shall arrive at the age of sixteen years, but the total monthly payment shall not exceed \$35.

(c) If the injured workman die during the period of total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive twenty dollars per month until death or remarriage, to be increased \$5 per month for each child under the age of sixteen years until such child shall arrive at the age of sixteen years but if such child is or shall be without father or mother, such child shall receive \$10 per month until arriving at the age of sixteen years. The total combined monthly payment under this paragraph shall in no case exceed \$35. Upon remarriage the payments on account of a child or children shall continue as before to the child or children.

(d) When the total disability is only temporary, the schedule of payment contained in paragraphs (1), (2) and (3) of the foregoing subdivision (c) shall apply so long as the total disability shall continue, increased 50 per cent for the first six months of such continuance, but in no case shall the increase operate to make the monthly payment exceed 60 per cent of the monthly wage (the daily wage multiplied by twenty-six) the workman was receiving at the time of his injury. As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed 5 per cent.

(e) For every case of injury resulting in death or permanent total disability it shall be the duty of the department to forthwith notify the state treasurer, and he shall set apart out of the accident fund a sum of money for the case, to be known as the estimated lump value of the monthly payments provided for it, to be calculated upon the theory that a monthly payment of \$20 to a person thirty

years of age, is equal to a lump sum payment, according to the expectancy of life as fixed by the American Mortality Table, of \$4,000 but the total in no case to exceed the sum of \$4,000. The state treasurer shall invest said sum at interest in the class of securities provided by law for the investment of the permanent school fund, and out of the same and its earnings shall be paid the monthly instalments and any lump sum payment then or thereafter arranged for the case. Any deficiency shall be made good out of, and any balance or overplus shall revert to the accident fund. The state treasurer shall keep accurate account of all such segregations of the accident fund, and may borrow from the main fund to meet monthly payments pending conversion into cash of any security and, in such case shall repay such temporary loan out of the cash realized from the security.

(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. If the injured workman be under the age of twenty-one years and unmarried, the parents or parent shall also receive a lump sum payment equal to 10 per cent of the amount awarded the minor workman.

(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments.

(i) A husband or wife of an injured workman, living in a state of abandonment for more than one year at the time of the injury or subsequently, shall not be a beneficiary under this act.

(j) If a beneficiary shall reside or remove out of the state the department may, in its discretion, convert any monthly payments as provided for such case into a lump sum payment (not in any case to exceed \$4,000) upon the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20 to a person thirty years of age is worth \$4,000, or with the consent of the beneficiary, for a smaller sum.

(k) Any court review under this section shall be initiated in the county where the workman resides or resided at the time of the injury, or in which the injury occurred.

Sec. 6. If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the accident fund. If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child, or dependent of the workman shall have the privilege to take under this act and also have cause of action against the employer, as if this act had not been enacted, for any excess of damage over the amount received or receivable under this act.

A minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act, and no other person shall have any cause or action or right to compensation for an injury to such minor workman except as expressly provided in this act, but in the event of a lump sum payment becoming due under this act to such minor workman, the management of the sum shall be within the probate jurisdiction of the courts the same as other property of minors.

Sec. 7. In case of death or permanent total disability the monthly payment provided may be converted, in whole or in part, into a lump sum payment (not in any case to exceed \$4,000), on the theory, according to the expectancy of life as fixed by the American Mortality Table, that a monthly payment of \$20 to a person thirty years of age is worth the sum of \$4000 in which event the monthly payment shall cease in whole or in part accordingly or proportionately. Such conversion may only be made after the happening of the injury and upon the written application of the beneficiary (in case of minor children, the application may be by either parent) to the department, and shall rest in the discretion of the department. Within the rule aforesaid the amount and value of the lump sum payment may be agreed upon between the department and the beneficiary.

Sec. 8. If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under § 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident), as he would have been prior to the passage of this act.

In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the state for the benefit of the accident fund. In any suit brought upon such cause of action the defense of fellow servant and assumption of risk shall be inadmissible, and the doctrine of comparative negligence shall obtain. Any such cause of action assigned to the state may be prosecuted or compromised by the department in

its discretion. Any compromise by the workman of any such suit, which would have a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

Sec. 9. If any workman shall be injured because of the absence of any safeguard or protection required to be provided or maintained by, or pursuant to, any statute or ordinance, or any departmental regulation under any statute, or be, at the time of the injury, of less than the maximum age prescribed by law for the employment of a minor in the occupation in which he shall be engaged when injured, the employer shall, within ten days after demand therefor by the department, pay into the accident fund, in addition to the same required by § 4 to be paid:

(a) In case the consequent payment to the workman out of the accident fund be a lump sum, a sum equal to 50 per cent of that amount.

(b) In case the consequent payment to the workman be payable in monthly payments, a sum equal to 50 per cent of the lump value of such monthly payment, estimated in accordance with the rule stated in § 7.

The foregoing provisions of this act shall not apply to the employer if the absence of such guard or protection be due to the removal thereof by the injured workman himself or with his knowledge by any of his fellow workmen, unless such removal be by order or direction of the employer or superintendent or foreman of the employer, or anyone placed by the employer in control or direction of such workman. If the removal of such guard or protection be by the workman himself or with his consent by any of his fellow workmen, unless done by order or direction of the employer or the superintendent or foreman of the employer, or anyone placed by the employer in control, or direction of such workman, the schedule of compensation provided in § 5 shall be reduced 10 per cent for the individual case of such workman.

Sec. 10. No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void.

Sec. 11. No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be *pro tanto* void.

Sec. 12. (a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.

(b) Where death results from injury the parties entitled to compensation under this act, or someone in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such other proof as required by the rules of the department.

(c) If change of circumstance warrant an increase or rearrangement of com-

pensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.

(d) No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the right thereto accrued.

Sec. 13. Any workman entitled to receive compensation under this act is required, if requested by the department, to submit himself for medical examination at a time and from time to time at a place reasonably convenient for the workman and as may be provided by the rules of the department. If the workman refuses to submit to any such examination, or obstructs the same, his rights to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during or for account of such period.

Sec. 14. Whenever any accident occurs to any workman it shall be the duty of the employer to at once report such accident and the injury resulting therefrom to the department and also to any local representative of the department. Such report shall state:

1. The time, cause, and nature of the accident and injuries, and the probable duration of the injury resulting therefrom.

2. Whether the accident arose out of or in the course of the injured person's employment.

3. Any other matters the rules and regulations of the department may prescribe.

Sec. 15. The books, records, and pay rolls of the employer pertinent to the administration of this act shall always be open to inspection by the department or its traveling auditor, agent, or assistant, for the purpose of ascertaining the correctness of the pay roll, the men employed, and such other information as may be necessary for the department and its management under this act. Refusal on the part of the employer to submit said books, records, and pay rolls for such inspection to any member of the commission, or any assistant presenting written authority from the commission, shall subject the offending employer to a penalty of \$100 for each offense, to be collected by civil action in the name of the state and paid into the accident fund, and the individual who shall personally give such refusal shall be guilty of misdemeanor.

Sec. 16. Any employer who shall misrepresent to the department the amount of pay roll upon which the premium under this act is based shall be liable to the state in ten times the amount of the difference in premium paid and the amount the employer should have paid. The liability to the state under this section shall be enforced in a civil action in the name of the state. All sums collected under this section shall be paid into the accident fund.

Sec. 17. Whenever the state, county, or any municipal corporation shall engage in any extra hazardous work in which workmen are employed for wages, this act shall be applicable thereto. The employer's payments into the accident fund shall be made from the treasury of the state, county, or municipality. If said work is being done by contract, the pay roll of the contractor and the subcontractor shall be the basis of computation, and in the case of contract work consuming less than one year in performance the required payment into the accident fund shall be based upon the total pay roll. The contractor and any subcontractor shall be subject to the provisions of the act, and the state for its general fund, the county, or municipal corporation shall be entitled to collect

from the contractor the full amount payable to the accident fund, and the contractor, in turn, shall be entitled to collect from the subcontractor his proportionate amount of the payment. The provisions of this section shall apply to all extra hazardous work done by contract, except that in private work the contractor shall be responsible, primarily and directly, to the accident fund for the proper percentage of the total pay roll of the work and the owner of the property affected by the contract shall be surety for such payments. Whenever and so long as, by state law, city charter, or municipal ordinance, provision is made for municipal employees injured in the course of employment, such employees shall not be entitled to the benefits of this act and shall not be included in the pay roll of the municipality under this act.

Sec. 18. The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforesaid.

Sec. 19. Any employer and his employees engaged in works not extra hazardous may, by their joint election, filed with the department, accept the provisions of this act, and such acceptances, when approved by the department, shall subject them irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Ninety per cent of the minimum rate specified in § 4 shall be applicable to such case until otherwise provided by law.

Sec. 20. Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interest under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision [1] of section numbered 5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. No bond shall be required, except that an appeal by the employer from a decision of the department under § 9 shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the dis-

cretion of the court except that in cases arising under §§ 9, 15, and 16 either party shall be entitled to a jury trial upon demand. It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal adviser of the department, and shall represent it in all proceedings, whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.

Sec. 21. The administration of this act is imposed upon a department, to be known as the industrial insurance department, to consist of three commissioners to be appointed by the governor. One of them shall hold office for the first two years, another for the first four years, and another for the first six years following the passage and approval of this act. Thereafter the term shall be six years. Each commissioner shall hold until his successor shall be appointed and shall have qualified. A decision of any question arising under this act concurred in by two of the commissioners shall be the decision of the department. The governor may at any time remove any commissioner from office in his discretion, but within ten days following any such removal the governor shall file in the office of the secretary of state a statement of his reasons therefor. The commission shall select one of their members as chairman. The main office of the commission shall be at the state capitol, but branch offices may be established at other places in the state. Each member of the commission shall have power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

Sec. 22. The salary of each of the commissioners shall be \$3,600 per annum, and he shall be allowed his actual and necessary traveling and incidental expenses; and any assistant to the commissioners shall be paid for each full day's service rendered by him, his actual and necessary traveling expenses and such compensation as the commission may deem proper, not to exceed \$6 per day to an auditor, or \$5 per day to any other assistant.

Sec. 23. The commissioners may appoint a sufficient number of auditors and assistants to aid them in the administration of this act, at an expense not to exceed \$5,000 per month. They employ one or more physicians in each county for the purpose of official medical examinations, whose compensation shall be limited to \$5 for each examination and report therein. They may procure such record books as they may deem necessary for the record of the financial transactions and statistical data of the department, and the necessary documents, forms, and blanks. They may establish and require all employers to install and maintain an uniform form of pay roll.

Sec. 24. The commission shall, in accordance with the provisions of this act:

1. Establish and promulgate rules governing the administration of this act.
2. Ascertain and establish the amounts to be paid into and out of the accident fund.

3. Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

4. Supervise the medical, surgical, and hospital treatment to the intent that same may be in all cases suitable and wholesome.

5. Issue proper receipts for moneys received, and certificate for benefits accrued and accruing.

6. Investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations coming under the observation of the department.

7. Compile and preserve statistics showing the number of accidents occurring in the establishment or works of each employer, the liabilities and expenditures of the accident fund on account of and the premium collected from the same, and hospital charges and expenses.

8. Make annual reports to the governor (one of them not more than sixty nor less than thirty days prior to each regular session of the legislature) of the workings of the department, and showing the financial status and the outstanding obligations of the accident fund, and the statistics aforesaid.

Sec. 25. Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but shall not exceed \$10 per day each.

Sec. 26. Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him. The state treasurer shall pay every warrant out of the fund upon which it is drawn. If, at any time, there shall not be sufficient money in the fund on which any such warrant shall have been drawn wherewith to pay the same, the employer on account of whose workman it was that the warrant was drawn shall pay the same, and he shall be credited upon his next following contribution to such fund the amount so paid with interest thereon at the legal rate from the date of such payment to the date such next following contribution became payable, and if the amount of the credit shall exceed the amount of the contribution, he shall have a warrant upon the same fund for the excess, and if any such warrant shall not be so paid, it shall remain, nevertheless, payable out of the fund. The state treasurer shall to such extent as shall appear to him to be advisable keep the moneys of the unsegregated portion of the accident fund invested at interest in the class of securities provided by law for the investment of the permanent school fund. The state treasurer shall be liable on his official bond for the safe custody of the moneys and securities of the accident fund, but all the provisions of an act approved February 21, 1907, entitled "An Act to Provide for State Depositories and to Regulate the Deposits of State Moneys Therein," shall be applied to said moneys and the handling thereof by the state treasurer.

Sec. 27. If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication

shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of § 4 of this act for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid, the entire act shall be thereby invalidated except the provisions of § 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof.

Sec. 28. If the provisions of this act relative to compensation for injuries to or death of workmen become invalid because of any adjudication, or be repealed, the period intervening between the occurrence of an injury or death, not previously compensated for under this act by lump payment or completed monthly payments, and such repeal or the rendition of the final adjudication of the invalidity shall not be computed as a part of the time limited by law for the commencement of any action relating to such injury or death: Provided, that such action be commenced within one year after such repeal or adjudication; but in any such action any sum paid out of the accident fund to the workman on account of injury, to whom the action is prosecuted, shall be taken into account or disposed of as follows: If the defendant employer shall have paid without delinquency into the accident fund the payment provided by § 4, such sums shall be credited upon the recovery as payment thereon, otherwise the sum shall not be so credited but shall be deducted from the sum collected and be paid into the said fund from which they had been previously disbursed.

Sec. 29. There is hereby appropriated out of the state treasury the sum of \$150,000, or so much thereof as may be necessary, to be known as the administration fund, out of which the salaries, traveling and office expenses of the department shall be paid, and also all other expenses of the administration of the accident fund; and there is hereby appropriated out of the accident fund for the purpose to which said fund is applicable the sum of \$1,500,000, or so much thereof as shall be necessary for the purposes of this act.

Sec. 30. Nothing in this act contained shall repeal any existing law providing for the installation or maintenance of any device, means, or method for the prevention of accident in extra hazardous work, or for a penalty or punishment for failure to install or maintain any such protective device, means or method, but §§ 8, 9, and 10 of the act approved March 6, 1905, entitled: "An Act Providing for the Protection and Health of Employees in Factories, Mills, or Workshops, Where Machinery is Used, and Providing for Suits to Recover Damages Sustained by the Violation Thereof, and Prescribing a Punishment for the Violation Thereof and Repealing an Act Entitled 'An Act Providing for the Protection of Employees in Factories, Mills, or Workshops Where Machinery is Used, and Providing for the Punishment of the Violation Thereof, Approved March 6, 1903,' and Repealing All Other Acts or Parts of Acts in Conflict Herewith," are hereby repealed, except as to any cause of action which shall have accrued thereunder prior to October 1, 1911.

Sec. 31. If this act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be provided by the legislature, and in default of such legislative provision, dis-

tribution thereof shall be in accordance with the justice of the matter, due regard being had to obligations of compensation incurred and existing.

Sec. 32. This act shall not affect any action pending or cause of action existing on the 30th day of September, 1911.

Wisconsin.—The Wisconsin act (Laws of 1911, chap. 50)⁶ is as follows:

Sec. 1. There are added to the statutes thirty-two new sections to read: Sec. 2394—1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

1. That the employee either expressly or impliedly assumed the risk of the hazard complained of.

2. When such employer has at the time of the accident in a common employment four or more employees, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this § 2394—1.

- Sec. 2394—2. No contract, rule, or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

- Sec. 2394—3. Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsec. 9 of § 1816 of the statutes as amended by chapter 254 of the Laws of 1907, the term "employer" as used in the two preceding sections of this act shall not include any railroad company as defined in subsec. 7 of said § 1816 as amended, said § 1816 and amendatory acts being continued in force unaffected, except as aforesaid, by the preceding sections of this act.

- Sec. 2394—4. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

1. Where, at the time of the accident, both the employer and employee are subject to the provisions of this act according to the succeeding sections hereof.

2. Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment.

3. Where the injury is proximately caused by accident, and is not caused by wilful misconduct.

And where such conditions of compensation exist for any personal injury or death, the right to recovery of such compensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had

⁶ Pronounced constitutional in *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N.W. 209.

not been passed, but shall be subject to the provisions of the preceding sections of this act.

Sec. 2394-5. The following shall constitute employers subject to the provisions of this act within the meaning of the preceding section:

1. The state, and each county, city, town, village, and school district therein.

2. Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

Sec. 2394-6. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, the filing of which statement shall operate, within the meaning of § 2394-5 of this act to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of the act.

Sec. 2394-7. The term "employee" as used in § 2394-4 of this act shall be construed to mean:

1. Every person in the service of the state, or of any county, city, town, village, or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein, provided that one, employed by a contractor, who has contracted with a county, city, town, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, town, village, or school district which made the contract.

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state (who, for the purposes of the next section of this act, shall be considered the same and shall have the same power of contracting as adult employees), but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

Sec. 2394-8. Any employee as defined in subsec. 1 of the preceding section shall be subject to the provisions of this act and any act amendatory thereof. Any employee as defined in subsec. 2 of the preceding section shall be deemed to have accepted and shall, within the meaning of § 2394-4 of this act, be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

1. The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

2. Such employee shall not, at the time of entering into his contract of hire,

express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of this act, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.

Sec. 2394-9. Where liability for compensation under this act exists, the same shall be as provided in the following schedule:

1. Such medical and surgical treatment, medicines, medical and surgical supplies, crutches, and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability, but not exceeding ninety days, to cure and relieve from the effects of the injury, the same to be provided by the employer; and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same.

2. If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employee leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

(a) If the accident causes total disability, 65 per cent of the average weekly earnings during the period of such total disability, provided that, if the disability is such as not only to render the injured employee entirely incapable of work, but also so helpless as to require the assistance of a nurse, the weekly indemnity during the period of such assistance after the first ninety days shall be increased to 100 per cent of the average weekly earnings.

(b) If the accident causes partial disability, 65 per cent of the weekly loss in wages during the period of such partial disability.

(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivision (a) and (b) respectively.

(d) Said subdivisions (a), (b), and (c) shall be subject to the following limitations:

Aggregate disability indemnity for injury to a single employee caused by a single accident shall not exceed four times the average annual earnings of such employee.

The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

The weekly indemnity due on the eighth day after the employee leaves work as the result of the injury may be withheld until the twenty-ninth day after he so leaves work; if recovery from the disability shall then have occurred, such first weekly indemnity shall not be recoverable; if the disability still continues, it shall be added to the weekly indemnity due on said twenty-ninth day and be paid therewith.

If the period of disability does not last more than one week from the day the employee leaves work as the result of the injury no indemnity whatever shall be recoverable.

3. The death of the injured employee shall not affect the obligation of the employer under subsecs. 1 and 2 of this section, so far as his liability shall have

become payable at the time of death; but the death shall be deemed the termination of disability, and the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:

(a) In case the deceased employee leaves a person or persons wholly dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of subsec. 2 of this section, to make the total compensation for the injury and death (exclusive of the benefit provided for in subsection 1), equal to four times his average annual earnings; the same to be payable unless and until the board shall direct payment in gross, in weekly instalments corresponding in amount to the weekly earnings of the employee.

(b) In case the deceased employee leaves no one wholly dependent on him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of four times such average annual earnings of the employee as the average annual amount devoted by the deceased to the support of the person or persons so partially dependent on him for support bears to such average annual earnings, the same to be payable, unless and until the board shall direct payment in gross, in weekly instalments, corresponding in amount to the weekly earnings of the employee; provided that the total compensation for the injury and death (exclusive of the benefit provided for in said subsec. 1) shall not exceed four times such average annual earnings.

(c) Liability for the death benefits provided for in subdivisions (a) and (b) respectively shall only exist where the accident is the proximate cause of death: Provided that, if the accident proximately causes permanent total disability, and death ensues from some other cause before disability indemnity ceases, the death benefit shall be the same as though the accident had caused death; and Provided, further, that, if the accident proximately causes permanent partial disability and death ensues from some other cause before disability indemnity ceases, liability shall exist for such percentage of the death benefits provided for in said subdivision (a) or (b) (as the case may be), as shall fairly represent the proportionate extent of the impairment of earning capacity caused by such permanent partial disability in the employment in which the employee was working at the time of the accident.

(d) If the deceased employee leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding \$100.

Sec. 2394-10. 1. The weekly earnings referred to in § 2394-9 shall be one fifty-second of the average annual earnings of the employee; average annual earnings shall not be taken at less than \$375, nor more than \$750, and between said limits shall be arrived at as follows:

(a) If the injured employee has worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed.

(b) If the injured employee has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary

which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or a neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.

(d) The fact that an employee has suffered a previous disability, or received compensation therefor, shall not preclude compensation for a later injury, or for death, but in determining compensation for the later injury, or death, his average annual earnings shall be such sum as will reasonably represent his annual earning capacity at the time of the latter injury, in the employment in which he was working at such time, and shall be arrived at according to, and subject to the limitations of, the previous provisions of this section.

2. The weekly loss in wages referred to in § 2394-9 shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provision of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.

3. The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she is living at the time of his death.

(b) A husband upon a wife with whom he is living at the time of her death.

(c) A child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of the parent, there being no surviving dependent parent. In case there is more than one child thus dependent, the death benefit shall be divided equally among them.

In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the death of the employee; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof; and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

4. No person shall be considered a dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.

5. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; and the death benefit shall be directly

recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees; provided that in case of the death of a dependent whose right to a death benefit has thus become fixed, so much of the same as is then unpaid shall be recoverable by and payable to his personal representative in gross. No person shall be excluded as a dependent who is a non-resident alien.

6. No dependent of an injured employee shall be deemed, during the life of such employee, a party in interest to any proceeding by him for the enforcement or collection of any claim for compensation, nor as respects the compromise thereof by such employee.

Sec. 2394-11. No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured or by someone of his behalf, or in case of his death, by a dependent or someone on his behalf, shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelop addressed to him at last known place of business or residence. Such mailing shall constitute completed service. Provided, however, that any payment of compensation under this act, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required; and provided further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby; and provided further, that if no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred.

Sec. 2394-12. Wherever in case of injury the right to compensation under this act would exist in favor of any employee, he shall, upon the written request of his employer, submit from time to time to examination by a regular practising physician, who shall be provided and paid for by the employer, and shall likewise submit to examination from time to time by regular physician selected by said industrial accident board, or a member or examiner thereof. The employee shall be entitled to have a physician, provided and paid for by himself, present at any such examination. So long as the employee, after such written request of the employer, shall refuse to submit to such examination, or shall in any way obstruct the same, his right to begin or maintain any proceeding for the collection of compensation shall be suspended; and if he shall refuse to submit to such examination after direction by the board, or any member or examiner thereof, or shall in any way obstruct the same, his right to the weekly indemnity which shall accrue and become payable during the period of such refusal or obstruction, shall be barred. Any physician who shall make or be present at any such examination may be required to testify as to the results thereof.

Sec. 2394-13. There is hereby created a board which shall be known as the industrial accident board. The commissioner of labor and industrial statistics shall be *ex officio* a member of such board. He may, however, authorize the deputy commissioner to act in his place. Within thirty days after the passage of

this act, the governor, by and with the advice and consent of the senate, shall appoint a member who shall serve two years, and another who shall serve four years. Thereafter such two members shall be appointed and confirmed for terms of four years each. Vacancies shall be filled in the same manner for the unexpired term. Each member of the board, before entering upon the duties of his office, shall take the oath prescribed by the Constitution. A majority of the board shall constitute a quorum for the exercise of any of the powers or authority conferred by this act, and an award by a majority shall be valid. In case of a vacancy, the remaining two members of the board shall exercise all the powers and authority of the board until such vacancy is filled. Each member of the board, including the said commissioner, shall receive an annual salary of \$5,000. This salary shall, as to the commissioner of labor and industrial statistics, be in full for his services as such commissioner of labor and industrial statistics.

Sec. 2394-14. The board shall organize by choosing one of its members as chairman. Subject to the provisions of this act, it may adopt its own rules of procedure, and may change the same from time to time in its discretion. The board, when it shall deem it necessary to expedite its business, may from time to time employ one or more expert examiners for such length of time as may be required, such examiners to be exempt from the operation of chapter 363 of the Laws of 1905, and amendatory acts. It may also appoint a secretary, who shall be similarly exempt, and such clerical help as it may deem necessary. It shall fix the compensation of all assistants so appointed. It shall provide itself with a seal for the authentication of its orders, awards, and proceedings, upon which shall be inscribed the words "Industrial Accident Board—Wisconsin—Seal." It shall keep its office at the capitol, and shall be provided by the superintendent of public property with a suitable room or rooms, necessary office furniture, stationery, and other supplies. The members of the board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board, before payment is made. All salaries and expenses authorized by this act shall be audited and paid out of the general funds of the state, the same as other general expenses are audited and paid.

Sec. 2394-15. Any dispute or controversy concerning compensation under this act, including any in which the state may be a party, shall be submitted to said industrial accident board in the manner and with the effect provided in this act. Every compromise of any claim for compensation under this act shall be subject to be reviewed by, and set aside, modified, or confirmed by the board upon application made within one year from the time of such compromise.

Sec. 2394-16. Upon the filing with the board by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post-office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board and hearings may be

held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any member thereof, or any examiner appointed thereby, shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the circuit court of any county.

Sec. 2394-17. After final hearing by said board, it shall make and file (1) its findings upon all facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the hearing and determination of any controversy before it, the board shall have power to order the payment of such, or any part, of the compensation, which is or may fall due, as to which the party from whom the same is claimed does not deny liability in good faith within ten days after the giving of notice of hearing provided for in the preceding section; and if the same shall not be paid as required by such order, the facts with respect to the liability therefor, and the determination of the board as to the rights of the parties, shall be embraced in, and constitute a part of, its findings and awards; and the board shall have the power to include in its award, as a penalty for noncompliance with any such order, not exceeding 25 per cent of each amount which shall not have been paid as directed thereby.

Sec. 2394-18. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a judgment in accordance therewith; which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

Sec. 2394-19. The findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive; and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the award, any party aggrieved thereby may commence, in the circuit court for Dane county an action against the board for the review of such award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall also state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the board, or any member of the board, shall be deemed completed service. The board shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the board shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have

been taken therein, and of its findings and award. Said action thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the board acted without or in excess of its powers.
2. That the award was procured by fraud.
3. That the findings of fact by the board do not support the award.

Sec. 2394-20. Upon the setting aside of any award the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

Sec. 2394-21. Said board, or any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the circuit court; but all such appeal shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as state causes on such calendar.

Sec. 2394-22. No fees shall be charged by the clerk of any court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies of transcripts thereof. In proceedings to review an award, costs as between the parties shall be allowed or not in the discretion of the court, but no costs shall be taxed against said board. In any action for the review of an award, and upon any appeal therein to the supreme court, it shall be the duty of the attorney general, personally, or by an assistant, to appear on behalf of the board, whether any other party defendant shall have appeared or be represented in the action or not. Unless previously authorized by the board, no lien shall be allowed, nor any contract be enforceable, for any contingent attorneys' fee for the enforcement or collection of any claim for compensation where such contingent fee, inclusive of all taxable attorneys' fees paid or agreed to be paid for the enforcement or collection of such claim, exceeds ten per cent of the amount at which such claim shall be compromised, or of the amount awarded, adjudged, or collected.

Sec. 2394-23. No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof; nor shall any claim for compensation, or compensation awarded, adjudged, or paid, be subject to be taken for the debts of the party entitled thereto.

Sec. 2394-24. The whole claim for compensation for the injury or death of any employee or any award or judgment thereon, shall be entitled to a preference over the unsecured debts of the employer hereafter contracted, but this section shall not impair the lien of any judgment entered upon any award.

Sec. 2394-25. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal

representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

Sec. 2394-26. Nothing in this act shall affect the organization of any mutual or other insurance company, or any existing contract for insurance of employers' liability, nor the right of the employer to insure in mutual or other companies, in whole or in part, against such liability, or against the liability for the compensation provided for by this act, or to provide by mutual or other insurance, or by arrangement with his employees, or otherwise, for the payment to such employees, their families, dependents, or representatives, of sick, accident, or death benefits in addition to the compensation provided for by this act. But liability for compensation under this act shall not be reduced or affected by any insurance, contribution, or other benefit whatsoever, due to or received by the person entitled to such compensation, and the person so entitled shall, irrespective of any insurance or other contract, have the right to recover the same directly from the employer; and in addition thereto, the right to enforce in his own name, in the manner provided in this act, the liability of any insurance company which may, in whole or in part, have insured the liability for such compensation: Provided, however, that payment in whole or in part of such compensation by either the employer or the insurance company, shall, to the extent thereof, be a bar to recovery against the other of the amount so paid, and provided further, that as between the employer and the insurance company, payment by either directly to the employee, or to the person entitled to compensation, shall be subject to the conditions of the insurance contract between them.

Sec. 2394-27. Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this act, and provisions thereof inconsistent with this act shall be void. No company shall enter into any such contract of insurance unless such company shall have been approved by the commissioner of insurance, as provided by law. For the purposes of this act, each employee shall constitute a separate risk within the meaning of § 1898d of the statutes.

Sec. 2394-28. Any employer against whom liability may exist for compensation under this act may, with the approval of the industrial accident board, be relieved therefrom by:

1. Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at 3 per centum per annum, with such trust company of this state as shall be designated by the employee (or by his dependents, in case of his death, and such liability exists in their favor), or in default of such designation by him (or them) after ten days' notice in writing from the employer, with such trust company of this state as shall be designated by the board; or

2. By the purchase of an annuity, within the limitations provided by law, in any insurance company granting annuities and licensed in this state, which may be designated by the employee, or his dependents, or the board, as provided in subsec. 1 of this section.

Sec. 2394-29. The board shall cause to be printed and furnished free of charge to any employer or employees such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act; it shall provide a proper record book in which shall be entered and indexed the name of every employer who shall file a statement of election under this act, and the date of

the filing thereof, and a separate book in which shall be entered and indexed the name of every employer who shall file his notice of withdrawal of such election, and the date of the filing thereof; and books in which shall be recorded all orders and awards made by the board, and such other books or records as it shall deem required by the proper and efficient administration of this act; all such records to be kept in the office of the board. Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause notice of the fact to be given to his employees, by posting such notice thereof in several conspicuous places in the office, shop, or place of business of the employer, or by publishing, or in such other manner as the board shall deem most effective; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employees.

Sec. 2394-30. A sum sufficient to carry out the provisions of this act is hereby appropriated out of any money in the treasury not otherwise appropriated.

Sec. 2394-31. All acts or parts of acts inconsistent with this act are to be deemed replaced by this act, and to that end are hereby repealed.

Sec. 2394-32. The legislature intends the contingency in subdivision 2 of § 2394-1 of this act to be a separable part thereof, and the subdivision likewise separable from the rest of the act, and that part of said § 2394-1 that follows subdivision 2, likewise separable from the rest of the act; so that any part of said subdivision, or the whole, or that part which follows said subdivision 2, may fail without affecting any other part of the act.

Sec. 2. Sec. 2394-3 to 2394-32, inclusive, shall take effect and be in force from and after the passage and publication of this act, and the entire act shall be in force from and after September 1st, 1911.

CHAPTER LXXVIII.

STATUTES RELATIVE TO THE SAFETY AND HEALTH OF EMPLOYEES IN MANUFACTURING AND MERCANTILE ESTABLISHMENTS.

- 1853. Introductory.
- 1854. Safety of employees. Generally.
- 1855. Enactments relative to the safeguarding of moving machinery and other dangerous appliances.
- 1856. Construction and effect of these enactments.
 - a. Generally.
 - b. Master's duty deemed continuous.
 - c. Under what circumstances machinery must be guarded.
 - d. What machinery is dangerous in such a sense that a master is required to fence it.
 - e. Specific parts of machinery within the scope of enactments.
 - f. What persons are within the protection of the statute.
 - g. Compliance with the statute.
 - h. Complaint.
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- 1857. Other enactments relative to mechanical appliances.
 - a. Steam boilers.
 - b. Elevators and lifts.
 - c. Means of communication.
 - d. Protection from electric currents.
- 1858. Dangerous openings; lighting.
- 1859. Construction and effect of the enactments.
- 1860. Protection against fire.
- 1861. Construction and effect of these enactments.
- 1862. Sanitary condition of place of work.
- 1863. Construction and effect of these enactments.
- 1864. Same subject. Provisions specifically applicable to bakeries.
- 1865. Meals of employees.
- 1866. Provision of seats for female employees.
- 1867. Work in tenements. Sweatshops.
- 1868. Places to which the English acts are applicable. Generally.
- 1869. Provisions with regard to manufacturing establishments properly so called.
- 1870. Places deemed to be within the scope of these provisions.
 - a. Premises within which "mechanical power is used in any process incident to the manufacture" of certain articles.
 - b. "Premises wherein steam, water, or other mechanical power is used in aid of the manufacturing process."

- c. "Premises wherein . . . any manual labor is exercised . . . for purposes of gain."
 - d. Premises in which "manual labor is exercised in adapting an article for sale."
 - e. "Place in the open air."
 - f. "Bleaching or dyeing works."
 - g. "Shipbuilding yard."
 - h. Bottle-washing works.
 - i. "Tenement factory."
 - j. Electrical stations for lighting any "street, public place," etc.
1871. Provisions with regard to establishments other than those in which manufacturing processes are carried on.
1872. Places within the scope of these provisions.
- a. "Dock, wharf, quay."
 - b. Warehouse.
 - c. "Machinery used in the process of loading or unloading a ship."
 - d. "Machinery temporarily used for the purpose of the construction of a building."
 - e. Laundries carried on by way of trade or for purposes of gain.
1873. "Occupier of a factory," when a person is deemed to be.
1874. Establishments embraced within the purview of American statutes.
1875. —of statutes in the British colonies.

As to the constitutionality of statutes imposing specific duties on employers, see the concluding chapter of this treatise.

The extent to which the imposition of a specific duty upon a master is regarded as creating a non-delegable duty is discussed in § 1495 *ante*.

1853. Introductory.—The groups of statutes discussed in chapters LXXI. to LXXVII. inclusive may be said to be generally for the purpose of affording the servant means of redress for injuries received, which he did not possess at common law. The statutes discussed in the present chapter and in the five succeeding chapters may be said to occupy a higher place from a sociological standpoint, in that they are designed primarily to prevent the servant from receiving injuries by imposing upon the master certain specified duties which tend to render the conditions surrounding his work safer. The one class increases the master's obligation in respect to remunerating or compensating an injured servant; the other imposes upon the master the active duty of taking designated steps tending to decrease the possibility of such injuries occurring. In other words, the preceding chapters may be said to be remedial, while the statutes to be discussed are preventive.

The second group of statutes may be divided generally into the following classes:

(1) The statutes designed to prevent physical injury by accident, including those requiring safeguards on machinery, safety appliances on rolling stock of railroads, the maintenance of safe conditions in mines, etc.

(2) Those designed to preserve the health of employees, including those requiring ventilation of the working place, protection from the cold, protection from dangerous fumes arising from the material at which the servant is at work, etc.

(3) Those designed to safeguard morality, including statutes requiring separate dressing rooms and toilet rooms for female employees, forbidding the employment of women in certain occupations, such as saloons, prohibiting the employment of children in immoral places and occupations, etc.

(4) Those prohibiting the employment of women in certain dangerous occupations, such as in mining, cleaning moving machinery, etc.

(5) Those designed to protect young children, including those which entirely prohibit the employment of children under certain ages and prohibit the employment of children of school age in the absence of employment certificates, etc.

As to the defenses which are available to the master in action-based upon a violation of the duties imposed by the statutes discussed in this and the succeeding chapters, see generally chapter LXXII., subtitle B.

1854. Safety of employees. Generally.—In practically every jurisdiction in which manufacturing is at all a common form of industry, the legislature has created a department of labor, which has come to be one of the most important executive branches of the government; and the head of this department is in many cases given extensive authority relative to the conduct of the manufacturing industries. It may be said in a general way that power is conferred upon him to visit, through his inspectors, the various industries within the jurisdiction, to note the conditions under which the employees work, and to recommend, or even in many cases to require, the installation of safety devices, etc., and the removal of dangerous or unhealthful conditions surrounding the work. One of the very important branches of the department is the maintenance of bureaus of labor statistics, whose principal function is to gather and preserve records as to the conditions obtaining in the various manufacturing industries, especially in relation to the commercial, industrial, social, and sanitary conditions under which the workmen are employed. Another important branch has particular relation to the question of

the employer's liability for injuries to the employees, the statutes imposing upon the employers the duty to report all accidents causing death or serious injury, to the department, and giving the latter power to investigate into the causes of such accidents.

An attempt to set out in a treatise of this kind all the various details of the statutes relative to governmental control of manufactories would be impractical, and the reader is referred to the various factory and labor acts for such details as may be desired.

The first statute which was passed to regulate labor in factories was the "Act for the Preservation of the Health and Morals of Apprentices and Others Employed in Cotton and Other Mills and Cotton and Other Factories." 42 Geo. III. chap. 73. This statute provided for the due cleansing of the factories by yearly washings with quicklime, for the admission of sufficient fresh air, and for supplying every apprentice yearly with suitable clothing. It also prohibited night work and excessive labor in the daytime, and directed that all apprentices should be instructed in the principles of the Christian religion. Many other statutes dealing with various trades were subsequently passed, the result being what Mr. Redgrave in his work on Factory and Workshop Acts calls "a perfect chaos of regulations." This incongruous mass of provisions was finally, after a careful inquiry by a Royal Commission, brought into harmony by the consolidating acts of 1878, which has now been superseded by the present act of 1901.

The extract from the decision in *Caspar v. Lewin*,¹ given in the note below, shows the rapid development in America of this kind of legislation.²

¹ (1901) 82 Kan. 604, — L.R.A. (N. S.) —, 109 Pac. 657.

² "The experience of England has been paralleled in this country. A beginning in factory legislation was made by the Massachusetts act of April 16, 1836, 'To Provide for the Better Instruction of Youth Employed in Manufacturing Establishments.' (See Mass. Laws 1842, chap. 60, § 1.) In 1897 the section of the New York law which relates to the protection of employees operating machinery was imbedded in a labor code which covers thirty-nine pages of the statute book, and three more pages are filled with a schedule of laws repealed by the act. (N. Y. Laws 1897, chap. 415.) The chapter referred to has since been amended a number of times.

"The first provision for safeguarding

dangerous machinery was made by the legislature of Massachusetts in 1877, in an act which reads in part as follows:

"The belting, shafting, gearing, and drums of all manufacturing establishments, when so located as to be, in the opinion of the inspectors hereinafter mentioned, dangerous to employees while engaged in their ordinary duties, shall be, as far as practicable, securely guarded.' (Acts & Res. Mass. 1877, chap. 214, § 1.)

The subject of guarding vats and pans was introduced by an act of the Wisconsin legislature which took effect May 2, 1887, section 2 of which reads as follows:

"Every stationary vat, pan, or other structure with molten metal or hot liquids shall be surrounded with proper

1855. Enactment relative to the safeguarding of moving machinery and other dangerous appliances.—Statutes requiring moving machinery and other dangerous appliances, such as vats or pans containing harmful fluids, to be guarded, and belts to be equipped with belt shifters, etc., have been enacted in nearly every jurisdiction in which manufacturing is one of the principal industries.

safeguards for preventing accidents or injury to those employed at or near them. All belting, shafting, gearing hoists, flywheels, elevators, and drums of manufacturing establishments, so located as to be dangerous to employees when engaged in their ordinary duties, shall be securely guarded or fenced so as to be safe to persons employed in any such place or employment.' (Wis. Laws 1887, chap. 549.)

"Belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys first appeared in the New York act of May 25, 1887, and such appliances were then required to be automatic. (N. Y. Laws 1887, chap. 462, § 11.) . . .

"In March, 1897, a statute of the state of Indiana became effective which followed the New York law of 1890, and required mechanical substitutes for belt shifters to be 'safe' and loose pulleys where 'possible.' (Ind. Laws 1897, chap. 65, § 8.) Mechanical contrivances for the purpose of throwing belts were required to be 'safe' in Iowa. (Iowa Laws, 1902, chap. 149, § 2) and in Minnesota (Minn. Laws 1893, chap. 7, § 21). In Pennsylvania, 'automatic shifters or other mechanical contrivances' were necessary. (Pa. Laws 1893, chap. 244, § 8.) In Ohio, shifters for 'shifting belts and poles and other appliances for removing and replacing belts on single pulleys' were sufficient. (Ohio Laws 1900, p. 42, § 1.) In Connecticut (Conn. Acts 1887, chap. 152, § 3), New Jersey (N. J. Laws 1885, chap. 168, § 3), and West Virginia (W. Va. Acts 1901, chap. 19, § 1), machinery was required to be 'securely guarded,' instead of 'properly guarded,' as in Indiana, Iowa, and New York. In Wisconsin the provision was 'securely guarded or fenced.' (Wis. Laws 1887, chap. 549, § 2.) In Massachusetts the expression was 'securely guarded.' (Laws 1887, chap. 214, § 1.) In Minnesota the phrase ran 'properly

guarded, fenced, or otherwise protected.' (Minn. Laws 1893, chap. 7, § 1.) In Missouri the words were 'safely and securely.' (Mo. Laws 1891, p. 160, § 3.) In Pennsylvania (Pa. Laws 1893, chap. 244, § 8) and Rhode Island (R. I. Laws 1894, chap. 1278, § 6) 'proper safeguards' were required.

"The protection of factory acts was expressly limited to employees engaged in their 'ordinary duties' in the states of Connecticut, Massachusetts, Missouri, New Jersey, and West Virginia. This limitation did not appear in the laws of Indiana, Iowa, Minnesota, New York, Pennsylvania, Washington, and Wisconsin. The original Wisconsin law has been quoted. In the Revision of 1898 the limitation upon the classes of employees entitled to the protection of safeguards were 'industriously by amendment dropped' (Marshall, J., in *Miller v. Kimberley & C. Co.* [1908] 137 Wis. 138, 143, 118 N. W. 536.) . . . In Ohio the owners and operators of all factories and workshops were required to make suitable provision 'to prevent injury to persons who may come in contact with any such machinery.' (Ohio Laws, 1900, p. 42, § 1.) In Rhode Island, belting and gearing were required to be provided with proper safeguards, and if vats, pans, or structures filled with molten metal or hot liquid were not surrounded with proper safeguards 'for preventing accident or injury to those employed at or near them' (R. I. Laws 1894, chap. 1278, § 9), the factory inspector might require alterations or additions.

"The dangerous location of machinery was made a feature in Connecticut, Massachusetts, Minnesota, New Jersey, Missouri, Rhode Island, and West Virginia; the practicability of guards in Connecticut, Massachusetts, Minnesota, and New Jersey. In Missouri and West Virginia guards were required where possible."

England.—Factory and workshop act 1901 (1 Edw. VII. chap. 22) sec. 10. (1) With respect to the fencing of machinery in a factory the following provisions shall have effect:—

(a) Every hoist or teagle and every fly-wheel directly connected with the steam or water or other mechanical power, whether in the engine house or not, and every part of any water wheel or engine worked by any such power, must be securely fenced; and—

(b) Every wheel race not otherwise secured must be securely fenced close to the edge of the wheel race; and—

(c) All dangerous parts of the machinery, and every part of the mill gearing, must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced; and—

(d) All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where they are under repair or under examination in connection with repair, or are necessarily exposed for the purpose of cleaning or lubricating, or for altering the gearing or arrangements of the parts of the machinery.

Sec. 12. (1) The traversing carriage of any self-acting machine must not be allowed to run out within a distance of 18 inches from any fixed structure not being part of the machine, if the space over which it runs out is a space over which any person is liable to pass, whether in the course of his employment or otherwise. Provided, that nothing in this subsection shall prevent any portion of the traversing carriage of any self-acting cotton spinning or woollen spinning machine being allowed to run out within a distance of 12 inches from any part of the head stock of another self-acting cotton spinning or woollen spinning machine.

(2) A person employed in a factory must not be allowed to be in the space between the fixed and the traversing parts of a self-acting machine, unless the machine is stopped with the traversing part on the outward run; but for the purpose of this provision the space in front of a self-acting machine shall not be included in the space aforesaid.

For earlier enactments, see factory workshop act, 1891, § 5, subs. 3; § 6, subs. 2.

Colorado.—Stat. Anno. 1911, § 2506-b (act of 1911, § 2). It is provided that any person operating a factory, mill, workshop, bakery, laundry, store, or any kind of an establishment wherein laborers are employed or machinery used, shall provide and maintain belt shifters wherever practicable; reasonable safeguards for all vats, pans, trimmers, cut-offs, gang edger, and other saws, planers, cogs, gearing, belting, shafting, coupling, set-screws, line rollers, conveyers, mangles in laundries, and machinery of other or similar description wherever practicable, and with which the employees of any such factory, mill, or workshop are liable to come in contact while in the performance of their duties; provision is also made for the attaching of a notice to machinery in a defective or unguarded condition, which notice shall not be removed until the defect has been remedied or the machine safeguarded.

Connecticut.—Gen. Stat. 1902, § 4516. The belting, shafting, gearing, machinery, and drums of all factories and buildings where machinery is used, when so placed as, in the opinion of the inspector, to be dangerous to the persons em-

ployed therein while engaged in their ordinary duties, shall, as far as practicable, be securely guarded.

No machinery other than steam engines in a factory shall be cleaned while running, after notice forbidding the same is given by the inspector to the owners or operators of the factory.

Illinois.—Laws 1909, p. 202, § 3 (b)–(d). Certain appliances for controlling or shutting down machinery are specified.

Sec. 7. Traversing carriage of any self-acting machinery not to run out within 18 inches of any fixed structure not being a part of the machine, if the space over which it runs out is one through which an employee is liable to pass.

Indiana.—Factory act 1899, § 9 (Burns's Anno. Stat. 1908), 8029 (7087i). It shall be the duty of the owner of any aforesaid establishment, or his agent, superintendent, or other person in charge of the same, to furnish and supply, or cause to be furnished and supplied, therein, in the direction of the chief inspector, where machinery is used, belt shifters or other safe mechanical contrivances for the purpose of throwing on or off belts or pulleys; and whenever possible, machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws and machinery of every description therein, shall be properly guarded, and no person shall remove or make ineffective any safeguard around or attached to any planer, saw, belting, shafting, or other machinery, or around any vat or pan, while the same is in use, unless for the purpose of immediately making repairs thereto, and all such safeguards shall be promptly replaced. By attaching thereto a notice to that effect, the use of any machinery may be prohibited by the chief inspector, should such machinery be regarded as dangerous. Such notice must be signed by the chief inspector, and shall only be removed after the required safeguards are provided, and the unsafe or dangerous machine shall not be used in the meantime. Earlier enactment, act 1897, p. 101.

Iowa.—Factory act, 29 Gen. Assem. chap. 149, § 2. It shall be the duty of the owner, agent, superintendent, or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply, or cause to be furnished and supplied, therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and, wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting shafting, set-screws, and machinery of every description therein shall be properly guarded. (Code Supp. § 4999 (b). For the earlier provision, see Code, § 4064.)

Kansas.—Gen. Stat. 1909, § 4679; Laws 1903, chap. 356, § 37. Every person owning or operating any manufacturing establishment in which machinery is used shall furnish and supply for use therein belt shifters, or other safe mechanical contrivance for the purpose of throwing on or off belts or pulleys; and, wherever it is practicable, machinery shall be operated with loose pulleys. All vats, pans, saws, planers, cog gearing, belting, shafting, set-screws, and machinery of every description used in a manufacturing establishment, shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.

Kentucky.—Stat. 1909, § 3248. It shall be the duty of the owner of any manufacturing establishment where any person under sixteen years of age is employed, his agents, superintendents, or other persons in charge of same, to furnish and supply, when practicable, or cause to be furnished and supplied to him, belt shifters, or other safe mechanical contrivance for the purpose of throwing belts on or off pulleys; and, whenever practicable, machinery therein shall be provided with loose belts. All vats, pans, saws, planes, cogs, gearing, belting, set-screws and machinery of every description therein, which is palpably dangerous, where practicable, shall be properly guarded; and no person shall remove or make ineffective any safeguard around or attached to any planer, saw, belting, shafting, or other machinery, or around any vat or pan, while the same is in use, unless for the purpose of immediately making repairs thereto; and all such safeguards shall be promptly replaced.

Massachusetts.—Rev. Laws 1902, chap. 104, § 41. The belting, shafting, gearing, and drums of all factories, if so placed as, in the opinion of the inspectors of factories and public buildings, to be dangerous to employees therein while engaged in their ordinary duties, shall be, as far as practicable, securely guarded. No machinery except steam engines in a factory shall be cleaned while running, if objection in writing is made by one of said inspectors.

Sec. 42. (Laws 1896, chap. 343). No traversing carriage of a mule in a cotton factory shall pass within a foot of a pillar or fixed structure.

Supp. to Rev. Laws 1907, p. 815 (act of March 16, 1904). Looms shall be equipped with guards approved by police inspection department to prevent injury to employees from shuttles falling or being thrown from the loom.

Michigan.—Comp. Laws 1897, § 5349; Pub. Acts 1895, act 184. It shall be the duty of the owner of a factory, or his agent, superintendent, or other person in charge of the same, to furnish or supply, or caused to be furnished and supplied, in the discretion of the factory inspector, where machinery is in use, proper shifters, or other mechanical contrivances for the purpose of throwing belts on or off pulleys. All gearing or belting shall be provided with proper safeguards, and wherever possible, machinery shall be provided with loose pulleys. All vats, saws, pans, planers, cogs, set-screws, gearing and machinery of every description shall be properly guarded, when deemed necessary by the factory inspector. For the earlier enactment, see Pub. Acts 1893, act 126.

Sec. 5369 (Pub. Acts 1889, Act 265, § 1997c6). It shall be the duty of the owner of such factory, mercantile industry, or manufacturing establishment, or his agent, superintendent, or other person in charge of the same, to furnish and supply, or cause to be furnished and supplied, in the discretion of the inspector, where dangerous machinery is in use, automatic shifters, or other mechanical contrivances for, of throwing on or off belts on pulleys; and no minor under fourteen years of age shall be allowed to clean machinery while in motion. All gearing and belting shall be provided with proper safe guards.

Sec. 5370 (§ 1997c7). That if the heating, lighting, ventilation or sanitary arrangement of any shop or factory is such as to be injurious to the health of persons employed therein, or that the means of egress in case of fire or other disaster is not sufficient or in accordance with all the requirements of law, or that the belting, shafting, gearing, elevators, drums and machinery in the shops and factories are located so as to be dangerous to employees, and not sufficiently guarded, or that the vats, pans, or structures filled with molten metal or hot

liquid are not surrounded with proper safeguards for preventing accident or injury to those at or near them, after due notice of such defect, said proprietors or agents shall be deemed guilty of violating the provisions of this act.

Minnesota.—Rev. Laws 1905, § 1813. All machinery of the several kinds specified shall be so located as not to be dangerous to workmen, or, as far as practicable, shall be fenced or otherwise protected. (Gen. Stat. 1894, § 2248; Laws 1893, chap. 7.)

Sec. 1814. Belt shifters to be furnished where practicable.

Missouri.—Rev. Stat. 1909, § 7828; Rev. Stat. 1899, § 6433, as amended by Laws 1909, p. 504. The belting, shafting, [machines, machinery], gearing, and drums, in all manufacturing, mechanical, and other establishments, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishment. (The words in brackets were added by the amending act. For the original statute, see Act of April 20th, 1891.)

Nebraska.—Comp. Stat. 1911, § 3793z8, § 20. All belting, shafting, gearing, elevators, drums, saws and cogs to be guarded; vessels filled with molten metal or hot liquid to be protected by guards, boxing or screens; belt shifters to be furnished.

New Jersey.—Laws 1904, p. 156, § 13 (Comp. Stat. 1910, p. 3026). The owner or person in charge of any of the places coming under the provisions of this act, where machinery is used, shall provide, in the discretion of the commissioner, belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys; whenever practicable, all machinery shall be provided with loose pulleys, all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, drums, and machinery of every description shall be properly guarded; no person shall remove or make ineffective any safeguard around or attached to such machinery, vats, or pans while the same are in use, unless for the purpose of immediately making repairs thereto, and all such safeguards so removed shall be promptly replaced; if the machinery, or any part thereof, or any vat, pan or vessel containing molten metal or hot liquid is in a dangerous condition or is not properly guarded, the use thereof may be prohibited by the commissioner, and a notice to that effect shall be attached thereto; such notice shall not be removed until the machinery is made safe and the required safeguards are provided; and in the meantime such unsafe or dangerous machinery, vats, pans, or vessels containing molten metal or hot liquid shall not be used; when, in the opinion of the commissioner, it is necessary, the halls leading to work-rooms shall be provided with proper lighting facilities (earlier provision, Gen. Stat. § 2345).

New York.—Labor law 1909, § 81 (as amended by Laws 1910, chap. 106). The owner or person in charge of a factory where machinery is used shall provide, in the discretion of the commissioner of labor, belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys. Whenever practicable, all machinery shall be provided with loose pulleys. All vats, pans, saws, planers, cogs, gearing, belting, set-screws, and machinery of every description, shall be properly guarded. No person shall remove or make ineffective any safeguard around or attached to machinery, vats, or pans while the same are in use, unless for the purpose of immediately making repairs

thereto, and all such safeguards so removed shall be promptly replaced. If the machine or any part thereof is in a dangerous condition or is not properly guarded, the use thereof may be prohibited by the commissioner of labor, and a notice to that effect shall be attached thereto. Such notice shall not be removed until the machine is made safe and the required safeguards provided, and in the meantime such unsafe or dangerous machinery shall not be used.

For the earlier enactments *in pari materia*, see Laws 1886, chap. 409; Laws 1887, chap. 462; Laws 1890, chap. 398; Laws 1892, chap. 673.

Ohio.—Gen. Code 1910, § 1027 (1)–(10); Laws 1900, p. 42, § 1. Elaborate regulations with respect to the guarding of various kinds of moving machinery, and the disconnection of machinery by tight and loose pulleys or other suitable appliances. The general effect of the provisions is similar to those contained in the New York labor law; but they are in some respects much more detailed.

Sec. 1027 (3). Keys, bolts, set-screws, and all parts of wheels, shafting, or other revolving machinery projecting unevenly beyond the surface, are to be covered, cut off, or countersunk.

Laws 1908, p. 30, § 4. Dangerous machinery in factories where women and children are employed, inspection of, by visitors.

Oklahoma.—Comp. Laws 1909, § 4029 (Laws 1907–8, p. 508). The owner or person in charge of the factory or any institution where machinery is used shall be provided with belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys whenever practicable. All machines shall be provided with loose pulleys, and all vats, pans, planers, cogs, gearing, belting, shafting, set screws and machinery of every description, shall be properly guarded. No person shall remove or make ineffective any safeguard around or attached to any machinery, vats, or pans while the same are in use, unless for the purposes of immediately making repairs thereto, and all such safeguards so removed shall be promptly replaced; if a machine or any part thereof is not properly guarded, the use thereof may be prohibited by the factory inspector, or deputy factory inspector, and a notice to that effect shall be attached thereto; such notice shall not be removed until the machine is made safe and the required safeguards are provided; and in the meantime such unsafe or dangerous machinery shall not be used.

Oregon.—Gen. Laws 1910, § 5040. Any person, firm, corporation, or association operating a factory, mill, or workshop where machinery is used, shall provide and maintain in use belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys while running, where the same are practicable with due regard to the nature and purpose of said belts and the dangers to employees therefrom; also reasonable safeguards for all vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set-screw, live rollers, conveyors, mangles in laundries, and machinery of other or similar descriptions, which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances and the dangers to employees therefrom, and with which the employees of any such factory, mill, or workshop are liable to come in contact while in the performance of their duties; and if any machine, or any part thereof, is in a defective condition, and its operation would be extrahazardous because of such defect, or if any machine is not safeguarded as provided in this act, the use thereof is prohibited; and a notice to that effect shall be attached thereto by the employer

immediately on receiving notice of such defect or lack of safeguard; and such notice shall not be removed until said defect has been remedied or the machine safeguarded as herein provided. (Laws 1907, chap. 158, p. 302, § 1.)

The statute adopted by the people of Oregon on November 8, 1910, by virtue of the initiative power vested in them by the state Constitution, provides in part as follows: All dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits.

Pennsylvania.—Laws 1905, No. 226, § 11. Provisions very similar to those of the New York statute, but there is also a provision to the following effect:

The floor space of no working room in any establishment shall be so crowded with machinery as thereby to cause risk to the life or limb of an employee; nor shall there be in any establishment machinery in excess of the sustaining power of the floors and walls thereof.

Rhode Island.—Gen. Laws 1909, chap. 78, § 6. All belting and gearing shall be provided with proper safeguards.

Tennessee.—Laws 1899, chap. 401, § 3. Belting, gearing, etc., when so placed as, in the opinion of the inspector, to be dangerous, shall, as far as practicable, be securely guarded.

Washington.—Rem. & Bal. Code, § 6587 (factory act, Laws 1905, chap. 84, § 1, as amended by Laws 1907, chap. 205). Provision similar to New York labor law, 81.

Laws 1895, chap. 22. Operators of shingle mills must protect saws with metallic guards.

West Virginia.—Code 1906, § 442; Acts 1901, chap. 19, § 1. In all manufacturing, mechanical, or other establishments in the state, machinery, belting, shafting, gearing, drums, and elevators, when so arranged and placed as to be dangerous to the persons employed therein while engaged in their ordinary duties, shall be safely and securely guarded when possible, and if not possible, notice of the danger shall be conspicuously posted in such establishments.

Wisconsin.—Sanborn & B. Anno. Stat. § 1636f(2) (Rev. Stat. 1636j). All belting, shafting, etc., in manufacturing establishments, so located as to be dangerous to employees when engaged in their ordinary duties, shall be securely guarded or fenced so as to be safe for persons employed in any such place of employment. (Laws 1887, chap. 549, § 2.)

Ontario.—Factories act. Rev. Stat. 1897, chap. 256, § 20 (1) (a). All dangerous parts of mill gearing, machinery, vats, pans, reservoirs, wheel races, flumes, water channels, doors, openings in the floors or walls, bridges, and all other dangerous places, shall be securely guarded.

Quebec.—Factories act, 48 Vict. chap. 32, Rev. Stat. § 3024(1). Belting, shafting, etc. and other moving parts of machinery, vats, pans, cauldrons, openings, bridges, etc., to be, as far as practicable, securely guarded.

Sec. 3024(2). No machinery other than steam engines shall be cleaned while in motion, if the inspector so direct by written notice.

Factory act, § 3021, as amended by 57 Vict. chap. 30, § 1. The industrial establishments mentioned in the preceding article must be built and kept in such manner as to secure the safety of all employed in them; and in those which contain mechanical apparatus, the machinery, mechanism, gearing, tools, and engines shall be so placed and kept as to afford every possible security for the employees.

1856. Construction and effect of these enactments.—As to the master's liability at common law for injuries caused by unguarded machinery, see §§ 975 *et seq. ante*. As to the persons liable under these statutes, see § 1913, *post*.

a. Generally.—Statutes of the general kind under discussion may be divided into three classes:

(1) Those which merely require "dangerous" machinery to be guarded.¹

(2) Those which require guarding whenever some designated public official deems it necessary.²

(3) Those which declare that certain designated machinery shall be properly guarded, without any qualification, or that it shall be guarded whenever practical.³

It is interesting to note that the more recent statutes are generally of the third class, and impose the greater obligation upon the master.

As the statutes differ so materially, it is natural that there should be a wide difference in the construction given them by the courts; but the courts also differ in construing statutes which are similar or even identical in terms.

The statutes, being remedial, are, according to the greater weight of authority, to be liberally construed.⁴ But the contrary rule prevails in some states, where it is held that, as the factory act is an extension of the common-law liability, it must be strictly construed.⁵

¹ The English, Wisconsin, and Minnesota statutes may be regarded as types of this class.

² Massachusetts and Connecticut have statutes of this type.

³ The statutes of New York, New Jersey, and Kansas are in this form.

"The factory act cuts squarely across the common-law doctrine of reasonable prudence, and supplies that foresight in reference to the places, structures, and appliances which it specifies. The legislature did not say, as in Connecticut and Massachusetts, that shafting so placed, as, in the opinion of the factory inspector, to be dangerous to employees, shall be guarded; or, as in Wisconsin, that shafting so located as to be dangerous to employees shall be guarded. It said that all shafting used in a manufacturing establishment shall be guarded; and whenever a required safeguard or appliance has not been provided, the only question open to investigation is

whether the injury occurred under circumstances which made the absence of it a contributing cause. In those instances in which practicability is a factor, that matter may be tried, but to submit to a jury the question of prudence and foresight where the law has been ignored would be to reopen a subject which the legislature has closed by a final decision." *Caspar v. Lewin* (1910) 82 Kan. 604, 625, — L.R.A.(N.S.) — 109 Pac. 657.

⁴ *Sorseleil v. Red Lake Falls Mill Co.* (1910) 111 Minn. 275, 126 N. W. 903.

The act is remedial and salutary. *Bair v. Heibel* (1903) 103 Mo. App. 621, 77 S. W. 1017.

The statute requiring dangerous machinery to be guarded is remedial, and should be liberally construed. *Abel v. Harwood Mfg. Co.* (1909) 107 Minn. 214, 120 N. W. 359, 121 N. W. 916.

⁵ *Bushitis v. Catskill Cement Co.*

And even in jurisdictions holding that statutes of this character are to be liberally construed, it is held that a servant relying upon the statute must bring himself squarely within the terms thereof.⁶ In one case it was held that the statute was not retroactive.⁷

These statutes are sometimes said to impose additional duties upon the master.⁸ But other courts hold that the statutes merely declare the common law.⁹ It is to be noted that the cases in the last group

(1908) 128 App. Div. 780, 113 N. Y. Supp. 294, affirmed in (1910) 198 N. Y. 548, 92 N. E. 1079; *Morgantown Mfg. Co. v. Hicks* (1910) 46 Ind. App. 623, 92 N. E. 199.

⁶ The act is a remedial one, and must be liberally construed; but it must be conceded that it is only the owner of a factory, mill, or workshop upon whom § 1814 imposes the duty of furnishing belt shifters for the purpose of throwing off or on belts or pulleys. *Sorseleil v. Red Lake Falls Mill Co.* (1910) 111 Minn. 275, 126 N. W. 903.

One who relies upon the statute brings himself fully and clearly within it. *Reliance Mfg. Co. v. Langley* (1907) 41 Ind. App. 175, 82 N. E. 114.

This statute was intended to protect those who worked around dangerous machinery from injury therefrom, and not to impose unreasonable requirements or onerous and unnecessary burdens upon the owner of the factory. It must receive from the court such construction as will carry out its very evident purpose. *Pinnell v. Cutsinger* (1909) 44 Ind. App. 419, 89 N. E. 493.

⁷ The factory act of 1903, which required employers to safeguard dangerous machinery, and imposed a penalty for failure to do so, having deprived the master of the defense of assumption of risks, the repeal of the act in 1905 did not operate retroactively, or affect causes of action that arose under the law of 1903 prior to its repeal. *Miller v. Union Mill Co.* (1907) 45 Wash. 199, 88 Pac. 130.

⁸ The purpose of the factory statute was to surround the workman with more protection than the common law gave him. *Dix v. Union Ice Co.* (1908) 76 N. J. L. 178, 68 Atl. 1101.

"The common-law security and safety of machinery cannot be allowed as a defense without annulling the statute. The statute was enacted for the purpose of establishing a statutory rule of safety in all instances where the statute

is applicable, and no other rule can be permitted to supersede it." *Millsap v. Beggs* (1906) 122 Mo. App. 1, 9, 10, 97 S. W. 956.

See also *Caspar v. Lewin*, cited in note 3, *supra*, and note 12, *infra*.

⁹ In *Freeman v. Glens Falls Paper Mill Co.* (1893) 70 Hun, 530, 24 N. Y. Supp. 403, affirmed in (1894) 142 N. Y. 639, 37 N. E. 567, the court, in advertising to this statute, said: "The duty prescribed by this statute is not more or greater than the common-law duty of an employer to employees to provide a safe place in which, and proper machinery with which, to work; and the defendant's liability to the person injured, by reason of the statute not being complied with, is not an absolute one, but is subject to the same limitations and restrictions as is the common-law liability for not furnishing a safe place and proper machinery."

The common-law duty of a master to properly guard the rollers of a machine with which a servant is employed is not enlarged by the special statute requiring all machinery of every description to be guarded. *Sutton v. Des Moines Bakery Co.* (1907) 135 Iowa, 390, 112 N. W. 836. The court said: "The defendant would be negligent if it failed to properly guard these rollers for the purpose of preventing injury that would otherwise be likely to result to an employee, and it may be conceded that, on the question of defendant's negligence, it would have been proper to submit to the jury the issue as to whether the failure to provide a safety hood was negligence under the circumstances. Similar considerations apply to the complaint that defendant failed to advise the plaintiff of the danger incident to the operation in which he was engaged, and the means of avoiding such danger. It was, no doubt, a question for the jury whether the danger was such that, as to a person not capable

deal with statutes of the third general class indicated above, while one at least in the first group was dealing with a statute of the first.

The statutory duty to guard machinery is absolute,¹⁰ and non-delegable (see § 1495, *ante*);¹¹ and the master cannot avoid liability for a failure to comply with the statute by the adoption of rules.¹²

Some of these statutes expressly provide that the servant may bring this action at common law.¹³

The unguarded condition of machinery is generally held to be the proximate cause of injuries resulting from coming in contact with unguarded machinery, although there was some concurring cause, such as the servant's slipping, for which the master was not responsible.¹⁴ As to the master's liability for injuries which could

of appreciating it, some warning or caution was proper."

¹⁰ *Davidson v. Flour City Ornamental Iron Works* (1909) 107 Minn. 17, 28 L.R.A.(N.S.) 332, 131 Am. St. Rep. 433, 119 N. W. 483.

It is the imperative duty of the master to guard machinery in cases where it is possible and practicable. *Tucker & D. Mfg. Co. v. Staley* (1907) 40 Ind. App. 63, 80 N. E. 975.

The requirement of Iowa factory act (Acts 29th Gen. Assem. p. 107, chap. 149; Code Supp. 1907, § 4999a2) as to belt shifters, or other safe contrivances for throwing belts on and off pulleys, is absolute, and exists irrespective of the question of the practicability of providing loose pulleys. *McCreery v. Union Roofing & Mfg. Co.* (1909) 143 Iowa, 303, 119 N. W. 738.

¹¹ The statute has adopted the rule of absolute duty. The master cannot delegate the performance of the act to another, and thus avoid responsibility. *Davidson v. Flour City Ornamental Iron Works* (1909) 107 Minn. 17, 28 L.R.A.(N.S.) 332, 131 Am. St. Rep. 433, 119 N. W. 483.

In *McManis v. St. Regis Paper Co.* (1905) 107 App. Div. 29, 94 N. Y. Supp. 932, the court said: "The statute ought not to be interpreted to mean that when a defendant knows that a guard covering cog wheels or gears which, by the statute, are required to be covered, has been removed, that he can absolve himself from liability for a failure to replace it by directing some employee to perform that duty."

¹² The protection of the factory act extends only to persons acting within

the scope of some employment or labor. But the factory owner cannot evade the requirements of the act,—as, that belt shifters shall be provided,—by means of rules or instructions relating to the use of appliances,—as, that belts shall be shifted only while the machinery is not in motion. *Caspar v. Lewin* (1910) 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 657.

¹³ In a common-law action for personal injuries sustained prior to the enactment of the factory act requiring the guarding of machinery, it is error to admit in evidence the certificate of the inspector, which was made *prima facie* evidence of compliance with such act, where the act further expressly provided that employees might bring their action at common law, in which case the certificate should not be admissible. *Tergeson v. Robinson Mfg. Co.* (1906) 43 Wash. 298, 86 Pac. 578.

¹⁴ The proximate cause of injury to an employee, caused by a revolving fly-wheel belt, against which he was thrown by slipping while attempting to lift a barrel, is the unguarded condition of the belt, and not his slipping or the fall of the barrel. *Hartman v. Berlin & J. Envelope Co.* (1911) 71 Misc. 30, 127 N. Y. Supp. 187.

An employee injured by contact with machinery which should have been guarded, as required by the factory act (Acts 1899, p. 234, chap. 142, § 9; Burns's Anno. Stat. 1901, § 7087i), may recover, though the jury specifically find that he was injured by reason of his foot slipping, where the injury would not have occurred if the machinery had been guarded. *United States*

not be anticipated, see note 45, *infra*; and upon this branch of proximate cause, see § 1575, *ante*.

Under the Iowa statute, it is immaterial whether the machines embraced in the statute are dangerous in the ordinary sense, since if they are not properly guarded as required by statute they must be regarded as dangerous.¹⁵

That similar machinery in other factories is not guarded is no defense, where the statute requires it to be guarded.¹⁶ Nor is it a defense that the unguarded machine was of standard make and constructed without guards.¹⁷ But testimony as to whether machinery is or is not guarded in other factories is admissible on the question of the practicability of guarding;¹⁸ so too, evidence that the de-

Cement Co. v. Cooper (1907) — Ind. App.—, 82 N. E. 981, 982.

To hold that the absence of a guard on a circular saw could not be the proximate cause of injuries received by coming in contact with the saw, would destroy the statute. *Tucker & D. Mfg. Co. v. Staley* (1907) 40 Ind. App. 63, 80 N. E. 975.

The master is liable for injuries caused by a servant's coming in contact with unguarded machinery, although a fellow servant pushed the plaintiff, causing him to start involuntarily, and thus come in contact with the machine. *Cook v. Ormsby* (1909) 45 Ind. App. 352, 89 N. E. 525.

¹⁵ *Kirchoff v. Honsbehn Creamery Supply Co.* (1909) 148 Iowa, 508, 123 N. W. 210.

¹⁶ In *Jones v. American Caramel Co.* (1909) 225 Pa. 644, 74 Atl. 613, it was held that the defendant was not relieved from the charge of negligence for failure to guard machinery because the plaintiffs failed to show that it was customary in factories to place guards or screens over revolving fans. The court said: "The legislative mandate is that machinery of every description shall be properly guarded, and customary disregard of this is but customary negligence, rendering everyone guilty of it responsible for the consequences resulting directly and solely from it."

"The legislature evidently concluded that the necessity of a guard ought not to depend on the custom of particular factories, but on that of those using similar saws for like purposes, and, as many establishments thoughtful for the safety of their employees had found it

practical to guard different instruments, including saws, all establishments where machinery is used should properly guard them. The duty to guard saws, at least when practicable, is fixed by law. The only inquiry left open is whether the guard is proper. That other factories may have ignored this law furnishes no excuse to anyone for not complying with its terms." *O'Connell v. F. Smith & Son* (1908) 141 Iowa, 1, 118 N. W. 266.

In *Schofield v. Schunck* (1855) 24 L. T. 253, which was an action for injuries caused by not securely fencing machinery in a mill, the trial judge told the jury to find for the defendants if the machinery was fenced "in the ordinary manner used and approved as sufficient in the best-regulated mills in the district." This was held to be a misdirection, as the proper question was whether the mill was securely fenced according to the best means of fencing that were known at the time.

¹⁷ "An employer cannot be excused from operating a machine, although of standard type, when a reasonable amount of experience and observation has developed the fact that it is inherently dangerous, and can be made reasonably safe by attaching safeguard appliances." *Johnson v. Atwood Lumber Co.* (1907) 101 Minn. 325, 112 N. W. 262.

It is immaterial that a bolter-lath saw was manufactured without a guard. *Callopy v. Atwood* (1908) 105 Minn. 80, 18 L.R.A.(N.S.) 593, 117 N. W. 238.

¹⁸ In *Kerr v. National Fulton Brass Mfg. Co.* (1908) 155 Mich. 191, 118 N.

fendant maintained guards of the same character as those maintained in other factories is evidence of due compliance with the statute.¹⁹

Where the statute provides merely that the machinery shall be safeguarded when some designated public official shall deem it necessary, it has been held that no liability attaches until after such official has acted.²⁰ But it is unnecessary for the public official to designate the manner in which the machinery shall be guarded.²¹ And

W. 925, the court said: "Testimony . . . as to the guarding of other emery wheels in defendant's plant was competent, if for no other purpose than as tending to show that it was practicable to obey the order of the inspector."

That knot saws in practically all other mills are without guards is received in proper cases as evidence of the practicability of guarding, but not as a standard of conduct. *Shaw v. Woodland Shingle Co.* (1910) 61 Wash. 56, 111 Pac. 1070.

The fact that the employee subsequent to the accident established guards around a vat of glue, is admissible upon the question whether it was practicable to guard the vat. *Carstens Packing Co. v. Swinney* (1911) 108 C. C. A. 152, 186 Fed. 50 (Washington statute).

¹⁹ In respect to § 1636j, except in situations obviously dangerous, if an employer furnishes such a guard or fence as is in general use among employers of ordinary care under the same or similar circumstances, he has discharged his duty,—the dangerous machinery is securely guarded or fenced within the meaning of the statute,—in that when all ordinary care to that end shall have been exercised by the master his statutory duty has been performed. *Willette v. Rhinelander Paper Co.* (1911) 145 Wis. 537, 130 N. W. 853.

²⁰ The liability of a master for failing to guard machinery, when deemed necessary by the factory inspector, as required by the factory act, depends on the fact of the order having been given by the inspector and brought to the notice of the master. *Kerr v. National Fulton Brass Mfg. Co.* (1908) 155 Mich. 191, 118 N. W. 925; *Monforton v. Detroit Pressed Brick Co.* (1897) 113 Mich. 39, 71 N. W. 586.

The failure of an employer to provide covering for cogwheels as required by 3 How. Anno. Stat. chap. 5, § 1997, will not render him liable for injury to a boy falling into such wheels in a scuffle, where the notice from the inspector, provided for by such statute, had not been given. *Borck v. Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254.

The legislature has made the question of supplying belt shifters or other safe mechanical contrivances, for the purpose of throwing on or off belts or pulleys, a discretionary matter with the chief inspector. *Robertson v. Ford* (1905) 164 Ind. 538, 74 N. E. 1.

Liability for failure to furnish belt shifters arises only when the inspector's order to furnish them has not been complied with. *Indiana Mfg. Co. v. Wells* (1903) 31 Ind. App. 460, 68 N. E. 319.

An employer is not liable to criminal prosecution or to an action for injuries by an employee, under Mass. Pub. Stat. chap. 104, until he has received notice from an inspector, as required by § 32 of that chapter. *Foley v. Pettie Mach. Works* (1889) 149 Mass. 294, 4 L.R.A. 51, 21 N. E. 304.

In *Davis v. Langdon* (1911) 11 New South Wales St. Rep. 149, it was held that the fact that an inspector of factories had not taken steps under § 29 to force him to fence any machinery as dangerous does not relieve the occupier of his liability to a workman injured by such machinery, if it was in fact dangerous and not securely fenced. But where an inspector proceeds under § 29, and an award is made that it is unnecessary and impracticable to fence certain machinery, the occupier is relieved of his statutory liability in respect thereof.

²¹ A master is not relieved of his statutory duty to safeguard machinery

a notice by the factory inspector, given to a master, which requires him to guard emery wheels in his plant, is broad enough to include emery wheels subsequently installed.²² Under the later Michigan statute it has been held that the duty to guard machinery is not dependent upon the action of the inspector.²³

Some of the statutes require the master to post a notice to that effect wherever it is impossible to guard dangerous machinery. The duty to keep such notice posted is continuous;²⁴ and the notice must be in the form presented by the statute;²⁵ but the posting of such a notice will not exonerate the master, if in fact the machinery can be guarded.²⁶

It has been held that the notice of the injury, prescribed by the Washington act, is not a prerequisite to the servant's right of action.²⁷

Under Quebec factories act, § 3021, as amended by 57 Vict. chap. 30, § 1, it was held that the jury was justified in finding that failure to guard crown gears was a violation of this provision.²⁸

b. Master's duty deemed continuous.—It is not sufficient for the master to furnish the guards; he must also adjust them;²⁹ and the

by the fact that the notice from the labor commissioner to do so does not specify the manner in which it is to be done. *Hill v. Saugested* (1908) 53 Or. 178, 22 L.R.A.(N.S.) 634, 98 Pac. 524.

²² *Kerr v. National Fulton Brass Mfg. Co.* (1908) 155 Mich. 191, 118 N. W. 925.

²³ In *Swick v. Aetna Portland Cement Co.* (1907) 147 Mich. 454, 111 N. W. 110, it was held, *per* Hooker and Carpenter, JJ., that the belting and gearing in a factory should be safeguarded, irrespective of any order by the factory inspector, although failure to furnish belt shifters would not render the master liable, in the absence of any direction on the part of the inspector.

²⁴ *Millsap v. Beggs* (1906) 122 Mo. App. 1, 97 S. W. 956.

²⁵ An instruction permitting the defendant, as a matter of law, to substitute other forms of notice for that required by the statute, and absolving him from obeying the statute if the plaintiff could have observed the danger, should not be given. *Ibid.*

²⁶ *Roundtree v. Kansas City Portland Cement Co.* (1911) 156 Mo. App. 679, 137 S. W. 1012.

²⁷ In *Campbell v. Wheelihan-Weidauer Co.* (1907) 45 Wash. 675, 89 Pac. 161, it was held that the failure to give the notice prescribed in § 6 of the factory act was not a prerequisite to the right to recover damages under the act, but that its sole purpose was to enable a workman to procure an inspection by the commissioner of labor of a supposedly defective machine which the employer neglected or refused to remedy. To the same effect, *McIntosh v. Saw Mill Phoenix* (1908) 49 Wash. 152, 155, 94 Pac. 930.

The statutory duty of the servant to report a defect in the machinery does not have reference to the original construction and arrangement of the machinery, but only to such machinery as has become dangerous by misplacement or accident of any kind. *Ward v. National Lumber & Bow Co.* (1909) 54 Wash. 304, 103 Pac. 1.

²⁸ *Royal Paper Mills Co. v. Cameron* (1907) 39 Can. S. C. 365, affirming (1907) Rap. Jud. Quebec 31 C. S. 273.

²⁹ The proprietor of a planing mill cannot escape liability for injury to an employee, caused by an unguarded saw, because he had furnished a proper safeguard, and the servant had failed to

duty of guarding is continuous,³⁰ so that the guards must be maintained as well as furnished,³¹ and kept in condition to perform the service contemplated by the statute.³²

adjust it, where it is not shown to have been his duty to adjust it. *Johnston v. Far West Lumber Co.* (1907) 47 Wash. 492, 92 Pac. 274.

The fact that the master provides guards without placing them will not relieve him. *Baltimore & O. S. W. R. Co. v. Cavanaugh* (1904) 35 Ind. App. 32, 71 N. E. 239.

³⁰ The statutory duty to guard an emery wheel is a continuing one, requiring the guard to be maintained while the wheel is in motion; and the duty is not discharged by furnishing a suitable guard and exercising reasonable care in selecting an operator. *Davidson v. Flour City Ornamental Iron Works* (1909) 107 Minn. 17, 28 L.R.A. (N.S.) 332, 131 Am. St. Rep. 433, 119 N. W. 483.

"'All dangerous parts must be securely fenced.' Words of this nature refer to an habitual and continuing state and condition of the machinery, which it seems impossible to satisfy by fencing being provided without being placed in such a position that the dangerous parts of the machinery shall thereby be securely fenced, or without such fencing being kept and continued in such a position as to form a secure fence. The 'securely fencing' the machinery during an undefined period of time undoubtedly implies the maintaining the fencing, during the entire of such time, in such a position that it will securely fence the machinery." *Scott v. Brookfield Linen Co.* [1910] 2 I. R. 509, 518, 519.

³¹ *Paul Mfg. Co. v. Racine* (1909) 43 Ind. App. 695, 88 N. E. 529.

The injured servant is entitled to maintain the action, whether the breach of the statute was in not providing, or in not maintaining, a fence. *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87.

In *Benner v. Wallace Lumber & Mfg. Co.* (1909) 55 Wash. 679. — L.R.A. (N.S.) —, 105 Pac. 145, it was held that the master is not relieved from his statutory duty to maintain guards on machinery by the fact that they had been removed by other servants. The

court said: "The appellant cites *Johnston v. Northern Lumber Co.* (1906) 42 Wash. 230, 84 Pac. 627, and *Daffron v. Majestic Laundry Co.* (1905) 41 Wash. 65, 82 Pac. 1089, and contends, on the authority of those cases, that it is relieved from liability for negligence by reason of the fact that it had properly safeguarded the saw. There is a marked difference between the facts of the case at bar and those of the cases cited. In the *Johnston Case* the guard had not been changed or removed. It had been in use for a number of years. It had not only been properly installed, but had been also maintained. The servant had been working at the machine with the same guard during all of that time. The contention there made was that some guard other than the one actually used should have been adopted. In the *Daffron Case* it appeared that a proper guard had been provided. Here the facts seem to be that no practical or proper guard whatever was provided for the knot saw, at the particular time the respondent went to work, or during the time he continued at work. If the appellant could excuse its neglect by relying upon the action of the knot sawyers in changing or removing the guards, such a defense would be equivalent to withdrawing from the jury the vital issue whether the saw was properly guarded when used by the respondent, and substituting in lieu thereof an immaterial inquiry into the custom of knot sawyers who had preceded respondent in operating the saw. The statute does not contemplate or permit any such defense or excuse. There was abundant evidence to sustain the jury in finding that a practical guard could be provided, that it was not provided at the time the respondent commenced work, and that as a result thereof he was injured. The motion for a directed verdict was properly denied."

The statute (§ 1636j, Stat. 1898) provides that gearings so situated "shall be securely guarded or fenced," and it is quite possible this statute casts the duty upon the employer to keep such gearings securely guarded or

The requirement in some statutes that a notice be posted when dangerous machinery cannot be guarded has also been held to be continuous.³³

Some statutes expressly provide that the guards must be maintained as well as provided.³⁴ In other statutes there are provisions that the duty to guard is not enforceable while the machine is being repaired.³⁵ But it has been held that such a provision is no defense

fenced. *Hoffman v. Rib Lake Lumber Co.* (1908) 136 Wis. 388, 117 N. W. 789.

The master is liable for injuries resulting from his directing a servant to desist from adjusting the guards upon a planer, and to use it without the guards. *Klein v. Garvey* (1904) 94 App. Div. 183, 87 N. Y. Supp. 998.

In a case where a boy thirteen years old was employed as a slate picker in a coal breaker, and fell into a pair of rollers breaking coal, and was injured, the evidence showed that the master had covered the rollers with a box, in the top of which was an opening covered by a plank, and that the plank was displaced by a fellow servant of the boy at the time of the accident, and had often been thus displaced before, with the boy's knowledge. It was held that the master had done his duty under the act of March 3, 1870, providing that all machinery where boys work shall be properly fenced off, and that the boy could not maintain an action against the master. *Honor v. Albrighton* (1880) 93 Pa. 475, 11 Mor. Min. Rep. 6. This decision, however, is decidedly against the weight of authority.

³² Where the hood or blower to a revolving cylinder with knives, in a planing machine, was battered and worn so that it did not fit closely, and thereby a suction of air was created over a roller into the cylinder under the hood, and care was required to adjust it, it was held that the hood was not a proper protection to dangerous machinery. *Jaroszeski v. Osgood & B. Mfg. Co.* (1900) 80 Minn. 393, 83 N. W. 389.

In *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678, it was held that the plaintiff was entitled to recover, the evidence being to the effect that the rods protecting the gearing had become bent so as to produce an opening which the sheet iron within

the rods did not guard, and that in passing around the machine in the discharge of her duty, she slipped on the floor, rendered slippery from the spraying of oil from the machinery, and her hand passed through the opening in the guard, and was crushed in the cog-wheels.

³³ "The statute evidently intended that in cases where a guard could not be placed a notice should be posted 'conspicuously,' so that the servant would be informed, not at some time prior to the injury,—but continuously informed, of the danger. The notice was intended to operate as a continuous reminder of the danger. Otherwise, it could be posted for a day and then torn down. The statute, recognizing that trait in human nature to become inattentive to danger by constant presence with it, required this continuous notice as a protection against what might, in ordinary respects, be termed the servant's carelessness." *Millsap v. Beggs* (1906) 122 Mo. App. 1, 9, 10, 11, 97 S. W. 956.

³⁴ A master who set a servant at work at a machine not properly guarded as required by statute cannot escape liability for injury to him because of absence of the guard, by the fact that he placed a proper guard upon it, which had been removed by another servant, where the statute requires the guard to be maintained as well as provided. *Benner v. Wallace Lumber & Mfg. Co.* (1909) 55 Wash. 679, — L.R.A.(N.S.) —, 105 Pac. 145 (construing laws 1907, p. 448, chap. 205, § 1).

³⁵ In *Espenlaub v. Ellis* (1904) 34 Ind. App. 163, 72 N. E. 527, the court approved the following instruction: "It is provided by statute in this state that all saws in any manufacturing establishment shall be properly guarded, and no person shall remove or make ineffective any safeguard around or attached to any such saw while the same

where the servant was injured while the machine was undergoing repairs, if the proper guards had never been installed.³⁶

In jurisdictions asserting the rule that a servant may assume the risk even of the master's breach of a statutory duty, the servant's acquiescence in the removal of a guard will of course defeat a recovery;³⁷ but a contrary rule undoubtedly would prevail where that defense is not open to the master.³⁸

c. *Under what circumstances machinery must be guarded.*—The statutes require machinery and other dangerous appliances to be guarded only when it can be done without impairing the efficiency of the machine or other appliance.³⁹ So also it has been held that statutes relating to the guarding of vats and pans containing hot or

is in use, unless for the purpose of immediately making repairs thereto, and all safeguards shall be promptly replaced."

³⁶ Where, in breach of their statutory duty, employers fail to provide any fencing for dangerous machinery, and a worker is injured because a dangerous part of such machinery is not fenced while undergoing repairs, they cannot escape liability on the ground that the *causa causans* of the worker's injury was not the omission to provide the fencing, but to maintain it, and that consequently, although there may have been a breach of the obligation to provide the fencing, such breach was not the cause of the injury received by the worker from such machine while under repair. *Scott v. Brookfield Linen Co.* [1910] 2 I. R. 509.

³⁷ Where a guard was removed by the direction of a foreman, and the employee did not ask to have it back, there can be no recovery. *Travis v. Haan* (1907) 119 App. Div. 138, 103 N. Y. Supp. 973.

³⁸ A statute relieving a servant of the hazard of assumption of risk in working about unguarded gearings applies where a guard which had been provided had become temporarily displaced without the knowledge of the master, where the guard was not sufficient when provided. *West v. Bayfield Mill Co.* (1910) 144 Wis. 106, — L.R.A. (N.S.) —, 128 N. W. 992.

Where it is the statutory duty of an employer to guard machinery for the protection of employees, this duty is not dependent upon the servant's request. *Blanchard-Hamilton Furniture*

Co. v. Colvin (1904) 32 Ind. App. 398, 69 N. E. 1032.

³⁹ The act does not intend to exact a compliance where, in respect to some particular machinery or appliance, it is impossible properly to guard it without rendering the same useless for the purpose for which it was intended. *Robertson v. Ford* (1905) 164 Ind. 538, 74 N. E. 1.

Proof that a machine, similar to the dough-mixing machine by which plaintiff was injured, when guarded had occasioned an accident to an employee while working thereat, is sufficient to support an instruction to the effect that, if the gearing upon the machine could not be safely guarded without materially interfering with the efficient working of the machine, a failure to so guard said gearing did not constitute negligence. *Huss v. Heydt Bakery Co.* (1908) 210 Mo. 44, 108 S. W. 63.

The statute only requires reasonable safeguards for set-screws and all other machinery which it is practicable to guard. *Burroughs v. Curtiss Lumber Co.* (1911) 58 Or. 270, 114 Pac. 103.

"When a machine, or some part of a machine, is not of a dangerous character, or it is so located as not to imperil workmen when in the place or places to which their duties call them, or where guarding or fencing is impracticable without materially impairing the use, the same need not be guarded." *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69.

It is necessary to allege and prove that it was practically possible to guard properly the machine without rendering

otherwise dangerous liquids are applicable only where the guarding is practical.⁴⁰ Whether or not it is practical to guard machinery is a question of fact for the jury,—especially where the testimony is conflicting.⁴¹ The same view has been taken of the Wisconsin stat-

it useless for the purpose for which it was intended to be operated, and there can be no recovery without showing also that the unguarded machine or appliance was of the kind or character of the class of machinery specifically designated in the statute. *Jenkins v. LaFayette Box Board & Paper Co.* (1909) 43 Ind. App. 463, 87 N. E. 992.

On the theory that no greater duty is imposed upon a manufacturer by N. Y. Laws 1889, chap. 560, § 6, providing that all cogs shall be properly guarded, than devolves upon him under the common law, it has been held that the omission to provide guards does not create a liability for injuries to a servant, where the cogs could not have been guarded in any manner that would have tended to make them safer for employees, without preventing their use. *Spaulding v. Tucker & C. Cordage Co.* (1895) 13 Misc. 398, 34 N. Y. Supp. 237. In this case a boy of sixteen employed on a rope walk near the cogs tripped, and in falling brought his hand into contact with them. The manner in which the cogs were guarded is not described.

⁴⁰ A city ordinance requiring every vat with hot liquids to be surrounded with "proper safeguards" for preventing accident or injury to those employed at or near them requires some practical safeguards which, while affording reasonable security, does not unreasonably interfere with the work which must be performed. *Chicago Packing & Provision Co. v. Rohan* (1892) 47 Ill. App. 640, disapproving an instruction which left it to the jury to say whether a railing which had been provided was a proper safeguard, a matter as to which no evidence had been produced, and which could be settled only by an expert.

⁴¹ *Bair v. Heibel* (1903) 103 Mo. App. 621, 77 S. W. 1017; *Johnson v. Onondaga Paper Co.* (1906) 112 App. Div. 667, 98 N. Y. Supp. 602; *Wittmer v. Fairhurst* (1909) 134 App. Div. 305, 118 N. Y. Supp. 939.

Whether it is "practicable," within

the meaning of the Minnesota act, to fence a particular piece of machinery, is a question for the jury. *Peterson v. Johnson-Wentworth Co.* (1897) 70 Minn. 538, 73 N. W. 510.

Whether it is practicable to guard vats of hot water used to loosen blocks of ice from the cans in an ice plant is a question for the jury. *Dix v. Union Ice Co.* (1908) 76 N. J. L. 178, 68 Atl. 1101.

Where the evidence is conflicting as to the practicability of guarding machinery effectively, due regard being had to the ordinary use of the machine, the question is for the jury. *Campbell v. Wheelihan-Wcidaur Co.* (1907) 45 Wash. 675, 89 Pac. 161.

It is a question for the jury when there is a conflict of evidence as to whether a saw could be advantageously guarded. *Rector v. Bryant Lumber & Shingle Mill Co.* (1906) 41 Wash. 556, 84 Pac. 7.

The questions whether a particular machine was properly guarded, or could have been advantageously guarded, as required by statute, is for the jury on conflicting evidence in relation thereto. *Barclay v. Puget Sound Lumber Co.* (1908) 48 Wash. 241, 16 L.R.A. (N.S.) 140, 93 Pac. 430.

It was for the jury to determine whether a saw could have been properly guarded, where witnesses testified that a proper guard could have been placed over or at the side of the saw at slight expense, without any inconvenience or detriment to the operation of the saw, although this was disputed by other witnesses. *Erickson v. E. J. McNeeley & Co.* (1906) 41 Wash. 509, 84 Pac. 3.

Where there is competent testimony tending to show that the cutterheads in a grooving machine could have been guarded practically and effectively, with due regard to the ordinary use of the machine, and that the accident complained of would not have occurred had such guard been in use, these are questions of fact for the consideration of the jury, and their verdict is binding on the court. *Adams v. Peterman Mfg. Co.* (1907) 47 Wash. 484, 92 Pac. 339.

ute, which requires machinery to be guarded only when it is dangerous.⁴² That compliance with the statute would cause inconvenience, or expense, or loss of time, is not conclusive on the question of practicability, but these circumstances may be considered by the jury.⁴³

Upon the question of the practicability of guarding a sprocket wheel attached to the front end of a resawing machine, a factory inspector who had had much experience in examining similar machinery for the purpose of determining its safety, had seen such machinery guarded in factories, and had ordered it guarded in other factories, is fully qualified to testify as an expert.⁴⁴

In a number of cases, some of which arose under statutes containing no express qualification of the duty to guard, it has been held that there can be no recovery for failure to guard machinery, where the master as a reasonable man could not have anticipated that injury would result from such failure.⁴⁵ In other cases, a recovery has been allowed upon the ground that the injury ought to have been,

⁴² Where a young girl was injured by her hair being caught by a projecting set-screw on a revolving shaft, the question whether the set-screw was so located on the shaft as to be dangerous to employees while in the discharge of their duties, so that it was the duty of the employer to guard it, was a question of fact for the jury. *Van de Bogart v. Marinette & M. Paper Co.* (1907) 132 Wis. 367, 112 N. W. 443.

It cannot be said, as matter of law, that negligence is inferable from the fact that a set screw on a paper winder projected $\frac{1}{8}$ of an inch above the surface of the collar. Whether such an arrangement was indicative of negligence is a question for the jury. *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

⁴³ The facts that it is inconvenient, and involves additional expense and additional space to provide and use belt shifters, etc., do not conclusively prove that it is not practicable to do so. *Skarpmoen v. Cloquet Box Co.* (1911) 114 Minn. 278, 130 N. W. 1106.

The fact that the work necessitated a frequent change in the machinery, which necessitated also a change in the guards, and would consume a great deal of time, may be considered by the jury upon the question whether it is practical to guard the machine. *Baltimore & O. S. W. R. Co. v. Cavanaugh*

(1904) 35 Ind. App. 32, 71 N. E. 239.

⁴⁴ *Schweikert v. John R. Davis Lumber Co.* (1911) 145 Wis. 632, 130 N. W. 508.

⁴⁵ *Dillon v. National Coal Tar Co.* (1905) 181 N. Y. 215, 73 N. E. 978; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* (1900) 162 N. Y. 399, 56 N. E. 897; *Scialo v. Steffens* (1905) 105 App. Div. 592, 94 N. Y. Supp. 305; *Wynkoop v. Ludlow Valve Mfg. Co.* (1909) 196 N. Y. 324, 30 L.R.A.(N.S.) 36, 89 N. E. 827.

This statute does not require employers to fence every machine, but only those which, "in reasonable anticipation, may be a source of danger." *Byrne v. Nye & W. Carpet Co.* (1899) 46 App. Div. 479, 61 N. Y. Supp. 741, holding that the defendant was not bound to anticipate that a child would attempt to adjust material passing through a swiftly moving machine which was in no way connected with the child's work in another part of the factory.

A master is not required to guard against possibilities that cannot be reasonably foreseen. *Goodrich v. Thomas Cort* (1910) 80 N. J. L. 653, 77 Atl. 1049.

Where an engineer in a sand-hoisting establishment, in oiling the machinery, which was stationary, was obliged to stand on a shaft, and the machinery started in a manner which could not

or at least might have been, anticipated.⁴⁶ But a radically different

have been expected, so that he was thrown between two cogwheels and injured, his employer was not negligent in failing to guard the cogwheels, as no ordinary sagacity would have apprehended danger under the circumstances. *Mcifert v. New Union Sand Co.* (1907) 124 Mo. App. 491, 101 S. W. 1103.

The statute does not require that every piece of machinery in a large building should be guarded. Factories are only required to guard against such dangers as would appear to a reasonably prudent man as liable to exist. *Grace v. Globe Store & Range Co.* (1907) 40 Ind. App. 326, 82 N. E. 99.

The owner of a manufacturing establishment, who has provided a covering for machinery, sufficient to prevent the clothing of the employees from coming in contact therewith, is not liable under N. Y. Laws 1890, chap. 398, § 12, providing that all machinery "shall be properly guarded," for injuries occasioned by an employee's throwing her hair over her head as she is coiling it, in such a manner that it flies underneath a table back of the covering of the shafting. Such an accident is not one which could have been anticipated. *Cobb v. Welcher* (1894) 75 Hun. 283, 26 N. Y. Supp. 1068.

It cannot be fairly said that stumbling occasioned by either his own carelessness or by pure accident, for which no one would be answerable, and which caused a servant to throw his hands into cogs, is a result that the master should have anticipated as natural and likely to occur from leaving the wheels uncovered. *P. H. & F. M. Roots Co. v. Meeker* (1905) 165 Ind. 132, 73 N. E. 253.

Where the plaintiff, an employee in a foundry as a molder's helper, was operating, by crank, a crane for lifting molten metal to the molds, and his hand slipped from the crank handle, and the handle in its reversed motion struck his hand, throwing it against unguarded cogwheels, injuring him, the proximate cause of the injury was the slipping of the hand from the crank handle, and not the unguarded machinery. *Crawford & McC. Co. v. Gose* (1909) 172 Ind. 81, 87 N. E. 711.

The master was not required to foresee that a servant would, by shipping, have fallen into a box which formed a guard in the rear of the machine, and in so doing have placed his hands in contact with the rollers from the front of the machine, the opposite side of it from where he was standing at the time of the slipping. *Goodrich v. Thomas Cort* (1910) 80 N. J. L. 653, 77 Atl. 1049.

⁴⁶ It cannot be said, as a matter of law, that the possibility that a servant working about a gang saw left unguarded by the master in violation of the factory act, § 9, might slip and fall against it, was so remote and unlikely to happen that it ought not reasonably to have been anticipated. *Evansville Hoop & Stave Co. v. Bailey* (1908) 43 Ind. App. 153, 84 N. E. 549.

The court cannot say, as a matter of law, that the proprietor of a cotton-batting manufactory ought not to have anticipated that a boy sixteen years old in the exercise of due care, when ordered by the superintendent to take waste from a machine while in motion, would slip on the platform, which was covered with oil, and thrust his hand into the machine, which was dangerous, but which it was practicable to guard so that no injury would have resulted. *Martin v. Walker & W. Mfg. Co.* (1910) 198 N. Y. 324, 91 N. E. 798.

It is the purpose of the statute to guard against accidents, although the precise manner in which they occur may not have been anticipated. *Christianson v. Northwestern Compo-Board Co.* (1901) 83 Minn. 25, 85 Am. St. Rep. 440, 85 N. W. 826; *Abel v. Harwood Mfg. Co.* (1909) 107 Minn. 214, 120 N. W. 359, 121 N. W. 916.

"It is not essential that the identical or precise injury sustained by appellant should have been expected or anticipated by appellee as the result of its negligent act. It, by the exercise of reasonable care, might have foreseen or anticipated that from the negligent breach of its statutory duty it was probable that injury of some kind might result to its employees engaged in operating the saw." *Davis v. Mercer Lumber Co.* (1905) 164 Ind. 413, 414, 420, 422, 423, 73 N. E. 899.

view of a statute very similar in terms to the New York statute has been taken by the Kansas court.⁴⁷

The rule in New York is that the statute has no application where the shafting or other machinery is so located in the room that there is no danger of employees operating the machinery coming in contact with it.⁴⁸ A similar view has been taken of the Missouri stat-

⁴⁷ The factory act ignores the common-law duty resting on the factory owner or operator to exercise reasonable care to prevent foreseeable injuries, and establishes a statutory measure of prudence, by making specific precautionary requirements relating to specific places, structures, and appliances; and in an action founded on the act for damages consequent upon injuries to an employee acting in the scope of his duty, caused by the absence of a prescribed safeguard, it is no defense that the injury could not, with reasonable prudence, have been anticipated. *Caspar v. Lewin* (1910) 82 Kan. 604, — L.R.A. (N.S.) —, 109 Pac. 657 (syllabus by the court).

⁴⁸ It is error to rule, as a matter of law, that there was a noncompliance with this statute, where the evidence is that the injury was caused by a set screw projecting $\frac{1}{8}$ of an inch from a shaft which was 15 feet above the floor and was reached by a ladder used only when necessary to oil the shaft bearing. *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* (1900) 162 N. Y. 399, 56 N. E. 897, affirming (1896) 11 App. Div. 411, 42 N. Y. Supp. 285. The court said: "The necessity for the guard, and the character and description of the guard, must of necessity depend upon the situation, nature, and dangerous character of the machinery, and in each case becomes a question of fact. . . . The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants whose duty required them to work in its immediate vicinity should be properly guarded, so

as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen."

Similarly, it has been held that shafting and set-screws in a factory, suspended 9 feet above the floor, are not within the provisions of this statute. *Glassheim v. New York Economical Printing Co.* (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

Where a shaft is elevated 14 or 15 feet above the floor of a factory, and can be reached only by a ladder, the owner cannot be charged with negligence in failing properly to guard it. *Dillon v. National Coal Tar Co.* (1905) 181 N. Y. 215, 73 N. E. 978, reversing (1903) 88 App. Div. 614, 84 N. Y. Supp. 1123.

There is no negligence on the part of a master in failing to guard a shaft and pulley which clears the floor more than 7 feet, and is well above the heads of employees. *Nash v. William M. Crane Co.* (1910) 141 App. Div. 665, 125 N. Y. Supp. 987.

The statute does not apply to a shaft and set-screw hung some 12 feet above the floor, so that the danger of contact with it was entirely removed from all employees. *Shaw v. Union Bag & Paper Co.* (1902) 76 App. Div. 296, 79 N. Y. Supp. 276. The plaintiff was engaged in putting up new shafting, and the court said: "Does the act in question define the duties of an employer towards an employee under such conditions? I think not. As stated in the act, it is for the 'protection of employees operating machinery.' That is, those whose duties require them to work about machinery in motion; those who cannot do their work except when assisted by such motion, and therefore must work in the midst of it. Clearly, the work of constructing this new work-

ute, which is for the protection of servants "engaged in their ordinary duties."⁴⁹ But the view taken by the majority of the courts is that it is not necessary that the servant should be operating the machinery.⁵⁰ It is sufficient that his duties bring him in dangerous proximity thereto,⁵¹ and this is so, even if those duties are not ordi-

room, of hanging this new shafting and painting the timbers on which it hung, could and possibly should have been done without the shaft being in motion, and no special statute was required to protect the workmen so employed. The defendant might well have understood that no special care or duty was imposed upon it with reference to such employees by the statute in question, and that the common-law rule would furnish the full measure of its liability to its employees under such circumstances, and I think that the jury should have been instructed to that effect."

The statute does not apply to shafting located 8 feet above the floor. *Scialo v. Steffens* (1905) 105 App. Div. 592, 94 N. Y. Supp. 305 (deceased was attempting to repair belt).

⁴⁹ The employer was not required to guard a belt and drum, where the belt was not connected with the floor on which the injured employee worked, but was connected with the floor above, and revolved about a drum at the ceiling above his head. *Strode v. Columbia Box Co.* (1910) 124 Mo. App. 511, 101 S. W. 1099.

Belting, shafting, gearing, and drums, several feet away on the back of the table before the employee did not need to be guarded, where he did not have to reach to or over them in the performance of his labor. *Lang v. Kansas City Bolt & Nut Co.* (1908) 131 Mo. App. 146, 110 S. W. 614. The court said: "The object of the statute was not to require guards in all cases, but only in such cases where the machinery would be dangerous to persons employed while engaged in their ordinary duties. It is apparent that the machines as placed and guarded by the wall in the rear could not have been in any sense dangerous to defendant's employees operating the machines, that is, while in the performance of their ordinary duties. No one in the discharge of their ordinary duties were required to go into the space between the wall

and the backs of the machines except the belt lacer and the machinist. And those persons, by the nature of their employment, assumed all the risk incident to their employment, and so far as they were concerned it was immaterial whether they were or were not guarded."

⁵⁰ "It is not material that the saw is so placed that the operator would not be likely to come in direct contact with it while engaged in its operation." *Gallopy v. Atwood* (1908) 105 Minn. 80, 82, 18 L.R.A.(N.S.) 593, 117 N. W. 238.

Liability to injury by coming in contact with unguarded machinery does not mean that an employee must be working with the machinery, but it is enough that, in the performance of such work as he has to do, it is possible for him to be injured. *Cook v. Danaher Lumber Co.* (1910) 61 Wash. 118, 112 Pac. 245.

⁵¹ "The guarding of belts and machinery is not simply to protect those operating machinery, as sometimes intimated, but is to guard all those who, in the course of their work, are obliged to be in the immediate vicinity of moving machinery." *Hartman v. Berlin & J. Envelope Co.* (1911) 71 Misc. 30, 127 N. Y. Supp. 187.

The employer's duty to guard machinery, imposed by the factory act (Laws 1903, p. 540, chap. 356), extends to all places which employees might reasonably be expected to use in the performance of their duties, including the taking of turns at resting under a rule permitting them to do so. *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Fisher* (1909) 79 Kan. 576, 100 Pac. 507.

In *Walker v. Newton Falls Paper Co.* (1904) 99 App. Div. 47, 90 N. Y. Supp. 530, in which an employee in repairing a freight elevator was injured by a set-screw on a shaft which operated some machinery not connected with his work, Chase, J., sustained the trial court in setting aside a verdict for the

nary, but are exceptional in character;⁵² consequently it enures to the benefit of a servant who has some function to discharge in respect of the machinery itself,⁵³ and even of a servant who is not

plaintiff, but said: "I express my individual opinion in saying that this act should be construed in view of the general purpose of the act, and for the benefit of all employees whose duties require them to work upon, or in the immediate vicinity of, moving machinery. The special danger arising from the failure of an employer to properly guard machinery is as great to employees who are required to perform their work upon or in the immediate vicinity of moving machinery, when such work is not assisted by the motion of the machinery itself, as to such employees who cannot perform their work without the assistance of such motion."

A master is liable for failure to guard a set-screw, although it is on a shafting 9 feet above the floor, where the room is used as a store room, and employees at work there are likely to come in contact with it. *Walker v. Simmons Mfg. Co.* (1907) 131 Wis. 542, 111 N. W. 694.

An employee engaged in storing materials in a room may recover for injuries due to the master's failure to guard a shafting in the room. *Ibid.*

⁵² Stat. 1898, § 1636j, applies if an employee is required, in the course of his employment, to go about or over a shaft, even if that employment is exceptional, and is not limited to a shaft so located as to be dangerous to an employee in the discharge of his "ordinary" duties. *Miller v. Kimberly & C. Co.* (1908) 137 Wis. 138, 118 N. W. 536.

In *Koutsky v. Forster-Whitman Lumber Co.* (1911) 146 Wis. 425, 131 N. W. 1001, the court said: "Stated in another way, the contention is that the statutory duty to guard can only be invoked by an employee who at the moment of the accident is performing a duty which necessarily or ordinarily brings him into dangerous proximity to the unguarded gearing. Applying the contention to the concrete case before us, it is in substance that the gearing in question was plainly not dangerous to a man engaged in straightening slabs on the slasher slide, because it was under the boards on which

he was standing, and hence, though the unprotected gearing might possibly be dangerous to a man cleaning up the floor under it, still, as the plaintiff was not so engaged at the time of his injury, the statute has no application to the case. . . . We regard this as too narrow a view of the statute. . . .

So we think that the second question of the verdict is not to be condemned because it does not limit the inquiry to the question whether there was negligence as to a person who was engaged in doing the very duty which the plaintiff was doing at the time of the accident. If in the performance of any of his duties, ordinary or exceptional, he was brought into dangerous proximity to the gearing, the statute stepped in and required the employer to fence or guard the gearing."

Section 4 of the Kansas factory act, relating to safeguards on machinery, is not limited in its application to workmen engaged in their ordinary duties only, but is designed to protect persons employed or laboring in manufacturing establishments, while in the performance of any duty, whether ordinary and general, or exceptional and occasional. *Caspar v. Leicin* (1910) 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 657 (unguarded shafting was 9 feet or more from floor of factory, but absence of belt shifter made it necessary for deceased to use a ladder in putting belt on pulley).

An employee in a sawmill, hired primarily to clean up around a resawing machine and assist in taking away material from it, having been directed by the foreman in charge of the mill to do the work of feeding the machine when the regular feeder wished him to and needed him, was engaged in the line of his duty when injured while obeying such direction. *Schweikert v. John R. Davis Lumber Co.* (1911) 145 Wis. 632, 130 N. W. 508.

⁵³ The provision in the act of 7 Vict. chap. 15, § 21, was held to cover a case in which an employee had to enter a space between a fly wheel and a spin wheel for the purpose of oiling them. *Britton v. Great Western Cotton Co.*

actually engaged in the performance of his duties at the time when the injury was received.⁵⁴

In the note below will be found a number of cases in which the master was found liable for failure to guard, where the circumstances are of a somewhat unusual character.⁵⁵

(1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525, 19 Eng. Rul. Cas. 42.

In *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 528, 62 N. W. 527, it was argued that the provision did not apply to an employee who was engaged in work upon the gears themselves, but merely to the case of other employees who in performing their duties are in danger of being caught by the gears, but who are not employed directly upon or about them. The court rejected this contention, and held that an oiler who, when injured, was feeling a shaft to see if it was hot, was entitled to recover.

The court is justified in telling the jury that wheels with bevel gearing, which are placed close to a beam 8 or 10 feet above the floor upon which an employee has to walk in oiling the machinery, should be guarded, under the statute. *Walker v. Grand Forks Lumber Co.* (1902) 86 Minn. 328, 90 N. W. 573.

The master is liable for injuries caused by his leaving an aperture between the beam upon which an employee in oiling the machinery must walk, and the box or hood with which the master had attempted to guard the gearing. *Ibid.*

In *Seely v. Tennant* (1908) 104 Minn. 354, 116 N. W. 648, it was said that the main shaft in a factory, which revolves at the rate of 220 revolutions a minute, and runs parallel to a platform about 4 feet above and so close that a person walking on the platform might come in contact with it, is within the express terms of the statute.

Sec. 1636 f. Sanborn & B. Anno. Stats., applies to employees engaged in cleaning the gears themselves, as well as to others. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523, 62 N. W. 527.

⁵⁴ The provision as to fencing machinery is applicable, though the servant was not actually engaged in the performance of his duties at the time

of the injury. *Kelly v. Globe Sugar Ref. Co.* (1893) 20 Sc. Sess. Cas. 4th series, 833.

Under the Quebec factories act an employer is liable for injuries to a girl employed in his factory whose hair is caught in a revolving shaft under the table at which she is at work, as she stoops to pick up a comb, where such shaft is not covered or otherwise guarded. *Bergeron v. Tooke* (1896) Rap. Jud. Quebec, 9 C. S. 506.

⁵⁵ The Ohio statute applies although the shafting is outside of the building, when it is near the customarily used passageway. *Wheeler v. Oak Harbor Head Lining & Hoop Co.* (1903) 61 C. C. A. 250, 126 Fed. 348.

A master in providing guards for shafting near which young girls with long hair are required to work must take into consideration their age, inexperience, and lack of care and discretion, and adopt a shield or device that will prevent the liability of their hair coming into contact with the shaft. *Kirwan v. American Lithographic Co.* (1910) 197 N. Y. 413, 27 L.R.A.(N.S.) 972, 90 N. E. 945, 18 Ann. Cas. 650.

The failure of a manufacturer to guard a shaft operating sewing machines, as required by statute, to prevent the clothing of operators being drawn into it to their injury, and not the act of the operator in reaching under the machine to recover a shuttle which has fallen there, is the proximate cause of injury to her through her hair being wound about the shaft. *Balzer v. Warring* (1911) — Ind. —, — L.R.A. (N.S.) —, 95 N. E. 257.

A shafting in a printing establishment, so situated that when a girl at work at a table leans over there is danger of her hair being caught, is within the statute. *McGinnis v. R. M. Rigby Printing Co.* (1906) 122 Mo. App. 227, 99 S. W. 4.

See also *Bergeron v. Tooke*, cited note 54, *supra*, and *Van de Bogart v. Marinette & M. Paper Co.* (1907) 132 Wis. 367, 112 N. W. 443.

It has been held that the statute is inapplicable where, although the machinery is moving, it is not being operated for manufacturing purposes.⁵⁶

An employer is guilty of a violation of the statute, if he maintains unguarded cogwheels in such a position that girls of twelve or thirteen years of age are required, in the course of their duties, to place their hands and dresses within about 8 or 9 inches of the wheels. *Gemmills v. Gourock Rope Work Co.* (1861) 23 Sc. Sess. Cas. 2d series, 425.

In *Doel v. Sheppard* (1856) 5 El. & Bl. 865, in respect to a plea that the shaft was not near to where children or young persons were liable to pass or be employed, and was so placed and situated in the said factory that there did not exist any such liability to injury from the same as to require such fencing as in the declaration mentioned, while in motion; and that all such liability was sufficiently guarded against by such position and situation of the said shaft, Lord Campbell, Ch. J., said: "I think the construction of the act which is contended for by the defendants is most erroneous; it would, in fact, amount to a repeal of the act. The act does not merely provide that machinery in factories is to be fenced where it is dangerous. All mill gearing, while in motion for a manufacturing purpose, is to be fenced. The legislature did not intend to leave it to be decided, upon the circumstances of each case, whether the machinery was dangerous and required fencing."

It is a violation of the statute to permit the cable of an elevator to remain unguarded where it is so close to the check ropes that the operator might, through mistake or inadvertence, take hold of the cable instead of the check ropes. *Thompson v. Johnston Bros. Co.* (1893) 86 Wis. 576, 57 N. W. 298.

A petition for injury to a shearsman in the defendant's mill, which alleges that the plaintiff while engaged in his duty as shearsman had his right hand and arm caught between exposed and unprotected cogwheels which were within 2 feet of where plaintiff was required to work, and that the defendant was negligent in failing properly to box, cover, and shield said cogwheels, and that the plaintiff was without fault on his part, states a cause of action.

Republic Iron & Steel Co. v. Yanuska (1909) 92 C. C. A. 280, 166 Fed. 684.

⁵⁶ There is nothing in the statute would justify a court in holding that where machinery is in the course of construction, the uncompleted parts of the machinery must be guarded so that those engaged in finishing its construction shall not be injured. *Foster v. International Paper Co.* (1902) 71 App. Div. 47, 75 N. Y. Supp. 610 (shafting that was run solely for purpose of installing new machinery).

In *Coe v. Platt* (1852) 7 Exch. 923, it was held that the employer was not liable for injuries caused by an unguarded shaft while that shaft was turning of itself, but not being used at all for any manufacturing process. In course of the opinion this somewhat ingenious argument was made: "Now, I cannot help thinking that the probable intention of the legislature in this clause was to give full protection to children and young persons who were engaged in attending to their duties on the machinery put in motion by the mill gearing in the rooms or floors where such manufacturing process was going on, and that the protection was to be confined to the times when such process was going on there; for there seems to be no reason to give protection by fencing when no one was, in the usual course of his or her ordinary duties, likely to be there at all; and this would be accomplished by our holding that the mill gearing in each separate room is separate and distinct from the mill gearing in any other room, and requires fencing only while some manufacturing process is going on in that room, and it is in motion for that purpose. This is, I think, the proper construction of the 21st section. But undoubtedly it may be plausibly argued that the whole of each vertical shaft is but one mill gearing, and that, if it is turning machinery in another room, it is in motion for a manufacturing process; and if this were the case here, it might be fit to have a further argument before we decided otherwise. This case also might be put as one of some difficulty: Suppose

d. What machinery is dangerous in such a sense that a master is required to fence it.—With reference to the English statute, the opinion has been expressed that “machinery or parts of machinery is and are dangerous if, in the ordinary course of human affairs, danger may be reasonably anticipated from the use of them without protection.”⁵⁷ The extent of the duty imposed upon the master by any enactment in which the same or similar language is employed seems to be correctly defined in this statement, and it is consistent with the

the injury arose from the defective fencing-off of this horizontal shaft at a time when, by its own proper revolution, it was not turning any machinery in the ground floor immediately connected therewith, but was immediately connected with machinery turned on the other floors by the vertical shafts connected with the horizontal shaft and turning by it. It might then perhaps be said that the horizontal shaft was in motion for a manufacturing process, and that the fencing it off was imperatively required by the act. But this case is clear of both these difficulties.” But a decision which holds that it was the legislative intent to permit shafting revolving in a room where manufacturing was being carried on, to remain unfenced because it did not at the time happen to be turning machinery in some other room, certainly does not appeal to the reason, to say the least.

⁵⁷ *Hindle v. Birtwistle* [1897] 1 Q. B. 192, per Wills, J., who thus criticized the theory upon which the decision of the county court judge proceeded, *viz.*, that the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working: “He seems to think that no machinery can be said to be dangerous unless it is dangerous in itself, however carefully worked. I entirely disagree with such an interpretation, and think that it would limit most materially a very beneficial act of Parliament. . . . No doubt it would be impossible to say that because an accident had happened once, therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In consider-

ing whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree.” It was accordingly held that shuttles of cotton looms which occasionally fly out from their bed under circumstances rendering them dangerous to any persons in the line of flight, because of negligence of the weaver in charge, or a foreign substance accidentally getting into the shuttle race, or defect in the yarn, though not in themselves defective, are within the purview of the provision, if any of the causes of their flying out are likely to occur with any degree of frequency.

This provision imposes a less stringent obligation than that imposed by the subs. 2 of § 5 (factory act 1901, § 10 [b]), with regard to a “wheel race,” which is required to be absolutely fenced. But where a servant is killed while oiling machinery, owing to the want of a hand rail to protect the pit in which it was sunk, a verdict for his widow will not be set aside, although the trial judge has omitted to ask the jury whether the pit was a “wheel race.” Under such circumstances it is for the jury to say whether the absence of the railing implied negligence, and it cannot be inferred that the verdict would have been different if the proper question had been put. *Chapman v. Nitro-Phosphate Co.* (1885) 1 Times L. R. 493.

But the mere fact that there will be danger if reasonable care be not taken by the workmen does not show that it is a case in which fencing is obligatory. *Robb v. Bullock* (1892) 19 Sc. Sess. Cas. 4th series, 971.

decisions rendered in some cases.⁵⁸ In Wisconsin it has been held that the master fulfils his duty when he exercises reasonable care in

⁵⁸ An employer is guilty of a violation of the statute, if he maintains unguarded cogwheels in such a position that girls of twelve or thirteen years of age are required, in the course of their duties, to place their hands and dresses within about 8 or 9 inches of the wheels. *Gemmills v. Gourock Rope Work Co.* (1861) 23 Sc. Sess. Cas. 2d series, 425.

A complaint is not demurrable which alleges that the plaintiff, being obliged to stand upon an iron-bound table, slipped, and in trying to save himself thrust his hand into an uncovered pinion wheel. *Shields v. Murdock* (1893) 20 Sc. Sess. Cas. 4th series, 727.

Where the hood or blower to a revolving cylinder with knives, in a planing machine, was battered and worn so that it did not fit closely, and thereby a suction of air was created over a roller into the cylinder under the hood, and care was required to adjust it, it was held that the hood was not a proper protection to dangerous machinery. *Jaroszeski v. Osgood & B. Mfg. Co.* (1900) 80 Minn. 393, 83 N. W. 389.

It has been laid down that the New York statute does not require employers to fence every machine, but only those which, "in reasonable anticipation, may be a source of danger." *Byrne v. Nye & W. Carpet Co.* (1899) 46 App. Div. 479, 61 N. Y. Supp. 741, holding that the defendant was not bound to anticipate that a child would attempt to adjust material passing through a swiftly moving machine which was in no way connected with the child's work in another part of the factory.

In *Lore v. American Mfg. Co.* (1910) 160 Mo. 608, 61 S. W. 678, it was held that an instruction that the employer does not guarantee or insure the employee against injury from machinery, but he discharges the measure of his duty if he provides such guards for the protection of the employees as a person of ordinary care would deem sufficient, was properly refused since such an instruction called for a less degree of care than that required by the statute. The plaintiff was held entitled to recover, the evidence being to the effect that the rods protecting the gearing had become

bent so as to produce an opening which the sheet iron within the rods did not guard, and that in passing around the machine in the discharge of her duty, she slipped on the floor, rendered slippery from the spraying of oil from the machinery, and her hand passed through the opening in the guard, and was crushed in the cogwheels.

It has been held that the Wisconsin provision only requires the guarding of such machinery as is dangerous in an unguarded condition. The mere fact that it occasioned an injury to an employee does not of itself show that it came within this description. *Powalske v. Cream City Brick Co.* (1901) 110 Wis. 461, 86 N. W. 153.

Whether a set-screw is "so located as to be dangerous to employees engaged in their ordinary duties," within this enactment so as to require it to be covered or guarded, is a question for the jury. *Guinard v. Knapp-Stout & Co.* (1897) 95 Wis. 482, 70 N. W. 671.

It cannot be said, as matter of law, that negligence is inferrable from the fact that a set screw on a paper winder projected $\frac{1}{8}$ of an inch above the surface of the collar. Whether such an arrangement was indicative of negligence is a question for the jury. *Kreider v. Wisconsin River Paper & Pulp Co.* (1901) 110 Wis. 645, 86 N. W. 662.

An employer is not, as matter of law, free from negligence in leaving unguarded a constantly moving elevator chain and carrying chain at a point where the two meet on the surface of the floor and run over a sprocket-wheel projecting just above the surface of the floor, beside which an inexperienced employee seventeen years old is placed at work. *Klatt v. N. C. Foster Lumber Co.* (1897) 97 Wis. 641, 73 N. W. 563.

In a case in which recovery was denied on the ground that the plaintiff fully appreciated and had assumed the risk, the court remarked that it was not yet settled in Wisconsin whether leaving gears uncovered constituted negligence under the act cited above. *Williams v. J. G. Wagner Co.* (1901) 110 Wis. 456, 86 N. W. 157.

A revolving screw in a conveyer box, a large steel appliance for transferring and moving grain from one part of an

respect to providing the safeguards.⁵⁹ The fact the injured servant and his fellow servants have control of the materials which pass through a saw does not prevent the saw from being dangerous as to him.⁶⁰

Whether or not machinery is dangerous so as to require guarding is for the jury.⁶¹

elevator to another, and moved by a powerful agency, is a dangerous piece of machinery, within the meaning of the statute, and, if located where workmen are likely to come in contact with it in the discharge of their duties, should be guarded and protected as required by law. *Wozland v. Northwestern Consol. Mill. Co.* (1911) 113 Minn. 440, 129 N. W. 856.

In *Strode v. Columbia Box Co.* (1907) 124 Mo. App. 511, 101 S. W. 1099, the court said: "The statute shows on its face that not all of the mentioned appliances need be guarded, and the point of law to be determined on the appeal is, What is meant by the words 'when so placed as to be dangerous to persons employed therein, or thereabout when engaged in their ordinary duties'?" Appellant's counsel say the meaning is that no appliance of the kind specified need be guarded unless there is danger of an employee getting in contact with the moving appliance while engaged in his ordinary duties. In other words, that the statute does not intend to protect employees against injuries arising from defective appliances or negligent management, for which the common law provides a remedy, but intend only to afford protection against such accidents as may occur from contact with the appliance while in motion, even if it is in good order and properly operated, and hence, if an appliance is so located that employees cannot come in contact with it while running, without going out of their way, the statute does not require it to be guarded. The argument is enforced by pointing to the clause of the statute which provides that when it is impossible to guard an appliance placed where it imperils employees, notice of the danger shall be conspicuously posted. This clause is said to demonstrate that the purpose of the statute is to prevent accidents occurring from employees getting into contact with moving belts, drums, and shafting, as there

would be no occasion for the warning if the statute intends that such appliances shall be guarded when set where employees cannot get against them."

⁵⁹ The statute leaves, primarily, the master to determine whether a situation needs guarding or fencing in contemplation thereof, and, if so, the means and manner of complying therewith, subject to the duty, which is absolute, to exercise all ordinary care in respect to the matter. *Willette v. Rhineland Paper Co.* (1911) 145 Wis. 537, 130 N. W. 853.

The effect of the statute is to prohibit the use of such machinery as is mentioned therein, unless by the exercise of ordinary care it can be rendered reasonably safe for employees in the discharge of their duty in the exercise of like care. *Ibid.*

⁶⁰ "The statute is broad and sweeping, and has application to all saws of a dangerous character. The fact that respondent and his coworker had control of the material which passed through the saw creates no exception to the rule, and has no bearing, except upon the question of assumption of risk or contributory negligence on their part. The statute is intended as a protection not only against the carelessness and ignorance of those who may accidentally come in contact with dangerous machinery while moving about in its vicinity, but it is also intended as a protection to the operatives themselves, who, by reason of inadvertence or some misfortune, may be injured by it." *Callopy v. Atwood* (1908) 105 Minn. 80, 82, 18 L.R.A. (N.S.) 593, 117 N. W. 238.

⁶¹ Whether or not machinery is so situated as to be dangerous and require guarding is usually a question for the jury. *Snyder v. Waldorf Box Board Co.* (1910) 110 Minn. 40, 124 N. W. 450.

It is error to direct a verdict for defendant where the jury might properly find that the machinery was located so

e. Specific parts of machinery within the scope of enactments.—It has been held that the English provision with respect to the fencing of "all dangerous parts of machinery" is applicable to all the machinery in a factory,—that by which the industrial operations are immediately performed, as well as that which supplies or conveys the motive power.⁶² Machinery, to be within the statutes, need not be permanently fixed in a factory.⁶³ A machine which comes within the terms of the statute must be guarded, although it was installed by the employer in compliance with another statute enacted for the furtherance of the health or comfort of the employees.⁶⁴ In a Scotch case it has been held that a machine which is worked by hand is not within the statute,⁶⁵ but a contrary view was taken in an Indiana case.⁶⁶

In the note below will be found a large number of machines, or parts thereof, which have been held to be embraced in the statute.⁶⁷

as to be dangerous to employees. *Chopin v. Combined Locks Paper Co.* (1907) 134 Wis. 35, 114 N. W. 95 (only about 14 inches between set screw and another piece of machinery).

Even when the law contains no express qualification of the duty to guard, the courts have construed it to require guarding only when danger to employees from the appliance is within reasonable anticipation. The language of our statute excepts from the force of it wheels and other appliances so placed as not to be dangerous to employees while engaged in their ordinary duties. Of course, this, in most instances, would raise a question for the jury; but when the evidence has no tendency to prove that a man of ordinary care would have foreseen the danger, it is a question of law. *Meifert v. New Union Sand Co.* (1907) 124 Mo. App. 491, 496, 101 S. W. 1103.

In an action by a servant for injuries from unguarded machinery, whether exposed gearing was such a danger as to make the injury one within the field of reasonable anticipation by the defendant is for the jury. *Klotz v. Power & Min. Machinery Co.* (1908) 136 Wis. 107, 17 L.R.A.(N.S.) 904, 116 N. W. 770. (Syllabus.)

⁶² *Redgrave v. Lloyd* [1895] 1 Q. B. 876, 64 L. J. Mag. Cas. N. S. 155, 15 Reports, 403, 72 L. T. N. S. 565, 43 Week. Rep. 527, 18 Cox, C. C. 149, 59 J. P. 293.

⁶³ "It is not necessary that a machine is incapable of use outside of a shop or factory, in order to make the statute applicable, when it is in fact used therein." *Crawford & M. Co. v. Gose* (1907) — Ind. App. —, 82 N. E. 984.

⁶⁴ An exhaust fan installed to secure greater safety and comfort to the employees of the defendant, in compliance with the requirements of § 11 of the act of May 2, 1905, P. L. 352, must be guarded as any other machinery. *Jones v. American Caramel Co.* (1909) 225 Pa. 644, 74 Atl. 613.

⁶⁵ Where a machine is worked by hand, there is no such danger as calls for fencing. *Milligan v. Muir* (1891) 19 Sc. Sess. Cas. 4th series, 18.

Lord Balfour, in *Henderson v. Glasgow Corp.* (1900) 2 Sc. Sess. Cas. 5th series, 1127, said that "wherever steam, water, or other mechanical power is used in aid of the process, a class of danger is introduced which does not exist where manual labor only is exercised."

⁶⁶ A crane used to lift molten metal in a manufacturing establishment, and operated by hand, is a machine within the factory act. *Crawford & M. Co. v. Gose* (1907) — Ind. App. —, 82 N. E. 984.

⁶⁷ The main shaft in a printing shop. *Berger v. Metropolitan Press Printing Co.* (1910) 61 Wash. 35, 111 Pac. 872.

A coupling of a shafting about 2½ feet above the ground. *Hoveland v.*

Inward revolving rollers when constituting the actual working portion of a machine, although they may in all cases be considered dangerous, are generally held not to be within the terms of the statute; in many cases it would undoubtedly destroy the efficiency of the ma-

Hall Bros. Marine R. & Shipbuilding Co. (1905) 41 Wash. 164, 82 Pac. 1090.

A vertical belt and a horizontal shaft rotating near the floor of a factory, exposed to contact with the limbs and clothing of employees. *Morgan v. C. Hager & Sons Hinge Mfg. Co.* (1906) 120 Mo. App. 590, 97 S. W. 638.

Emery wheels. *Davidson v. Flour City Ornamental Iron Works* (1909) 107 Minn. 17, 119 N. W. 483. (A contrary view has been taken in Indiana. *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 303, 75 N. E. 277; *National Drill Co. v. Myers* (1907) 40 Ind. App. 322, 81 N. E. 1103. But see note 77, *infra*.)

A sprocket wheel and chain used in transmitting power from a shaft to a roller in a resawing machine. *Schweikert v. John R. Davis Lumber Co.* (1911) 145 Wis. 632, 130 N. W. 508. (Syllabus).

A laundry mangle. *Pein v. Mizner* (1908) 41 Ind. App. 255, 83 N. E. 784.

An uncovered screw conveyor in a cement factory. *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69.

A screw conveyor in a grain elevator. *Wozland v. Northwestern Consol. Mill Co.* (1911) 113 Minn. 440, 129 N. W. 856.

A jointer. *Bigum v. St. Paul Sash, Door & Lumber Co.* (1909) 107 Minn. 567, 119 N. W. 481.

A "sharper" in a picture moulding factory, consisting of a machine with sharp knives attached, which revolves at a speed of 4,000 revolutions a minute. *United States Furniture Co. v. Taschner* (1907) 40 Ind. App. 672, 81 N. E. 736.

Friction wheels. *Ward v. National Lumber & Box Co.* (1909) 54 Wash. 304, 103 Pac. 1.

A friction wheel and rattlers, constituting a part of defendant's machinery, and constructed with a friction surface, so as to transmit motion to the rattlers by friction from the wheel, are within the class of appliances termed "gearing" by the Indiana factory act (*Burns's Anno. Stat.* 1908, § 8029), requiring all

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gearing, etc., to be properly guarded. *Whiteley Malleable Castings Co. v. Wishon* (1908) 42 Ind. App. 288, 85 N. E. 832.

In the Indiana statute, "shafting" includes pulleys running on the shafts and countershafts. *Hohenstein-Hartmetz Furniture Co. v. Matthews* (1910) 46 Ind. App. 616, 92 N. E. 196.

A set-screw used in attaching a circular knife to the shaft is a part of the "shafting." *Van de Bogart v. Marinette & M. Paper Co.* (1907) 132 Wis. 367, 112 N. W. 443.

The maintenance of unprotected spindles with a projecting set-screw has in Canada been regarded as a breach of the factories act (Ont. Rev. Stat. 1887) chap. 208, § 15, subs. 1, by which the requirement is that "moving machinery shall be fenced." *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, affirmed in 21 Ont. App. Rep. 596, which was also affirmed in (1895) 24 Can. S. C. 598.

A device for crushing old car wheels preparatory to melting and remolding, which consists of four posts set in a square of 10 feet and a heavy frame of iron and wood at the top upon which is a heavy pulley and certain wheels connected with ropes and chains which pass over the pulley, and to which is attached a 1500-pound hammer which is dropped upon the wheels,—constitutes a machine within the meaning of the Indiana factory act. *Green v. American Car & Foundry Co.* (1904) 163 Ind. 135, 71 N. E. 268.

A federal court has taken the same view of the Indiana statute in respect to a similar appliance. *Inland Steel Co. v. Kachwinski* (1907) 80 C. C. A. 571, 151 Fed. 219.

A bag-turning machine, designed to turn floor sacks from the wrong to the right side, consisting of an iron frame work about as high as an ordinary table, containing a plunger, consisting of an iron rod which plays back and forth in the end of a cylinder, is within the statute requiring dangerous machinery to be guarded. *Abel v. Hardwood Mfg. Co.* (1909) 107 Minn. 214, 120 N. W.

chinery entirely to erect guards which would add to the safety of the operator.⁶⁸ Under the circumstances noted below, printing presses have been held not to be within the statute.⁶⁹

359, affirmed on rehearing in 107 Minn. 217, 121 N. W. 916.

A machine consisting of a horizontal, rapidly revolving metal shaft, with steel knives protruding up through a slot or opening in an iron table, the said shaft revolving at the rate of 4,000 revolutions per minute, the machine being run by steam power transmitted by belting, and used in planing and shaving timbers,—is within the statute. *Millsap v. Beggs* (1906) 122 Mo. App. 1, 97 S. W. 956.

Vats of hot water used in an ice factory to loosen blocks of ice from the cans must be guarded, if practicable. *Dix v. Union Ice Co.* (1908) 76 N. J. L. 178, 68 Atl. 1101.

⁶⁸ The factory act does not require the guarding of steel rollers revolving towards each other and used to straighten material passed between them. *Keena v. American Box Toe Co.* 144 Wis. 231, 128 N. W. 858.

The rollers of a steel-roller sandpaper-smoothing machine are not "belting, shafting, gearing, and drums in a manufacturing establishment," and hence do not come within either the letter or the meaning of § 6433, Rev. Stat. 1899. *Czernicke v. Ehrlich* (1908) 212 Mo. 386, 111 S. W. 14.

The rollers of a planer are not included within a statute applicable to "belting, shafting, gearing, and drums." *Smith v. Forrester-Nace Box Co.* (1905) 193 Mo. 715, 92 S. W. 394.

A "liner," which consists of an iron frame on which rests a heavy hollow revolving iron roller which is filled with steam, and while in operation is heated to a high temperature, with a smaller roller on top and revolving thereon, between which rollers papers are passed by the operator, is not within the factory act requiring certain machinery to be guarded. *Jenkins v. LaFayette Box, Board & Paper Co.* (1909) 43 Ind. App. 463, 87 N. E. 992.

The knives of a planing machine, set in a rotating cylinder or axle, are not shafting within Rev. Stat. 1899, § 6433 (Anno. Stat. 1906, p. 3217). *Cole v. North American Lead Co.* (1908) 130 Mo. App. 253, 112 S. W. 753.

In *Sitts v. Waiontha Knitting Co.*

(1904) 94 App. Div. 38, 87 N. Y. Supp. 911, the court said that it was doubtful whether under the factory act any negligence could be imputed to the defendant because of its failure to place guards in front of the rollers at the back of a mangle, where the movement of the rollers was necessarily such as to push objects away, and not to draw them in.

⁶⁹ In *Kimmerle v. Carey Printing Co.* (1911) 144 App. Div. 714, 129 N. Y. Supp. 572, it was held that the statute does not apply to a printing press, where the moving parts of the press are entirely within in a heavy iron frame, and at no time pass outside of the frame, and can only be reached by passing a hand or foot inside the frame, and there is no occasion for so doing in operating the press. The court said: "The evidence in this case, furnished by the plaintiff, is positive that the machine in question was so constructed that no injury could come to the employee while engaged in the ordinary operation of the machine, and that it was only upon the happening of 'unexpected and not to be anticipated events' that the plaintiff thrust his hand into a position of danger. The machine involved in this action was, as a matter of law, under all the authorities, and in reason, properly guarded, and the defendant was entitled to have its request charged."

The statute does not require guards upon a printing press, which is very simple in construction, so that a servant needed no instruction to work thereon, and the danger of being hurt from lack of guards could not be anticipated, and the construction of the press was such that a guard was neither necessary nor suitable. *Foster v. Bemis Indianapolis Bag Co.* (1904) 163 Ind. 351, 71 N. E. 953.

The negligent failure to guard the rapidly revolving cylinders of a printing press propelled by electricity as a motive power is not a violation of the statutory requirement. *Bemis Indianapolis Bag Co. v. Krentler* (1907) 167 Ind. 653, 79 N. E. 974.

Where the practical operation of a printing machine requires that the op-

It has been held that a revolving saw is not included in the Wisconsin statute, which embraces only "belting, shafting, and gearing."⁷⁰

The statute does not apply to an emery wheel used as a part of a factory equipment to grind tools;⁷¹ nor to the reciprocating parts of a steam engine.⁷² A buggy used for moving heavy iron rails is an implement, and not a mechanical contrivance, within § 18 of the New York labor law.⁷³ The statute does not require a manufacturer to guard the cover of a vat in his plant, while removed from the vat.⁷⁴ In the note below a number of machines of a somewhat unusual character have been held not to be within the statute.⁷⁵

erator have an open and unobstructed field in front of the rotating cylinders, the nippers, and the guides at the edge of the feed board, in order that the bags may properly feed into the printing press, the master is not required to place a board across this area in front of the rollers and above the nippers, which would obstruct the operator's view and interfere with his manipulation of the work, and thus interfere with and tend to prevent defendant from conducting its business in a proper and customary way. *Kuich v. Milwaukee Bag Co.* (1909) 139 Wis. 101, 120 N. W. 261.

⁷⁰ Stat. 1898, § 1636jj, added by Laws 1905, p. 462, chap. 303, which eliminates the defense of assumption of risk, does not enlarge the provisions of § 1636j, so as to require an employer to guard a revolving saw which was not within the earlier statute. *Schmitt v. Seefeld* (1909) 139 Wis. 459, 121 N. W. 136.

⁷¹ *National Drill Co. v. Myers* (1907) 40 Ind. App. 322, 81 N. E. 1103.

⁷² *Crossman v. P. & T. Degnan Sand, Dredging & Lighterage Co.* (1903) 24 Ohio C. C. 585.

⁷³ *Pluckham v. American Bridge Co.* (1905) 104 App. Div. 404, 93 N. Y. Supp. 748.

⁷⁴ *Bessler v. Laughlin* (1907) 168 Ind. 38, 79 N. E. 1033.

⁷⁵ The failure to provide a chute or conveyor to carry slabs of wood and other material from the second floor of a saw-mill, so as to remove the danger of a workman on the ground floor being injured by the refuse being thrown down, was held not to be a violation of the statutory duty to safeguard machinery, in *Crum v. North*

Vernon Pump & Lumber Co. (1904) 34 Ind. App. 253, 72 N. E. 193, appeal dismissed in (1904) 163 Ind. 596, 72 N. E. 587.

A square opening in a floor, below which was certain machinery consisting of rollers and knives which revolved at a high rate of speed, the purpose and use of which was to mix sawdust, damp clay, and other materials to the proper consistency for molding into shape for tiling and building material, is not within the statute. *National Fire Proofing Co. v. Roper* (1906) 38 Ind. App. 600, 77 N. E. 370.

A statute requiring a master to guard all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description, does not apply to an elevated track running near galleries in a factory, upon which run traveling cranes, so as to render the master liable to a servant falling onto the track, in front of the crane, to his injury. *Wyhkoop v. Ludlow Valve Mfg. Co.* (1909) 196 N. Y. 324, 30 L.R.A.(N.S.) 36, 89 N. E. 827.

A recovery cannot be had for failure to provide a cover for the revolving basket of a laundry machine used for drying clothes, where covers were very rarely used upon such machines, and when used are for the purpose of keeping the dirt from the clothes, rather than to protect the operator from injury, and at the time of the accident the machine was being cleaned by plaintiff, and the putting on or removal of the cover, if one had been furnished, would have been under his control. *Beckstein v. Central Star Laundry Co.* (1910) 140 App. Div. 8, 124 N. Y. Supp. 446.

The doctrine of *ejusdem generis* was applied in an Ontario case so as to limit materially the effect of the earlier statute.⁷⁶ In Indiana the supreme court has been inconsistent in its construction of the statute providing: "All vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description." The rule finally adopted is that the phrase, "machinery of every description," does not modify in any way the specific appliances mentioned, but embraces all other kinds of machinery, which would be too numerous for the legislature to mention, although an earlier decision of the supreme court to the effect that the general terms simply referred to other appliances of the same general description as those indicated by the specific terms, under the doctrine of *ejusdem generis*

⁷⁶ In construing the words "all belting, shafting, gearings, flywheels, drums, and other moving parts of machinery" (Ont. Rev. Stat. 1887, chap. 208, § 15, subs. 1), a divisional court was of opinion that the general clause covered only those parts of machinery which were of a similar nature to those enumerated specifically, and that the word "moving" was used in the transitive sense of "propelling," and was accordingly held not to be applicable to a saw. *Hamilton v. Groesbeck* (1890) 19 Ont. Rep. 76. This construction seems to have been approved by the court of appeal ([1891] 18 Ont. App. Rep. 437), which, by holding that no negligence on the defendant's part was shown in leaving the saw unguarded, may be presumed to have proceeded on the theory that the plaintiff was relegated to his common-law rights. Whether this narrow construction is correct would seem to be very disputable, to say the least. Some of the most dangerous parts of machines are those which do the actual work for which the machines are designed, and it is difficult to believe that it was not the intention of the legislature to include these within the purview of the act. To construe that act in such a sense that only the "propelling" parts would be covered by it would deprive it of at least one half of its beneficial operation. Clearly, however, there are some kinds of saws—e. g., the circular—which cannot be completely guarded without greatly impairing, if not destroying, their usefulness; and a decision holding the act to be inapplicable to such

saws might perhaps be sustained on the ground that, under such circumstances, the case was one which came within the purview of the saving clause of the statute, which exempts employers from the obligation to guard machinery where it is not practicable to do so. Another strong reason for doubting the correctness of the construction placed in this case upon the word "moving" is that, in subs. 4 of § 5 of the English factories act of 1878, it is directed that "all fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use." Considering that this statute is the one from which that of Ontario is copied, it seems a reasonable inference that, although these precise words are not found in the latter statute, the colonial legislature intended to enact a provision which would give servants a protection at least as complete as that which they derived from the English act.

By the amended factories act of Ontario (58 Vict. chap. 50, § 3, Ont. Rev. Stat. 1897, chap. 20 [1] a), employers are required to fence "all dangerous parts" of machinery. This change entirely gets rid of the ambiguity of the earlier act.

The maintenance of unprotected spindles with a projecting set-screw has in Canada been regarded as a breach of the act as it stood before this amendment. *O'Connor v. Hamilton Bridge Co.* (1894) 25 Ont. Rep. 12, affirmed in (1894) 21 Ont. App. Rep. 596 (1895) 24 Can. S. C. 598.

eris, was not in terms overruled.⁷⁷ The doctrine of the Washington court is the same as that which appears to prevail in Indi-

⁷⁷ In *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277, the court held that an emery wheel was not embraced within the statute, since that form of machinery was not specifically mentioned. The court said: "The rule generally affirmed by our decisions, and also by other authorities, is that where words of a particular or specific description in a statute are followed by general words which are not so specific and limited, the latter are to be construed as applicable to persons, things, or cases of like character to those designated by the preceding particular or specific words, unless there is a clear manifestation on the part of the legislature of a contrary purpose. . . . The rule in question is commonly denominated by the authorities '*ejusdem generis*,' because it usually restricts expressions in a statute, such as 'all others' or 'any others,' to persons and things of the same kind or class of those specifically designated by the preceding words. There being nothing in the statute in question to indicate to the contrary, the general phrase, namely, 'and machinery of every description therein,' must, under the rule stated, be construed as meaning and including machinery or appliances belonging to or of the class or character designated as 'vats, pans, saws,' etc. 'The paragraph in question however, utterly fails to aver facts to show that the emery belt mentioned therein is of the kind or character of the class of machinery specifically designated by the statute to be guarded. Aside from the fact that it throws off particles of emery as alleged, there is nothing to show a necessity for guarding it for the reason that its operation or use is attended with danger to the employees of appellant who work in the vicinity thereof."

In *National Fire Proofing Co. v. Roper* (1906) 38 Ind. App. 600, 77 N. E. 370, the court, after citing the *Sullender Case*, said: "The fact that a particular appliance, machine, or part of a machine, is dangerous to those using it or passing near it in the line of duty as employees, would not be sufficient to bring the injury caused by its being unguarded within the statute; for, mani-

festly, there are many kinds of appliances and machines and parts of machines wholly different from those particularly mentioned in the statute, which may be thus dangerous."

But in *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69, the same court, in holding that a screw conveyor was within the statute, said that the word "all" qualifies each class or genus of things specified, and leaves nothing of any class mentioned for the general words "and machinery of every description" therein to embrace under the rule of *ejusdem generis*, so that these words must be held to embrace all the great body or mass of machinery not expressly mentioned in the statute. Unfortunately the *Cooper Case* makes no mention of the *Sullender Case* upon this point, although it is apparently impossible for the two cases to stand together.

In *Inland Steel Co. v. Kachwinski* (1907) 80 C. C. A. 571, 151 Fed. 219, it was said that the *Sullender Case* was decided merely upon questions of pleading, and that the emery belt in question might have been brought within the statute by averring and proving that it was of the same kind as an unguarded vat, pan, saw, etc., with respect to danger of operating and practicability of erecting guards. The language used in the *Sullender Case* does not tend to support this view, but it is supported by the fact that the plaintiff was given leave, upon request, to file an amended complaint.

In *Pein v. Mizner* (1907) 41 Ind. App. 255, 83 N. E. 784, the appellate court was of the opinion that a mangle in a laundry was within the terms of the statute, but they were confronted with the *Sullender Case*, and consequently transferred the case to the supreme court, with the recommendation that the *Sullender Case* be overruled or modified so that it would accord with the expressed legislative intent and the current of the decisions in that state; but when the case came before the supreme court in (1908) 170 Ind. 659, 84 N. E. 981, the question was not discussed at all, the lower court being directed to sustain a demurrer to the complaint upon the ground that it dis-

ana.⁷⁸ And a somewhat similar view is taken of the statute in New South Wales.⁷⁹

closed contributory negligence upon the part of the plaintiff.

The argument of the appellate court in the *Pein Case* appears very clear and conclusive: "The doctrine of *ejusdem generis* is that where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them, and is presumed to be restricted to the same genus as those words. . . . The language here does not admit of the application of the *ejusdem generis* doctrine. The phrase 'and machinery of every description' cannot be limited by the prior enumeration, for the reason that such enumeration is not an enumeration of machines at all—the genus of those words is not of the same nature as of 'machinery of every description.' A vat is not a machine; neither is a pan, nor a saw. Cogs, gearing, belting, shafting, and set-screws are not machines, but may each or all enter into and be a part of various machines. Since no enumeration of machinery precedes the general terms, there is nothing to limit those terms, and they are broad enough to cover any machine that is dangerous to life or limb, and which, without impairing its utility, can be guarded. . . . In the . . . [*Sullender Case*] an emery belt was held not to 'come within the term or word "belting," as employed in the statute.' But if an emery belt is a 'machine,' it is the same kind of a machine as 'belting;' if it is a 'thing,' it is of like character to 'belting.' Whether it is a 'machine' or a 'thing,' it should have been held to be within the statute. If an emery belt does not come within the general words, it is difficult to conceive of any machine or thing which could possibly do so. It is the dangerous quality of machinery which the statute seeks to guard against, and it is because of that danger that 'all other machinery' is brought within the scope of the statute. Whether the danger lies in a wheel drop of a foundry (*Green v. American Car & Foundry Co.* [1904] 163 Ind. 135, 71 N. E. 268); in a dovetailing machine (*N. S. Huey Co. v. Johnston* [1905] 164 Ind. 489, 73 N. E. 996); in the bits of a shaper (*United States Furniture Co. v. Taschner* [1907] 40

Ind. App. 672, 81 N. E. 736); in the bits of a boring machine (*Buehner Chair Co. v. Feulner* [1905] 164 Ind. 368, 73 N. E. 816); in a screw conveyor (*United States Cement Co. v. Cooper* [1907] — Ind. App. —, 82 N. E. 981); or in an emery belt used to polish metal parts of vehicles; or in the mangle of a laundry,—should make no difference. They are all dangerous machines and should be guarded,—provided, of course, the same can be done without impairing their utility."

⁷⁸ In *Ward v. National Lumber & Box Co.* (1909) 54 Wash. 304, 103 Pac. 1, the court said: "The appellant invokes the rule of *ejusdem generis*, and insists that the friction wheel, not being specified in the factory act, and not being of the same kind or genus as any of the machinery specially mentioned, does not fall under the head of machinery of other or similar description, and that therefore the assumption of risk attaches in this kind of a case. Considering the whole scope of the factory act, and the evident intention of the legislature, we are unable to reach the conclusion contended for by the appellant. There is no doubt that the general rule is that the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words; but, . . . the maxim has no application where there is no room for construction, but only when the meaning is not apparent from the language itself; and it is also said: 'Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning.' [26 Am. & Eng. Enc. Law, 610] This is peculiarly the case under our statute, where the specific words signify subjects greatly different from one another, vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set-screws, live rollers, conveyors, mangles in laundries etc., all, or nearly all, being machinery or parts of machinery of different character. We think, in the face of the statute, it

f. What persons are within the protection of the statute.—The statute is not intended for the benefit of new licensees or trespassers,⁸⁰ nor of persons whose presence near the machinery is purely voluntary,⁸¹ nor of servants who must go out of their way to come in contact with the machinery.⁸²

The Minnesota act (Rev. Laws 1905, § 1813) applies to protect a

would be doing violence to the evident intention of the legislature to hold that the duty to guard the machinery in question was not imposed upon the millowner; and the testimony is undisputed that this machine could have been guarded without affecting the efficiency of its operation."

⁷⁹ In *Davis v. Langdon* (1911) 11 New So. Wales St. Rep. 149, it was held that § 28 of the New South Wales factories and shops act 1896 imposes an absolute obligation on the occupier of a factory to fence all dangerous parts of machinery therein, whether they are the particular parts specified in subsec. (1), (2), and (3), or not.

⁸⁰ Employees only are entitled to the protection of a section of a statute requiring guards around elevator wells in every manufacturing, mechanical, mercantile, or public building in the state, where its title indicates that it relates to the health and safety of employees, and all sections except two, wherein the parties are mentioned for whose protection the act is intended, refer in express terms to employees, and those two are silent as to whom reference is made. *Glaser v. Rothschild* (1909) 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576 (plaintiff mere invitee of an employee).

The mere fact that the owner of a horse-power machine has omitted to protect it with a cover, as required by statute, does not afford an action to a child injured by operating it, where it stands on the owner's private lands, at a considerable distance from the roadway, and the injured child was a meddler. *Smith v. Hayes* (1898) 29 Ont. Rep. 283.

⁸¹ A servant cannot recover for injuries received in attempting to replace a guard on knives in a planer, where he had no duties to perform requiring him to come in close proximity to the knives. *Vigo Cooperage Co. v. Kennedy* (1908) 42 Ind. App. 433, 85 N. E. 986.

The master is not liable for injuries

received when, at the time of receiving the injuries complained of, the servant was voluntarily using the offending shafting as a horizontal bar for gymnastic exercise, and he did not come in contact therewith while in the performance of his duties. *Talkington v. Washington Veneer Co.* (1910) 61 Wash. 137, — L.R.A.(N.S.) —, 112 Pac. 261.

The master is under no obligation to fence machinery for the protection of a mere volunteer. *Stodden v. Anderson & W. Mfg. Co.* (1908) 138 Iowa, 398, 16 L.R.A.(N.S.) 614, 116 N. W. 116.

Under the Indiana act, if the servant's employment did not require him to work in the immediate vicinity of the machinery in question, or if he undertook to perform a service not required of him by the master, and in the performance of it he was injured, in either case the master would not be liable in damages for such injury. *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277; *Whiteley Malleable Castings Co. v. Wishon* (1908) 42 Ind. App. 288, 85 N. E. 832.

⁸² A master is not required to guard a shafting which is so located that an employee must necessarily go out of his ordinary course, or the course which he might be reasonably expected to take, in order to reach it. *Powalske v. Cream City Brick Co.* (1901) 110 Wis. 461, 86 N. W. 153, denying recovery where the employment of a servant did not bring him within the reach of danger from an unguarded shaft which was about 18 inches from his place of work, and where a movement directly towards the shaft was guarded against by a large pile of stones, and the only way to reach the shaft was by stepping out of his path and upon the pile of stones, — an act which was not required in his work.

"The statute, and the common-law rule as well, respecting the guarding of machinery so located as to be dangerous to employees in the discharge of

coal shoveler at an elevator who is also in charge of the gasoline engine located in a small engine house, by which the elevator is operated.⁸³

g. Compliance with the statute.—Whether or not the statute has been complied with depends upon the facts of the particular case, as the statutes do not define the specific kind of guard to be used, or the specific manner of guarding.⁸⁴ It has been held that they do

their duties, do not apply to a situation where the employee must necessarily go out of any way which he could reasonably be expected to take, in order to reach it." *Houg v. Girard Lumber Co.* (1911) 144 Wis. 337, 140 Am. St. Rep. 1012, 129 N. W. 633.

In *Hurley v. Atlantic, G. & P. Co.* (1910) 138 App. Div. 642, 122 N. Y. Supp. 701, it was held that the purpose of guarding machinery was to prevent workmen from accidentally or inadvertently coming in contact with the machinery; the statute does not apply where an employee deliberately places himself in contact therewith.

A master's failure to guard shafting as required by statute does not render him liable for an injury to a minor employee while he was attempting to use it as a horizontal bar, although it was so located that employees might come in contact with it while at work, so that the master was negligent in failing to guard it. *Talkington v. Washington Veneer Co.* (1910) 61 Wash. 137, — L.R.A.(N.S.) —, 112 Pac. 261.

⁸³ *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1909) 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

⁸⁴ The phrase "properly guarded," in the factory act, is relative term, and involves the extent of guarding and the question of the efficiency of the machine for the purpose used. *State v. Rodgers* (1910) 175 Ind. 25, 93 N. E. 223.

The question of the sufficiency of the guards used is for the jury in an employee's action for injuries, unless it appears, as a matter of law, that the machine was or was not properly guarded. *Stephenson v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 371, 130 N. W. 586.

The kind of guard to be used is not defined by statute, but it must be such an one as reasonably accomplishes its purpose. *Ibid.*

"The particular manner of guarding this or other machines is not described by the statute, and hence what shall constitute a proper guarding is a question of fact, to be determined from the character of the machine and nature of the peril to be avoided. It was evidently the intention of the lawmakers to require employers to protect their workmen, by appropriate and efficient structures, against all unnecessary dangers, or such as may be reasonably removed or diminished without impairing the usefulness or headway of the machine, or operative." *Green v. American Car & Foundry Co.* (1904) 163 Ind. 135, 71 N. E. 268-270.

A planer, consisting of a steel shaft about 3 inches square, on which were bolted two blades about 18 inches long and 2½ inches wide, the shaft of which turns 3,500 revolutions a minute, is not properly guarded when protected only by a guard extending over to about the center of the knives, so that the feeder of the machine could not see them. *Kirchoff v. Hohmsbehn Creamery Supply Co.* (1909) 148 Iowa, 508, 123 N. W. 210.

Where there was evidence that, had there been guard rails about a fly wheel and a crank disc, the plaintiff when oiling the machinery could have caught them when he slipped, or could have held to them when he leaned over to test the bearings, or could have thrown himself back toward the fly wheel when he slipped and lost his balance, it was not error to submit to the jury whether or not the fact that the machinery was not guarded with rails as required by statute contributed to plaintiff's injury. *Henderson v. Kansas City* (1903) 177 Mo. 477, 76 S. W. 1045.

The gearing of a system of live rollers to carry lumber from a saw may be found to be insufficiently guarded where the only guard employed is an inch board nailed along its upper edge to the edge of another inch board which

not require that the machinery should be remodeled,⁸⁵ and only require guards sufficient to protect against such dangers as reasonably intelligent and experienced employers would anticipate.⁸⁶

Evidence that the defendant maintained guards similar to those maintained in other factories is evidence of a compliance with the statute.⁸⁷

A contrivance consisting of a pulley on a frame, which could be thrown against a belt communicating power to a shaft to increase the effectiveness of the power, was not a "contrivance," within the Iowa factory act, for throwing belts on and off pulleys.⁸⁸

Under the Washington decisions, if the master has made a bona fide attempt to guard the machinery, he may interpose the defense of assumption of risk, which is otherwise closed to him.⁸⁹

forms part of the table carrying the rollers, without supports at the lower edge or at the ends, while the work requires employees to lean against the guard in such a way as to spring the lower edge inward, and the material passing over the rollers has a tendency to strike against and loosen it from the table. *West v. Bayfield Mill Co.* (1910) 144 Wis. 106, — L.R.A.(N.S.) —, 128 N. W. 992.

A machine which is so guarded that "there is no probability of a workman being injured thereby in the usual and ordinary discharge of his duties, with the attendant danger of accident or mischance that may be anticipated," is properly guarded within the statute, though it may be possible for an employee to be injured by knowingly and unnecessarily placing some portion of his person within the danger zone. *Vigo Cooperage Co. v. Kennedy* (1908) 42 Ind. App. 433, 85 N. E. 986.

An iron yoke at the end of a log carriage, the only purpose of which was to hold that end of the carriage solid, and to protect blocks from coming in contact with the saw prematurely, is not a proper guard against dangers of the saw, within the meaning of the statute. *Erickson v. E. J. McNecley & Co.* (1906) 41 Wash. 509, 84 Pac. 3.

The four walls of an engine house, although it is but 12 feet square, are not a guard or fence within the meaning of the factory act. *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1909) 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

The method of injury is not men-

tioned in the statute; but if it is one of the results of the failure to use proper guards, it must be conceded that it was one of the casualties intended to be guarded against. *United States Furniture Co. v. Taschner* (1907) 40 Ind. App. 672, 81 N. E. 736.

The Ontario factories act 1884, chap. 39, § 15, subs. 1, providing that various dangerous places shall be securely guarded, is infringed where a vat on which workmen have to stand is inadequately covered. *Dean v. Ontario Cotton Mills Co.* (1887) 14 Ont. Rep. 119.

⁸⁵ The Kansas factory act does not require the remodeling of machinery, or the addition of any attachments, excepting those of the character indicated. *Henschell v. Union P. R. Co.* (1908) 78 Kan. 411, 96 Pac. 857.

The factory act did not contemplate such a radical change in the operation of machinery as to require the installation of a self-feeding apparatus upon an ordinary rotary rip saw which was a hand-feeding machine. *McIntosh v. Saw Mill Phoenix* (1908) 49 Wash. 152, 94 Pac. 930.

⁸⁶ *Daffron v. Majestic Laundry Co.* (1905) 41 Wash. 65, 82 Pac. 1089; *Johnston v. Northern Lumber Co.* (1906) 42 Wash. 230, 84 Pac. 627.

⁸⁷ *Willette v. Rhineland Paper Co.* (1911) 145 Wis. 537, 130 N. W. 853.

⁸⁸ *McCreery v. Union Roofing & Mfg. Co.* (1909) 143 Iowa, 303, 119 N. W. 738.

⁸⁹ Where the master in good faith has endeavored to comply with the requirements of the factory act in a careful and judicious manner, he is entitled to

Wash. Laws 1905, p. 164, § 7, makes a certificate of the commissioner of labor prima facie evidence of a compliance with the provisions of the act; hence, under such a statute, it has been held that the trial court performs its full duty when it instructs the jury that the burden is upon the plaintiff to overcome the prima facie evidence of the compliance with the statute, which is shown by the commissioner's certificate.⁹⁰

h. Complaint.—The complaint need not expressly plead the statute;⁹¹ it is sufficient if it states facts bringing the case within it.⁹² But the servant who relies upon the statute must show in his complaint that he is clearly within the provisions thereof,⁹³ and an employee will not be allowed to recover on one theory where the complaint alleges another.⁹⁴ The complaint must allege that the machinery in question was embraced in the statute,⁹⁵ and that it was practical to guard properly the machinery.⁹⁶ But where the statute

interpose the defense of assumption of risk. *Daffron v. Majestic Laundry Co.* (1905) 41 Wash. 65, 82 Pac. 1089; *Johnston v. Northern Lumber Co.* (1906) 42 Wash. 230, 84 Pac. 627.

⁹⁰ The statute makes the certificate of the commissioner of labor only prima facie evidence of a compliance with the provisions of the act. *Vosberg v. Michigan Lumber Co.* (1907) 45 Wash. 670, 89 Pac. 168.

⁹¹ *Nickey v. Dougan* (1905) 34 Ind. App. 601, 73 N. E. 288; *Lohmeyer v. St. Louis Cordage Co.* (1908) 214 Mo. 685, 113 S. W. 1108.

⁹² It is of no "moment that the petition makes no mention of the act, since it is a public one, and the allegations of the petition sufficiently state a cause of action based on the appellant's failure to comply with its requirements." *Bair v. Heibel* (1903) 103 Mo. App. 622, 77 S. W. 1017.

In an action for injuries founded on the act of April 20, 1891, declaring that all dangerous shafting and gearing in manufacturing establishments shall be "safely and securely guarded," it is not necessary that the complaint should refer to the title of the act, or aver that defendant's negligence was in violation of the act. It is sufficient if it states facts bringing the case within the statute. *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678.

⁹³ *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69.

A declaration alleging a violation of the master's duty to provide "shafting and gearing" with a proper safeguard does not aver a cause of action under a statute which requires that "all belting and gearing" shall be properly guarded. *Pierce v. Contreaville Mfg. Co.* (1903) 25 R. I. 512, 56 Atl. 778.

The complaint may allege the failure of defendant to guard machinery, in the language of the statute. *Blanchard-Hamilton Furniture Co. v. Colvin* (1904) 32 Ind. App. 398, 69 N. E. 1032.

⁹⁴ An employee cannot recover on the theory that defendant had failed to post a notice that the gearing was dangerous but could not be properly guarded, where the complaint alleged that the gearing of a dough-mixing machine was dangerous and was not safely guarded, as the statute required. *Huss v. Heydt Baking Co.* (1908) 210 Mo. 44, 108 S. W. 63.

⁹⁵ *United States Furniture Co. v. Taschner* (1907) 40 Ind. App. 672, 81 N. E. 736.

⁹⁶ *National Fire Proofing Co. v. Roper* (1906) 38 Ind. App. 600, 77 N. E. 370; *Kintz v. Johnson* (1906) 39 Ind. App. 280, 79 N. E. 533; *Robertson v. Ford* (1908) 164 Ind. 538, 74 N. E. 1.

In an action based on the failure of the employer to provide exhaust fans to carry off the dust from an emery wheel, the complaint must allege that the emery wheel could have been provided with exhaust fans without render-

specifically requires a certain machine or a part of a machine to be guarded, it is unnecessary to allege that it is dangerous.⁹⁷ It is not necessary in a complaint to negative the exception in the Indiana factory act as to the safeguarding of machinery, etc., while the same is undergoing repairs.⁹⁸

In an action under the section of the Kansas factory act (Gen. Stat. 1909, § 4679) requiring certain machinery to be guarded where practicable, an allegation that it was the defendant's duty to guard the cogwheels by which the plaintiff was injured will be held to imply that such guarding was practicable, no motion having been filed to make the pleading more definite in that regard.⁹⁹

In the note below will be found a number of cases which state in general terms the requisites of a sufficient complaint based upon various statutes.¹⁰⁰

ing it useless. *National Drill Co. v. Myers* (1907) 40 Ind. App. 322, 81 N. E. 1103.

In *Hill v. Saugested* (1908) 53 Or. 178, 22 L.R.A.(N.S.) 634, 98 Pac. 524, it was held that, when the complaint alleged that the deputy labor commissioner inspected the mill and pronounced the saw to be a dangerous and unsafe appliance, and then and there gave the defendant notice in writing to safeguard it, the averment of the act of the commissioner was a sufficient allegation as to the practicability of guarding.

In *American Car & Foundry Co. v. Clark* (1904) 32 Ind. App. 644, 70 N. E. 828, it was held that a complaint based upon the failure of the master to provide springs to hold the wood in place upon a wood-working machine was not defective in failing to allege that it was practicable to provide such spring. This decision is clearly against the weight of authority, but there is no discussion of the question.

⁹⁷ As the statute requires the shafting to be guarded, it is not necessary to allege that it is dangerous, nor that the pulley which is a necessary attachment of the countershaft is dangerous. *Hohenstein-Hartmetz Furniture Co. v. Matthews* (1910) 46 Ind. App. 616, 92 N. E. 196.

⁹⁸ The objection to the complaint, that the pleader did not show that the breach is not included in the exception, is not tenable, because the exception is stated in a subsequent clause of the

statute, and it is not intended by the statute that there shall be any exception to the proper guarding of the vats, etc., named in the statute, but the exception refers to the removal of the guards, after the same have been placed, for the purpose of repairing the guarded vats, machinery, etc. *Chamberlain v. Waymire* (1904) 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81.

⁹⁹ *Gambill v. Bowen* (1910) 82 Kan. 840, 109 Pac. 670.

¹⁰⁰ A party claiming damages under the act in question must affirmatively show (1) that he was an employee; (2) that machinery in question was unguarded; (3) that it was dangerous; (4) that his duties required him to work in the immediate vicinity thereof; (5) that it could have been properly guarded without rendering it useless for the purposes intended. *Robbins v. Ft. Wayne Iron & Steel Co.* 41 Ind. App. 557, 563, 84 N. E. 514.

A complaint which alleges that a machine was very dangerous because unguarded, that it was practicable to guard it, that defendant negligently failed to guard it, and that because of such negligence the plaintiff was injured, states a cause of action under the factory act. *N. S. Huey Co. v. Johnston* (1905) 164 Ind. 489, 73 N. E. 996.

An allegation that an uncovered screw conveyor was dangerous from being exposed, and that it might have been covered at reasonable cost and without affecting its efficiency, was sufficient.

i. Burden of proof.—A few cases have discussed the question of the burden of proof in actions based on statutes of this character.¹⁰¹

United States Cement Co. v. Cooper (1909) 172 Ind. 599, 88 N. E. 69.

A complaint under the Ohio statute, which alleges that the plaintiff, employed in a factory, was injured by her skirts becoming entangled with an unboxed shaft projecting outside of the building, near a window customarily used by the employees as a passageway and for a seat; that the defendant well knew that the window was customarily used as a passageway, that the shaft was dangerous; that it negligently omitted to warn plaintiff of the danger from the shaft, and omitted to provide seats for employees; and that it knew of the custom of the employees to use the window as a seat,—states a cause of action. *Wheeler v. Oak Harbor Head Lining & Hoop Co.* (1903) 61 C. C. A. 250, 126 Fed. 348.

In *Rogers v. Portland Lumber Co.* (1909) 54 Or. 387, 102 Pac. 601, rehearing denied in (1909) 54 Or. 394, 103 Pac. 514, the court said: "Plaintiff, in his brief, relies on the provisions of the act of February 25, 1907 (Laws 1907, p. 302), providing for safeguarding dangerous machinery in mills and factories, as precluding the defense that plaintiff assumed the risk of unguarded machinery. To entitle an employee to recover for injuries resulting from a violation of the provisions of that act, it is necessary to plead noncompliance by the employer with the terms of the act, and that the injury was the result of such noncompliance, and also to plead a compliance by plaintiff with the conditions of recovery for resulting injury by giving notice, within six months, to the employer, of the time, place, and cause of the injury. There is no suggestion in the pleadings that the statute has been violated by defendant, or that plaintiff relies upon a violation thereof. Therefore the provisions of the act are not available to plaintiff in this action."

A complaint in an action on Burns's Supp. 1897, § 7087h (Acts 1897, p. 101), which provides that machinery of every description shall be "properly guarded" in manufacturing establishments, is demurrable where its allegations are that plaintiff was required to hold down pieces of wood which were

being run through a sticker; that while he was so doing his hand caught in the bit of the machine, the defendant having knowingly and negligently allowed the machine to become unsafe in that there was no guard around the knives and no rollers to hold the pieces of wood in the proper position, but they had to be held down by hand; and that they were negligent in suffering the machine to become out of repair and in allowing plaintiff to work about the machine, he being inexperienced, as they knew, and ignorant that guards were necessary. Such a complaint does not show that the injuries were due to the want of guards or rollers, or due to the fact that plaintiff was holding the timber, or that it was negligence to allow plaintiff to do so, or that guards were necessary to the safe operation of the machine. *Rietman v. Bangert* (1901) 26 Ind. App. 468, 59 N. E. 1080.

¹⁰¹ In *Caspar v. Lewin* (1910) 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 657, it was held that under § 6 of the factory act (Laws 1903, chap. 356; Gen. Stat. 1909, § 4681) it is sufficient, in order to establish liability, for the plaintiff to prove, in the first instance, that death or injury resulted in consequence of failure to provide the required safeguards, or that failure to provide such safeguards directly contributed to such death or injury; and it is not necessary for the plaintiff to go further, in those cases where the subject is pertinent, and to prove the practicability of such safeguards. Upon this point the court overruled *Henschell v. Union P. R. Co.* (1908) 78 Kan. 411, 96 Pac. 857.

A plaintiff assumes an unnecessary burden in undertaking to prove that machinery could have been guarded when it already appears that it was dangerous, and was not guarded, and that no notice had been posted. *Roundtree v. Kansas City Portland Cement Co.* (1911) 156 Mo. App. 679, 137 S. W. 1012.

Where the practicability of guarding dangerous machinery is in dispute, the burden is upon the plaintiff to prove that it was practical. *Glockner v. Hardwood Mfg. Co.* (1909) 109 Minn. 30, 122 N. W. 465, 123 N. W. 807, 18 Ann. Cas. 130.

1857. Other enactments relative to mechanical appliances.—*a. Steam boilers.*—In a few jurisdictions, enactments have been passed relating to the safety of steam boilers.

England.—Factory act 1901, § 11 (1). Every steam boiler used for generating steam in a factory or workshop, or in any place to which any of the provisions of this act apply, must, whether separate or one of a range, (a) have attached to it a proper safety valve and a proper steam gauge and water gauge to show the pressure of steam and the height of water in the boiler; and (b) be examined thoroughly by a competent person at least once in every fourteen months. (2) Every such boiler, safety valve, steam gauge, and water gauge must be maintained in proper condition.

Indiana.—Burns's Anno. Stat. 1908, § 8050 (Acts 1903, p. 535). Every boiler house in which a boiler, or nest, or battery of boilers is placed shall be provided with a steam gauge or gauges, properly connected with the boilers, and where the engine is in a separate room, or more than 40 feet distant from the gauge or nearest boiler, shall have another gauge attached to the steam pipe, so the engineer can readily ascertain the pressure carried. The safety valves of steam boilers subject to inspection under this act shall be loaded to sustain only the maximum pressure allowed by said certificate of inspection.

Maine.—Rev. Stat. 1903, chap. 22, § 22. Steam boilers to be equipped with a fusible safety plug.

Massachusetts.—Laws 1907, chap. 465. Provisions relating to the inspection of all steam boilers and their appurtenances except railroad locomotives, motor road vehicles, boilers in private residences, etc., used solely for heating, boilers of not more than three horse power, boilers used for horticultural and agricultural purposes exclusively, and boilers under the jurisdiction of the United States.

New York.—Labor Law 1909, § 91 (act of April 1, 1899, amending Laws 1897, chap. 415, § 3). Every boiler to be furnished with safety valve and steam gauges.

Oklahoma.—Comp. Stat. 1909, § 4052 (Laws of 1907-8, p. 640). Employees not to be required to enter steam boiler, fire box, or smoke chamber thereto when the same is under pressure.

Pennsylvania.—Purdon's Dig. Supp. p. 5486, § 24 (Laws of 1905, P. L. 357, § 15). Boilers used for generating steam or heat shall be kept in good condition, shall be inspected once in twelve months, shall be provided with proper safety valve and with steam and water gauges. Every boiler house in which a boiler or nest of boilers is placed shall be properly equipped with steam gauges, etc.

Quebec.—Factories act, 48 Vict. 32; Rev. Stat. § 3024(5). Boilers to be kept in good order.

b. Elevators and lifts.—Statutes relative to the strength and safety of elevators and lifts have been enacted in the following jurisdictions:

Connecticut.—Gen. Stat. 1902, § 4515. All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, if considered necessary by said inspector, whereby the cab or car will be

securely held in the event of accident to the shipper rope or hoisting machinery, or from any similar cause, and said mechanical device shall at all times be kept in good working order.

Indiana.—Burns's Anno. Stat. 1908, § 8025; Acts 1899, p. 231, § 5. Safety device to be placed on elevators when deemed necessary by the inspector.

Massachusetts.—Rev. Laws, chap. 104, § 27. Elevator cabs or cars, whether used for freight or passengers, shall be provided with a suitable mechanical device by which they will be securely held in the event of an accident to the shipper rope or hoisting machinery, or any similar accident, and they shall be guarded and equipped with some attachment or device fastened to the elevator cab or car, elevator well, or floor of the building, which shall prevent any person from being caught between the floor of the cab or car and the floor of the building while attempting to enter or leave the elevator. Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator. Elevator wells hereafter built shall be so constructed that that part of the inside surface of the well which comes in front of the opening or door of the cab or car shall be flush with the cab or car, and the door opening from said elevator well into the building shall be placed not more than 2 inches back from the face of said well, so as to allow no space for a foothold between the car and well door of the building.

Minnesota.—Rev. Laws 1905, § 1815; Laws 1903, chap. 397. Every elevator car used for either freight or passengers shall be provided with some suitable mechanical device by which it can be securely held in the event of accident to the rope or hoisting machinery.

Pennsylvania.—Act of May 30, 1895, Pub. Laws, 129. Elevators to be equipped with automatic devices which work independently of the operator.

Rhode Island.—Gen. Laws 1906, chap. 108, § 15; Pub. Laws 1903, chap. 973. Freight elevators to be equipped with automatic signal apparatus.

Ontario.—Factories act. Rev. Stat. 1897, chap. 256, § 20(1) (d). Elevator cabs, whether used for passengers or freight, to be provided with safety appliances. For earlier provision, see Rev. Stat. 1887, § 15, subsec. 4.

Quebec.—Factories act, 48 Vict. 32, Rev. Stat. § 3024 (4). Elevator cabs or cars to be provided with safety devices for securely holding them in the event of accident.

The statutes relative to the equipment and safety of elevators have been construed in the cases set out in the note below.¹

¹As to the master's liability at common law in respect to defects in elevators, see §§ 908, 974, 990, *ante*.

In the absence of a statute, an employer is not bound to equip its freight elevator on which its employees ride in the course of their duties with safety devices. *Indianapolis Abattoir Co. v. Neidlinger* (1910) 174 Ind. 400, 92 N. E. 169.

In *Reliance Mfg. Co. v. Langley* (1907) 41 Ind. App. 175, 82 N. E. 114, the court said: "The evident scope and

purpose of this whole section is to protect the lives and limbs of persons in factories and workshops from accidents in and about elevators. But it is also evident the legislature intended that this protection should be reasonable and practical, and not arbitrary or oppressive. Other duties with regard to elevators are clearly imposed upon the owners by this section, conditioned upon the discretion of the inspector. If the legislature had intended arbitrarily to impose upon all owners, lessees, or

c. Means of communication.—In the following jurisdictions, provisions requiring some system of communication between the oper-

agents the duty of maintaining safety devices on all elevators, it would have said so. There is nothing to indicate the omission occurred by inadvertence or mistake. The act seems to have been carefully drawn to cover the subjects intended. The explanation is found in the fact that prior to this enactment it had been frequently determined in the courts of this state and other states that on some elevators and hoists, under certain conditions and circumstances, safety devices were neither practical nor necessary."

In *Carnahan v. Robert Simpson Co.* (1900) 32 Ont. Rep. 328, it was held that the statute does not require the approval of the device in its concrete form as part of the elevator, but the approval of the kind of device used. The court said: "Had similar language been used as to the device to be used by a railway company for coupling its cars, the approval by the inspector of the well-known Miller coupler by that name would, in my opinion, be a sufficient compliance with the statute, and I do not see why, if that be so, the approval of the device adopted in the Fensom elevator, a well-known form of elevator, should not be held to be a sufficient compliance with the provisions of the statute which I am considering, when, as in this case, such an elevator is used."

In construing the Ontario factories act (Rev. Stat. 1887), § 15, subsec. 4, providing for safety devices on elevators, the court has held that, even if the device furnished has neither been approved nor disapproved by the government inspector, the plaintiff cannot recover unless he shows that it was of such a pattern as to make the use of it unreasonable. *Black v. Ontario Wheel Co.* (1890) 19 Ont. Rep. 578.

In *Weeks v. Fletcher* (1908) 29 R. I. 112, 69 Atl. 294, it was said that the requirement that the elevator should have attached to it "some suitable appliance which should give automatically, at all times, on every floor of the building which it should approach, a distinct, audible warning signal that said elevator was in motion," was for the purpose of giving notice to persons whose business was upon such floor that the trap-

doors of the elevator well were about to open, and this warning was desirable to prevent such persons, not only from personally approaching dangerously near to the elevator, but also from wheeling or placing any movable thing dangerously near to it by means whereof either they or persons in the elevator might be injured.

Where there was evidence that the freight elevator by whose operation the plaintiff was injured was not equipped with safety appliances, and it might have been found that there had been no approval of its use by any of the officers mentioned in the statute, and that the nature of the business was not such that the necessity for danger signals did not warrant this expense, the jury would have had a right to find a verdict for the plaintiff unless he had either assumed the risk of what happened, or had been guilty of some lack of due care which contributed to the injury. *Doolan v. Pocasset Mfg. Co.* (1908) 200 Mass. 201, 85 N. E. 1055.

The Massachusetts statute does not apply to an elevator temporarily used as a part of the ways, works, and machinery in the construction of a building. *Rippucci v. Commonwealth Constr. Co.* (1906) 190 Mass. 518, 77 N. E. 478.

A failure to provide a competent operator, as prescribed by ordinance, does not make the company liable for injuries resulting from plaintiff's husband's attempt to operate the elevator himself for his own accommodation. *Stagg v. Edward Westen Tea & Spice Co.* (1902) 169 Mo. 489, 69 S. W. 391. The court said: "The city ordinance was adopted with a view to protect passengers and employees on elevators from dangers likely to and resulting from the management of elevators by incompetent operators, and provides for their removal; but it is obvious from reading the petition that the failure to have a competent operator on the defendant's elevator had no casual connection with the killing of plaintiff's husband. Had defendant employed a boy under the requisite age, or otherwise incompetent, and an accident had occurred as the result of such incompetency, then the argument and author-

ator of the motive power and the employees in the other portions of the plant have been enacted.

Massachusetts.—Rev. Laws 1902, chap. 104, § 38; act April 11, 1890, chap. 179. Communication to be provided in manufacturing establishments between the rooms which contain machinery and engine room, by means of speaking tubes, electric bells, or appliances to control the motive power, or such other means as may be satisfactory to the inspectors of factories if, in their opinion, such communication is necessary. For earlier enactments *in pari materia*, see Laws 1893, No. 276; Laws 1901, No. 322, § 8.

Oregon.—All machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power. (This is a portion of the act of Nov. 8, 1910, which is mentioned in the next substitute.)

d. Protection from electric currents.—The statute adopted by the people of the state of Oregon November 8, 1910, by virtue of the initiative power, provides in part as follows:

In the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor, or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent, and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

As to the master's duty at common law in respect to protecting the servant from electric currents, see §§ 908, 1004, *ante*.

ities urged by plaintiff to the effect that a failure to comply with the requirements of a city ordinance constitutes negligence for which one injured because of such failure may recover damages would be apposite; but where no operator is appointed and no injury results from operating the elevator by defendant or its agents, the ordinance has no bearing on the case, and it is unnecessary to discuss the power of the city to pass the same."

1858. Dangerous openings; lighting.—Statutes relative to the guarding of dangerous openings and to the lighting of the place of work, hallways, etc., have been passed in the following jurisdictions:

Colorado.—Stat. Anno. 1911, § 2503-d (act of 1911, § 4). The openings of all hoistways, hatchways, elevators, and wellholes in all factories, mills, workshops, bakeries, laundries, etc., shall be protected by good and sufficient trapdoors, hatches, fences, gates, or other safeguards, and all due diligence shall be used to keep all such means of protection closed except when necessary.

Connecticut.—Gen. Stat. 1902, § 4517. The inspector may order all hoistways, hatchways, elevator wells, and wellholes, upon every floor of every factory, mercantile establishment, or other building where machinery is used, to be protected by trapdoors, self-closing hatches, safety catches, or such other safeguards as will insure the safety of the employees therein. Due diligence shall be used to keep such trapdoors closed at all times, except when in actual use by an occupant of the building having the use and control of the same.

Illinois.—Laws 1909, p. 207, § 17. Lighting of factories, mercantile establishments, mills, or workshops.

Indiana.—Acts 1899, p. 231, § 5; Burns's Anno. Stat. 1908, § 8025. It shall be the duty of the owner or lessee of any manufacturing or mercantile establishment, laundry, renovating works, bakery, or printing office, where there is an elevator, hoisting shaft, or wellhole, to cause the same to be properly and substantially inclosed or secured, if, in the opinion of the chief inspector, it is necessary to protect the lives and limbs of those employed in such establishment. It shall also be the duty of the owner, agent, or lessee of each of such establishments to provide, or cause to be provided, if, in the opinion of the chief inspector, the safety of persons in or about the premises should require it, such proper trap or automatic doors so fastened in or at all elevator ways as to form a substantial surface when closed, and so constructed as to open and close by the action of the elevator in its passage either ascending or descending, but the requirements of this section shall not apply to passenger elevators that are inclosed on all sides.

Kansas.—Gen. Stat. 1909, § 4676. Every person owning or operating any manufacturing establishment which may contain any elevator, hoisting shaft, or wellhole shall cause the same to be properly and substantially inclosed or secured, in order to protect the lives or limbs of those employed in such establishment (Laws 1903, chap. 356, § 1).

Louisiana.—Wolf's Rev. Laws 1904-1948, p. 421; Laws 1900, chap. 60, § 15. Stairways with substantial handrails shall be provided in factories, mills, and manufacturing establishments for the better safety of persons employed in said establishments. The doors of such establishments shall swing outwardly or slide, as ordered by the factory inspector, and they shall be neither locked, bolted, nor fastened during working hours.

Sec. 18. Openings of all hatchways, elevators, and wellholes upon every floor of every manufacturing, mechanical, or mercantile, or public building, where women or children are employed, are to be protected by trapdoors or self-closing hatches or guard rails.

Massachusetts.—Rev. Laws 1902, chap. 1041, § 43. The openings of all hoist-
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ways, hatchways, elevators, and wellholes upon every floor of a factory or mercantile or public building shall be protected by sufficient trapdoors or self-closing hatches and safety catches, or such other safeguards as the inspectors of factories and public buildings direct; and due diligence shall be used to keep such trapdoors closed at all times, except when in actual use by the occupant of the building who has the use and control of same. (Earlier enactments, Laws 1885, chap. 374, § 110; Pub. Stat. chap. 104, § 14.)

Michigan.—Pub. Acts 1901, act No. 113, § 5. It shall be the duty of the owner, agent, or lessee of any manufacturing establishment where hoisting shafts or wellholes are used, to cause the same to be properly inclosed and secured.

Minnesota.—Rev. Laws 1905, § 1815; Laws 1903, chap. 397. All hoistways, hatchways, elevator wells, and wheel holes in factories, etc., shall be guarded.

Missouri.—Rev. Stat. 1909, § 7830. The openings of all hatchways, elevators, and wellholes upon every floor of every manufacturing, mechanical, or mercantile, or public building in this state shall be protected by good and sufficient trapdoors or self-closing hatches or safety catches, or strong guard rails at least 3 feet high, and all due diligence shall be used to keep such trapdoors closed at all times, except when in actual use by the occupant of the building having the use and control of the same. (Rev. Stat. 1899, § 6435.)

New Jersey.—Laws of 1904, p. 156 (Comp. Stat. 1910, p. 3026). The openings of all hoistways, hatchways, elevators, and wellholes upon every floor of factories, etc., shall be protected by trapdoors or guard rails.

New York.—Labor law 1909, § 79. If, in the opinion of the commissioner of labor, it is necessary to protect the life or limbs of factory employees, the owner, agent, or lessee of such factory where an elevator, hoisting shafts, or wellhole is used, shall cause, upon written notice from the commissioner of labor, the same to be properly and substantially inclosed, secured, or guarded, and shall provide such proper traps or automatic doors so fastened in or at all elevator ways, except passenger elevators inclosed on all sides, as to form a substantial surface when closed, and so constructed as to open and close by action of the elevator in its passage either ascending or descending. The commissioner of labor may inspect the cable, gearing, or other apparatus of elevators in factories, and require them to be kept in a safe condition. (Thus amended by Laws 1909, chap. 299, in effect October 1, 1909.) (Earlier enactment, Laws 1887, chap. 462, § 8, amending Laws 1886, chap. 408.)

Sec. 81. When, in the opinion of the commissioner of labor, it is necessary, the workrooms, halls, and stairs leading to the workrooms shall be properly lighted, and in cities of the first class, if deemed necessary by the commissioner of labor, a proper light shall be kept burning by the owners or lessee in the public hallways near the stairs upon the entrance floor and upon the other floors on every work day in the year, from the time when the building is opened for use in the morning until the time it is closed in the evening, except at times when the influx of natural light shall make artificial light unnecessary. Such lights shall be independent of the motive power of such factory.

Ohio.—Gen. Code 1910, § 1027(4); Laws 1910, p. 42, § 1. Unused elevator openings to be railed in and automatic gates to be placed on each floor where entrance to the elevator carriage is obtained.

Sec. 1027 (6). Lighting of hallways, rooms, approaches to rooms, basements, etc., where sufficient daylight is not obtainable.

Oklahoma.—Comp. Laws 1909, § 4030 (Laws of 1907-8, p. 509). Elevators, hoisting shafts, or wellholes shall be provided with traps or automatic doors whenever it is deemed necessary by the factory inspector.

Oregon.—Gen. Laws 1910, § 5042. The openings of all hoistways, hatchways, elevators, and wellholes and stairways in factories, mills, workshops, warerooms, or stores shall be protected, where practicable, by good and sufficient trapdoors, hatches, fences, gates, or other safeguards, and all due diligence shall be used to keep all such means of protection closed, except when it is necessary to have the same open that the same may be used. (Laws 1907, chap. 158, p. 303, § 3.)

The statute adopted by the people of Oregon on November 8, 1910, by virtue of the initiative power, provides in part as follows: All shafts, wells, floor openings, and similar places of danger, shall be inclosed.

Pennsylvania.—Laws 1905, No. 226, § 12. Elevators, hoisting shafts, lifts, and wellholes to be properly guarded, and automatic doors at elevator ways. Earlier enactment, act of 1901, Pub. Laws, 322, § 7.

Sec. 13. Workrooms, halls, and stairways to be kept in a clean and sanitary condition and properly lighted.

Rhode Island.—Gen. Laws 1909, chap. 78, § 5. Hoisting shafts and wellholes in factories, etc., to be guarded.

Laws 1910, chap. 549, § 1. All hoistway and elevator openings through floors, where there is no shaft, shall be protected by sufficient railings, gates, trapdoors, etc., which shall be kept closed when not in use. (Prior enactment, see Gen. Laws 1909, chap. 129, § 16.)

Tennessee.—Laws 1899, chap. 401, § 4. Hatchways, etc., in factories, to be protected by trapdoors, self-closing hatches, or safety catches.

Washington.—Rem. & Bal. Codes & Stat. § 6589 (factory act, Laws 1905, chap. 84, § 1, as amended by Laws 1907, chap. 205). Provision similar to New York labor law, § 79.

West Virginia.—Code 1906, § 443; Acts 1901, chap. 19. All hatchways, elevators, and wellholes shall be securely guarded.

Ontario.—Factories act. Ont. Rev. Stat. 1897, chap. 256, § 20(1) (c). Openings of hoistways, etc., to be protected.

Quebec.—Factories act, 48 Vict. chap. 32, Rev. Stat. § 3024(3). It was provided that openings of hoistways, etc., should be protected by trapdoors or self-closing hatches and safety catches.

1859. Construction and effect of the enactments.—As to the master's duty to guard vats, pans, etc., which form a part of his appliances, see §§ 1855, 1856, *an'e*. As to the master's liability at common law for injuries caused by leaving dangerous openings unguarded, see §§ 879, 999, *ante*. As to the master's duty at common law in respect to lighting the place of work, see § 1005.

In some cases it has been held that these enactments are solely for the benefit of employees, and not of third persons.¹ And the Mis-

¹In one case a fireman who had fallen the building on the theory that the fail-into an unguarded elevator well sought ure to fence it constituted a breach to recover damages from the owner of of a statutory duty; but the action

souri statute requiring elevator shafts to be closed on every floor while the elevator was not in use has been held not to be designed for the protection of the operator.² But it has been held that the purpose of the statute is not merely to protect employees from falling down the openings, but to secure them from injury from moving elevators.³ So it has been held that the Michigan statute requiring elevator shafts, wellholes, etc., to be guarded, is applicable where the elevator did not fill the shaft, but left unguarded spaces at the side through which a servant fell.⁴

was held not to be maintainable for the reason that the title of the enactment by which the duty was imposed showed that it was intended solely for the protection of employees. *Hamilton v. Minneapolis Desk Mfg. Co.* (1899) 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693.

So, also, it was held in *Glaser v. Rothschild* (1909) 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576, that employees only are entitled to the protection of a section of a statute requiring guards around elevator wells in every manufacturing, mechanical, mercantile, or public building in the state, where its title indicates that it relates to the health and safety of employees, and all sections except two, wherein the parties are mentioned for whose protection the act is intended, refer in express terms to employees, and those two are silent as to whom reference is made.

A regulation made under § 79 of the factory act of 1901 regarding the use of a gangway when a ship is lying at a quay was held to be applicable to persons employed in loading, etc., a vessel, and not to affect the common-law liability of the shipowner to third persons. *O'Brien v. Arbit* [1907] S. C. 975.

² The Missouri statute is not designed for the protection of operatives of elevators. *Latapie-Viganuz v. Askeu Saddle Co.* (1905) 193 Mo. 1, 91 S. W. 496. The court said: "The language of the section, together with the context and the other accompanying provisions of the act, clearly demonstrates that the lawmakers had in mind provisions for the safety of the employees in large factories, and that the section here involved was intended to provide that elevator shafts should be closed on

every floor of the building while the elevator was not in use, so as to prevent persons working around the same in the factory from falling into such elevator shafts. It was not the purpose of the framers of the section to prescribe such precautions in order to protect the person whose duty it was to operate or run the elevator while so doing. The statute leaves the duty of the master to the servant employed to operate the elevator the same as it was at common law."

³ *Alkire v. Cudahy Packing Co.* (1910) 83 Kan. 373, 111 Pac. 440 (employee slipped and fell so that his head protruded into an unguarded elevator well, and was struck by a descending elevator).

⁴ In *Murphy v. Grand Rapids Veneer Works* (1906) 142 Mich. 677, 106 N. W. 211, where, because of the fact that the walls of an elevator shaft were thicker at the base than at the top, there was at the third floor a space 14 inches wide and 7 feet long between the walls of the shaft and the platform of the elevator, which completely filled the shaft at the bottom, it was held that a workman who fell through the opening was within the protection of the statute, since the statute imposes a duty on manufacturers to protect their employees from the danger of falling down elevator shafts from the inside, and not merely a duty to prevent people from accidentally falling down an elevator shaft from the outside. The court said: "The other provisions of the section relate to the requirement of automatic doors or gates at all elevator openings, and for the annual inspection by state officers of elevator apparatus. The contention of defendant is that this statutory duty imposed was clearly for the purpose of

It is the master's duty to keep the safeguards in place as well as to furnish them.⁵

A depression in the floor of a mill, of the depth of the floor, made by an opening in the same at a place where the elevator passes up and down, the opening being closed by an automatic slide, does not constitute a violation of the statute.⁶

The duty of the owner of a manufacturing establishment to provide an inclosure for an elevator shaft, under N. Y. Laws 1887, chap. 462, § 8, amending N. Y. Laws 1886, chap. 409, arises only after the inspector has declared that, in his opinion, it is necessary to do so in order to protect the life or limbs of those employed in the establishment.⁷ Under this provision it was held that where an employee, just after entering a building on a dark morning, fell into a hoistway which had been left open by a coemployee who had passed through a few minutes before, it was for the jury to say whether the protection required by the statute was given.⁸

1860. Protection against fire.—Provisions designed to protect employees in factories from dangers due to fire have been passed in the majority of the jurisdictions. It is to be noted that some of these enactments apply to buildings generally, and not solely to factories.

preventing people from accidentally falling in from the outside. May it not be said that the legislature considered the safety of employees whose duty brought them continually in contact with these dangerous places on the inside as well as the outside of elevators? That the legislative intent was to protect everybody who might be in danger of injury? If the construction insisted upon by the defendant is given, then this elevator shaft built outside the building, with doors opening into it from the different floors, was properly inclosed and secured, and no further duty was imposed upon defendant. No argument is necessary to show that an opening 14 inches wide and 7 feet long between the edge of an elevator platform and the wall of the shaft, if not inclosed, is an unsafe and dangerous place to every person who goes up or down on that elevator. If the statute requires only such inclosure and security as will prevent people from the outside from falling in, then this space between the platform and the wall might be of any dimensions. In the case at bar it may be well said that

this shaft on the south side was never inclosed and secured. This space was left by building a lighter wall for the upper stories. It was of no use or necessity for the conduct of business. But whether a shaft is built within or without a manufactory, our construction of the statute is that it required such shaft to be properly inclosed and secured to protect all who had occasion to use it, and that in this case that statutory duty had not been performed by defendant.⁹

⁵ An instruction that if a gate to an elevator well was furnished, yet kept open by order of defendant, there was not a compliance with the ordinance requiring such hatchways to be "effectually barred or closed by railing or gates for the prevention of accidents therefrom," is not erroneous. *Wendler v. People's House Furnishing Co.* (1901) 165 Mo. 527, 65 S. W. 737.

⁶ *Hoard v. Blackstone Mfg. Co.* (1900) 177 Mass. 69, 58 N. E. 180.

⁷ *Boehm v. Mace* (1892) 28 Abb. N. C. 138, 18 N. Y. Supp. 106.

⁸ *McCauley v. Smith* (1892) 47 N. Y. S. R. 500, 19 N. Y. Supp. 991.

England.—Factory and workshop act 1901, § 14, subsec. (1), (2). Owners of factories and workshops in which more than forty persons are employed are required to furnish fire escapes. In buildings constructed before the passage of the original act, no agreement between the owner and the occupier will relieve the former from this duty. Subsec. (4). Proceedings where owner alleges that occupier ought to bear or contribute to the expenses of complying with the act. Subsec. (6). Fire escapes to be maintained in good condition, and free from obstructions. The whole of a tenement, factory, or workshop is deemed, for the purposes of the section, to be one factory, and the owners to be substituted for the occupier.

Sec. 16, subsec. (1). While employees are within a factory or workshop, the doors must not be fastened in such a manner that they cannot be easily and immediately opened from the inside. Subsec. (2). In factories or workshops erected after January 1, 1896, the doors of rooms in which more persons than ten are employed shall, except in the case of sliding doors, be constructed so as to open outwards.

Colorado.—Stat. Anno. 1911, § 2506h (act of 1911, § 8). All factories, mills, etc., must have proper and sufficient means of escape from fire by more than one way of egress, which shall be kept free from obstruction; all doors are to open outward, and shall not be fastened during working hours; hand rails shall be provided on all stairways; all factories, etc., in which females are employed, shall have the stairs properly screened at the side and bottom.

Stat. Anno. 1911, § 2506j (act of 1911, § 9). The state inspector may, if necessary, compel the erection of fire escapes.

Georgia.—Code 1911, § 3151 (Acts 1889, p. 168). Buildings more than two stories in height, used in the third or higher stories, in whole or in part, as factories or workshops, shall be provided with more than one way of egress from each story of said building, above the second story, by inside or outside stairways, such stairways to be at opposite ends of each story. Outside stairways to have railed landings connecting with each story by doors or windows opening outwardly, such doors, windows, and landings to be kept at all times clear of obstructions. All the main doors of such buildings, both inside and outside, to open outwardly, and each floor to be supplied with fire extinguishers.

§ 3153. The municipal authorities of any town or city in this state may, by ordinance, provide that the provisions of this article shall apply to all buildings not used as private residences, three or more stories in height, within their limits.

Idaho.—Rev. Code 1908, § 1550. It is hereby made the duty of every person, firm, or corporation, or his or its agents, officers, or trustees, owning or having the management or control of any public hall, office building, hotel, school building, factory, or other structure over two stories in height, to provide and furnish such building with safe and suitable metallic, iron, or fireproof ladders of sufficient strength, and to permanently and securely attach the same to the outside or outer walls of such buildings, in such manner and in such position as to be adjacent to the windows, and convenient and easy of access to the occupants of such buildings in case of fire.

Sec. 1551. Such metallic, iron, or fireproof ladders must connect with each floor above the first, and be well fastened and secure and of sufficient strength, and must extend from the first story to the upper stories of such building or to the cornice thereof.

Illinois.—Hurd's Rev. Stat. 1908, p. 1111 (Laws of 1899, p. 220). All buildings four or more stories in height, except those used for private residences, to be provided with one or more outside metallic ladder or stair fire escapes. (For earlier provision, see act of June 29, 1885.)

Indiana.—Burns's Anno. Stat. 1908, § 3841. Buildings in which persons are employed above the second floor in a factory, workshop, or mercantile or other establishment to be provided with proper ways of egress or means of escape from fire, which shall be kept free from obstruction, in good repair, and ready for use at all times; all the rooms above the second story to be provided with more than one way of egress leading to fire escapes on the outside or to stairways on the inside; all external doors to open outward, and all windows open outward or upward.

Secs. 3842 *et seq.* Regulations in respect to the sufficiency of the fire escapes.

Iowa.—Code Supp. 1907, § 4999-a6. The owners, proprietors, and lessees of all buildings, structures, or inclosures of three or more stories in height, now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill.

Sec. 4999-a8. Specifications as to number and construction of fire escapes.

Sec. 4999-a9. Signs indicating location of fire escapes shall be posted at all entrances to elevators, stairway landings, and in all rooms. [30 G. A. chap. 136, § 4.]

Code Supp. 1902, § 4999g. It is provided that each manufactory or warehouse shall have one fire escape for each 5,000 superficial feet of area, if not more than twenty persons be employed in the same, and if more than twenty then additional fire escapes must be provided. [29 G. A. chap. 150, § 3.]

Kansas.—Gen. Stat. 1909, § 4677. Hand rails to be provided in all stairways in manufacturing establishments; stairs to be secured at the sides and ends, and all doors to be so constructed as to open outwardly, and to be neither locked, bolted, nor fastened during working hours.

Sec. 4678. Buildings three or more stories high to be provided with fire escapes equipped with balconies which embrace at least two windows at each floor.

Kentucky.—Stat. 1909, § 4522 (Act Feb. 13, 1888). All buildings of three or more stories in height, in every city of more than ten thousand inhabitants, excepting private residences and stores and warehouses in which not more than twenty persons are employed, shall be provided with one or more permanent metallic ladders or fire escapes, extending from the first story to the upper stories of such buildings, and above the roof and on the outer walls thereof, in such location, numbers, and character of construction as the chief of fire department or chief fire officer of each such city may determine.

Sec. 4523. If the owner of the building fails to take steps looking to compliance with the requirements, then the agent, lessee, or occupant, who is jointly liable for the violation of the provisions of this act, must have the work performed at his own expense, and for which a lien on the building and grounds is hereby declared to exist after record in the office of the county clerk.

Maine.—Rev. Stat. 1903, chap. 28, § 38 (as amended by Laws 1909, chap. 194). All buildings in which any trade, manufacture, or business is carried on requiring the presence of workmen above the first floor shall be provided with suitable and sufficient fire escapes, outside stairs, or ladders.

Chap. 40, § 45. Inspector of factories is directed to enforce the provision relative to the swinging of doors and fire escapes in chap. 28, §§ 37, 38.

Maryland.—Laws 1896, chap. 364. Sweatshops to be provided with fire escapes.

Massachusetts.—Laws 1907, chap. 503, § 1. Buildings in which ten or more persons are employed above the second story in a factory, workshop, mercantile, or other establishment to be equipped with fire escapes. Earlier enactment, Rev. Laws 1902, chap. 104, § 25; Laws 1877, chap. 214.

Laws 1905, chap. 347. Fire escapes to be kept unobstructed.

Michigan.—Comp. Laws, § 5534. Fire escapes to be provided in factories, mills, warehouses, or workshops more than two stories in height. (Laws 1883, No. 170, § 2.)

Sec. 5347. Same provision as to manufacturing establishments generally. (Laws 1895, No. 184, § 6.)

Sec. 5359. Responsibility for constructing or repairing fire escapes, elevators, and other permanent improvements ordered by inspector rests on owner of building. (Laws 1897, chap. 111.)

Minnesota.—Rev. Laws 1905, § 1816. Fire escapes and doors opening outwards to be provided in mills, factories, and workshops.

Sec. 1817. At least one external fire escape to be provided in every factory, mill, or workshop more than two stories high, and as many more as the labor commissioner may require.

Sec. 1818. Means of egress. Hand rails on stairways.

Missouri.—Rev. Stat. 1909, § 7831. All manufacturing, mechanical, mercantile, or other establishments in this state, of two or more stories in height, in which twenty or more persons are employed above the first floor thereof, shall be provided with at least one or more outside iron fire escapes. For every twenty persons employed on every floor above the second floor of such establishment, there shall be one rope or portable fire escape, and each story shall be amply supplied with means for extinguishing fire. (Rev. Stat. 1899, § 6436.)

Sec. 7832. In all such establishments the main doors, both inside and outside, shall open outwardly, when the inspector, in writing, so directs; and no outside or inside door of any building wherein labor is employed shall be so locked, bolted, or otherwise fastened during the hours of labor as to prevent egress. (Rev. Stat. 1899, § 6437.)

Sec. 7834. No explosive or inflammable compound shall be used in any establishment in this state where labor is employed, in such place or manner as to obstruct or render hazardous the egress of operatives in case of fire. (Rev. Stat. 1899, § 6439.)

Sec. 10,666. External fire escapes to be provided by owner, proprietor, lessee, or keeper of certain buildings of more than three stories in height, factories being one of those mentioned.

Nebraska.—Comp. Stat. 1911, § 3565 (§ 15). Every building more than two stories high, and containing above the ground floor sleeping apartments, offices, assembly hall, workrooms, etc., designed for occupancy by fifteen or more persons, shall be provided with one [or] more fireproof stairways, chutes, or toboggans constructed on the outside thereof. [1909, H. R. 26.]

New Jersey.—Laws of 1904, p. 156 (Comp. Stat. 1910, p. 3026). Doors of factories, etc., shall open outward and be kept unlocked during working hours.

P. 159 (Comp. Stat. 1910, p. 3028). Explosives or inflammable compounds shall not be kept in a factory in such a way as to render hazardous the egress of operatives in case of fire.

PP. 163 *et seq.* (Comp. Stat. 1910, pp. 3030 *et seq.*). External fire escapes to be provided in factories, workshops, mills, or places where the manufacturing of goods is carried on. Manner of construction prescribed.

For earlier enactment, see P. L. 1890, p. 101 (N. J. Comp. Laws, p. 2326). See also N. J. Comp. Laws, pp. 2325 *et seq.*, for various legislative enactments authorizing municipalities to require fire escapes.¹

New York.—Labor law, 1909, § 80. Hand rails shall be provided on all stairways in factories, and the steps of the stairways shall be covered with rubber if, in the opinion of the commissioner of labor, the safety of employees would be promoted thereby. All doors are to open outward.

No door, window, or other opening on any floor of any factory shall be obstructed by stationary metal bars, grating, or window mesh. Any metal bars, grating, or window mesh provided for in such doors, windows, or openings shall be so constructed as to be readily movable or removable from the interior in such a manner as to afford the free and unobstructed use of such doors, windows, or openings for purposes of egress in case of need. (As amended by Laws of 1910, chap. 461.)

Sec. 82. Such fire escapes as may be deemed necessary by the commissioner of labor shall be provided on the outside of every factory in this state, consisting of three or more stories in height. Each escape shall connect with each floor above the first, and shall be of sufficient strength, well fastened and secured, and shall have landings or balconies not less than 6 feet in length and 3 feet in width, guarded by iron railings not less than 3 feet in height, embracing at least two windows at each story, and connected with the interior by easily accessible and unobstructed openings. The balconies or landings shall be connected by iron stairs, not less than 18 inches wide, with steps of not less than 6 inches tread, placed at a proper slant and protected by a well-secured hand rail on both sides, and shall have a drop ladder not less than 12 inches wide, reaching from the lower platform to the ground. The windows or doors to the landing or balcony of each fire escape shall be of sufficient size, and located, as far as possible, consistent with accessibility from the stairways and elevator hatchways or openings, and a ladder from such fire escapes shall extend to the roof. Stationary stairs or ladders shall be provided on the inside of every factory, from the upper story to the roof, as a means of escape in case of fire. For earlier enactment, see factory act 1886, § 6, as amended by Laws 1890, chap. 398, and Laws 1892, chap. 673. See also Laws 1887, chap. 462, § 10.

Sec. 83a. (amended, Laws 1912, chap. 330.), § 83a. Fire drills required in factories in which there are twenty-five persons or more regularly employed above the first or ground floor. (Inserted by Laws 1912, chap. 330.)

Sec. 83b. Factory buildings over 90 feet in height, in which wooden flooring or wooden trim is used, and more than 200 people are regularly employed above the 7th floor, to be equipped with automatic sprinkler system. (Inserted by Laws 1912, chap. 332.)

Sec. 83c. Waste materials and rubbish to be deposited in fireproof receptacles. All gas jets to be properly protected. Smoking is prohibited. (Inserted by Laws 1912, chap. 329.)

North Dakota.—Rev. Code 1905, § 2175. The owners and proprietors of all

¹ In *De Gintner v. New Jersey Home* was held that the act of 1890 repealed (1895) 58 N. J. L. 354, 33 Atl. 968, it the earlier acts of 1882 and 1888.

hotels, factories, etc., over two stories in height, are required to provide safe and suitable fire escapes from all rooms above the second story (Laws 1883, chap. 58, § 1).

Sec. 2177. All doors of ingress and egress in all buildings used for public assemblages of any character in this state, including factories, shall be so constructed as to open and swing outward, and doorways shall not be less than 4 feet in width, with proper landings and stairways of at least equal width. [1887, chap. 54, § 1; Rev. Codes 1899, § 1719.]

Ohio.—Gen. Code 1910, §§ 4658, 4659. Factories, workshops, etc., over two stories high, to be provided with convenient exits from the different stories. If the building is over three stories in height, a life-saving net shall be provided. (Rev. Stat. § 2573.)

Sec. 1006. Hand rails to be provided for stairways.

Sec. 12579. Any buildings capable of containing fifty or more persons shall be provided with doorways and escapes to permit the audience to escape therefrom within a reasonable time.

Sec. 12580. Doors to open outward.

Sec. 12589. Buildings used as factories, etc., over two stories in height, shall be equipped with fire escapes.

Laws 1908, p. 30, § 4. Visitors of factories where women and children are employed are to see that proper fire escapes are provided.

Oklahoma.—Comp. Laws 1909, § 4032 (Laws of 1907-8, p. 509). Hand rails to be provided on all stairways in factories; stairs to be screened, all doors to open outward, and to be left unfastened during working hours.

Sec. 4034 (Laws of 1907-8, p. 509). Fire escapes to be provided on the outside of factories of more than two stories whenever deemed necessary by the factory inspector.

Pennsylvania.—Purdon's Dig. Supp. 1904-1909, p. 5500, §§ 1 *et seq.* (Laws 1905, P. L. 359, § 22). Buildings used as factories above the second floor to be equipped with fire escapes. Earlier enactments, act July 11, 1879, P. L. 128, amended, act July 3, 1885, P. L. 68.

Laws 1897, No. 37, § 2. Factory inspector may order the erection of fire escapes in "sweatshops."

Rhode Island.—General Laws 1909, chap. 129, § 1. Factories three or more stories in height to be provided with outside metallic fire escapes. Earlier enactment, Laws 1890, chap. 826.

P. L. 1878, chap. 688, § 23, provides as follows: Every building already built or hereafter to be erected, in which twenty-five or more operatives are employed in any of the stories above the second story, shall be provided with proper, sufficient, strong, and durable metallic fire escapes or stairways constructed as required by the act, unless exempted therefrom by the inspector of buildings, which shall be kept in good repair by the owner of such building, and no person shall at any time place any encumbrance upon such fire escapes.

The act further provides that the supreme court may restrain by injunction any violation of the act, and may, according to the course of equity, secure the fulfilment and execution of the provisions thereof; and the act further provides for a penalty for violation thereof.

South Dakota.—Comp. Laws 1910, § 3163 (Laws 1887, chap. 54, § 1). Doors of ingress and egress in factories to open outward.

Sec. 3164 (§ 4). Factories of two or more stories to be provided with fire escapes.

Texas.—Code 1898, art. 337. Fire escapes to be provided.

Vermont.—Pub. Stat. 1906, § 5512; Laws 1892, chap. 83. Fire escapes on factories, mills, and workshops more than two stories high, where persons are employed above second story.

Wisconsin.—Sanborn & B. Stat. Supp. 1906, § 1636-4 (Laws 1901, chap. 349, § 1). Buildings more than two stories high, and containing above the ground floor rooms intended for occupancy by twenty-five or more persons, to be provided with fire escapes. Earlier enactment, Sanborn & B. Stat. Supp. § 4575a, as amended by Laws 1895, chap. 355.

Sec. 4390. Doors to open or swing outwardly. Fire escapes.

Ontario.—Factories act, Ont. Rev. Stat. chap. 256, § 21, subsec. (1). Means for preventing fires.

Subsecs. (2) and (3), as amended by Laws 1901, chap. 35m, § 3, and Laws 1902, chap. 36, § 1. Tower stairways with iron doorways and external iron or other unflammable fire escapes on the outside of the building are to be provided.

Shops regulation act, Ont. Rev. Stat. 1897, chap. 257, § 15. In addition to existing requirements as to fire escapes, wire or rope to be provided in every shop above two stories in height.

Sec. 38. Every shop to be provided with proper means and facilities of escape in case of fire.

Municipal act, Ont. Rev. Stat. 1897, chap. 223, § 542, subsec. 14. Municipalities are empowered to make by-laws for securing employees against injuries from fire.

Quebec.—Factories act (48 Vict. chap. 32), Rev. Stat. § 3025. Doors to open outwardly, and in factories of more than three stories in height, fire escapes to be provided.

New South Wales.—Factory act 1909, No. 28, § 12 (amending factory act 1896). Provision as to fire escapes.

1861. Construction and effect of these enactments.—The duty of erecting fire escapes did not exist at common law, but is solely of statutory origin.¹ See § 905, *ante*. But it has been held that the duty imposed by the statute is not the full measure of the master's duty in this respect.²

¹ *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999; *Huda v. American Glucose Co.* (1897) 154 N. Y. 474, 40 L.R.A. 411, 48 N. E. 897; *Maiorca v. Myers* (1909) 131 App. Div. 210, 115 N. Y. Supp. 923.

The duty of providing a building with fire escapes did not exist at common law, but has its origin and measure in the statute. *Landgraf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501.

The duty to erect fire escapes, imposed by the statute, "is a new duty, having no other origin and no other measure, and cannot be made to outrun or exceed the terms of the act." *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999.

² The statutes relating to fire escapes do not relieve the master in any degree from his common-law liability to exercise care to provide means for escape

Although the acts of this character are remedial, and consequently ought to receive a liberal construction, so as to secure the benefits intended, yet the person sought to be charged with the duty must be clearly brought within the classes designated.³

Certain statutes provide that there shall be erected such fire escapes as the building commissioner or other designated public officer shall require, and under statutes of this character it has been held that there is no liability on the part of the owner until some action has been taken by the designated public officer.⁴ But the contrary rule prevails in other cases.⁵ A certificate of approval of a fire es-

for his servants in case of fire; they simply prescribe the minimum of what he shall do in that respect to escape the penalty. *Dakan v. Chase & Son Mercantile Co.* (1906) 197 Mo. 238, 94 S. W. 944. The court said: "In other words, the common law applied to the situation the general rule of conduct to be observed by the master in caring for the safety of his servants; that is, reasonable care commensurate with the danger reasonably to be apprehended. Whatever such reasonable care would suggest as the duty of one in the situation of this master, whether it be the furnishing of one well-known device or another, the common law required in this case."

³ In *Arms v. Ayer* (1901) 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851, it was held that a statute requiring the placing of fire escapes on buildings will not be extended to persons or to requirements not fairly within the provisions of the act.

⁴ *Greenhaus v. Alter* (1898) 30 App. Div. 585, 52 N. Y. Supp. 268; *Maker v. Slater Mill & Power Co.* (1888) 15 R. I. 112, 23 Atl. 63 (criminal prosecution).

In *McCulloch v. Ayer* (1899) 96 Fed. 178, the *Maker Case* was followed, the question being whether the landlord or the tenant was the person liable.

⁵ In *Arnold v. National Starch Co.* (1909) 194 N. Y. 42, 21 L.R.A. (N.S.) 178, 86 N. E. 815, it was held that an order of a factory inspector to place fire escapes on a factory is not necessary to make it the duty of the owner to do so, under a statute providing that such fire escapes as may be deemed

necessary by the factory inspector shall be provided on the outside of every factory, and describing their form, location, and method of construction. The court cites *McLaughlin v. Armfield* (1890) 58 Hun, 376, 12 N. Y. Supp. 164, and *Willy v. Mulledy* (1879) 78 N. Y. 310, 34 Am. Rep. 536, which are cases involving tenants, but makes no mention of *Greenhaus v. Alter*, *supra*.

In *McLaughlin v. Armfield*, *supra*, the court held that, under the statute (§ 16 of title 14 of chap. 583 of the Laws of 1888), directing that any building occupied, or built to be occupied, as a manufactory, "shall be provided with such fire escapes and doors as shall be directed and approved by the commissioner," the duty rests upon the owner to bring the subject before the commissioner and obtain his direction in the premises; and the owner cannot avoid responsibility by alleging that the statute does not absolutely require fire escapes, but only such fire escapes as shall be directed or approved by the commissioner.

In *Arms v. Ayer* (1901) 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851, it was held that notice from the inspector is not necessary to charge the owner of a building with the duty of placing a fire escape thereon, under a statute providing that within three months after the passage of the act, all buildings of certain kinds shall be provided with fire escapes, although one section provides that any person "who shall be required" to place fire escapes on his building shall obtain a permit, such requirement referring to the duty imposed by the statute itself, and not to any act of the inspector.

In *Carrigan v. Stillwell* (1903) 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389,

cape, granted to the owner of a building, operates in favor of his successor in title.⁶

In some statutes, in which the duty of erecting the fire escapes is placed upon the "owner" of the factory, it has been held that the word "owner" refers to the person operating the business, and not to the owner of the building.⁷ But the wording of some statutes makes

it was held that action by the municipal authorities is not necessary to charge the owner of a building with liability for failure to provide fire escapes, under a statute requiring buildings to be equipped with them, and directing such authorities to make, annually, careful inspection of the safeguards provided, pass upon their sufficiency, and notify the owner of the building in case they are insufficient, and imposing a penalty on him for failure to comply with their recommendations.

Bonbright v. Schoettler (1903) 1 L.R.A. (N.S.) 1091, 64 C. C. A. 212, 127 Fed. 320. It was also held that a provision in an act amending a statute requiring the placing of fire escapes on buildings, that nothing in the act shall interfere with fire escapes now in use, approved by the proper authorities, saves from the operation of the statute fire escapes which had been officially approved under the former statute.

⁷ The duty imposed by the act of June 11, 1879 (P. L. 128), to erect fire escapes in certain factories, etc., attaches to the owner who occupies the premises and places the operatives in a position of danger, and enjoys the benefit of their services. *Schott v. Harvey* (1884) 105 Pa. 222, 51 Am. Rep. 201; *Keely v. O'Conner* (1884) 106 Pa. 321. In the former case the court said: "But the question which more immediately concerns us is, who is the 'owner' of a factory within the meaning of the act? The plaintiff contends that the owner is the person who holds the fee in the land on which the factory building stands. The word 'factory' is a contraction of manufactory, which Webster defines to be a building, or collection of buildings, appropriated to the manufacture of goods. But a manufactory is something more than a building. It includes not only the building, but the machinery necessary to produce the particular goods manufactured, and the engines or other power requisite to propel such machin-

ery. A building with only bare walls and a roof would no more be a manufactory than it would be a hotel. Such a building would be a mere shell, and would not impose the duty of erecting fire escapes upon anyone. It is only when it is completed by the addition of machinery, and operatives are introduced to assist in the manufacture, that the duty of erecting fire escapes attaches. To whom does that duty attach? Clearly, to the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of their services. If he is the lessee of the building, then he is a tenant in possession. For all practical purposes he is the owner until the end of his term, which may be in one year or in one hundred years. There is a large amount of property held in reversion in the city of Philadelphia. Some of the leases are for a term of several hundred years. However long the term, the lessee is but a tenant for years; the fee is in him that hath the reversion. Yet the broad principle contended for would make the reversioner, who has practically parted with all control of the property, responsible for the neglect of the tenant in possession to put up fire escapes. And this would be so even if the property leased had been a vacant lot, and the factory building had been erected, and the machinery placed therein by the tenant subsequent to the lease. We cannot impute to the legislature an intention of doing a thing so palpably unjust and absurd as this. When, therefore, they used the word 'owner' in this connection, it is plain the owner at the time of the injury was contemplated, without regard to the quantity or duration of his estate. It will be noticed that the act does not say the owner of the factory building or of the ground on which it stands."

In *Lee v. Smith* (1885) 42 Ohio St. 458, 51 Am. Rep. 839, it was held that section 2573 of Revised Statutes, as amended April 19, 1893 (80 O. L. 188),

it plain that the owner of the building is the person upon whom the duty is imposed.⁸ See § 1913, *post*.

It is clear that the owner of a factory upon whom is imposed the statutory duty of erecting a fire escape does not fulfil his whole duty by erecting one, but it must be maintained in a condition for use.⁹ But no liability attaches to the owner where the escape has been ob-

does not impose upon any owner in fee of a building more than two stories high, the duty to provide a convenient exit from the different upper stories of said buildings when such owner is not in possession or control thereof, although his tenant in possession and control of the building may use the same as a factory or workshop. The court said: "If the business of manufacturing in the building is discontinued, the duty of providing fire escapes does not rest on any owner, as it does not where such business was never commenced. The owner of a building may have no interest in the use to which it is applied. Hence the owner of a building and the owner of a factory which is conducted in the building may be different persons; and when this is so, the owner of the factory, and not the owner in remainder or reversion of the building, is the person on whom the statute imposes the duty."

⁸ In *Landgraf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501, it was held that the owner of a building is not relieved from liability for failure to provide fire escapes by the fact that a portion of the building was occupied by tenants. The court said: "The construction thus contended for may have been proper, as applied to the statutes under consideration where such construction was adopted, but cannot be held to be the proper construction of the Illinois act of 1885. Section 2 of the latter act provides that 'all buildings of the number of stories and used for the purposes set forth in § 1 of this act, which shall be hereafter erected in this state, shall, upon or before their completion, each be provided with fire escapes of the kind and number and in the manner set forth in said § 1 of this act.' The fact that the buildings are to be provided with fire escapes 'upon or before their completion,' indicates that the duty of providing such fire escapes devolves upon the owners of the build-

ings. The fire escapes are required to be a part of the construction of the building itself. Moreover, the notice commanding such fire escapes to be placed upon the building is required by § 3 to be given to 'the owners, trustees, lessee, or occupant, or either of them.' The injunction being in the alternative, the notice may be given to the one, as well as to the other, and therefore to the owner, as well as to the lessee or occupant. We are therefore of the opinion that the appellees were not relieved from liability in regard to the placing of fire escapes upon their building, because the fourth floor of the premises, where appellant's intestate was at work at the time of her death, was in the possession and under the control of tenants of appellees, instead of being directly in the possession of appellees themselves." See also *Arms v. Ayers* (1901) 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851.

In *Carrigan v. Stillwell* (1903) 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389, it was held that the owner of a building required by statute to be provided with fire escapes is not relieved from liability for their absence by the fact that the building was in possession of a tenant, where the statute requires notice to be given to him in case they are found to be unsafe, and imposes a penalty upon him for neglect to comply with recommendations in regard to them.

Under the New York statute the duty of providing fire escapes is placed upon the owner of the building, and not upon the one operating it as a manufactory. *Abrahan v. Manufacturers' Nat. Bank* (1888) 16 N. Y. S. R. 750.

⁹ In *Arnold v. National Starch Co.* (1909) 194 N. Y. 42, 21 L.R.A. (N.S.) 178, 86 N. E. 815, the owner of a building who fails to place the fire escapes thereon which are required by statute cannot escape liability for injury by fire to an occupant of the build-

structed by third persons over whom the owner has no control;¹⁰ nor where the obstruction is not of such a character as to be the proximate cause of the injuries.¹¹ In the note below will be found several cases dealing with the question as to what is a sufficient compliance

ing, on the theory that other sufficient means of escape were provided, if one consisted of a stairway which was blocked and useless by panic-stricken persons seeking to escape from the building, and the other was a mere ladder to the roof, which cannot be regarded as an efficient means of escape from a fire burning below. The court said: "The evidence, in my judgment, permitted the jury to find against this argument and both of the propositions involved in it. It clearly permitted the jury to say that the system of stairways leading to the ground became blocked and useless for a considerable time; and certainly it cannot be said as a matter of law that the stairway leading to the roof, even if appellant knew of it, was a safe or efficient means of escape from a fire which was rapidly burning and spreading on the floor below. And on the other proposition, while the evidence may not establish with mathematical accuracy just when the fire reached appellant's clothes and person with reference to its first appearance on the floor, or with reference to her final escape therefrom, many minutes afterwards, still, as I read it, it permitted the jury to find that as the result of an accumulation of inflammable dust and material the fire spread very rapidly throughout the floor, that appellant came in contact with it and was set on fire some time after it first appeared, and that if there had been statutory and convenient fire escapes from the windows she might have escaped thereby before becoming on fire; and, conversely, that the failure to comply with the statute resulted in her detention in the burning room for many unnecessary minutes, and that such detention and inability to escape caused and contributed to her injuries. Even if it should be found that the fire reached appellant when it first appeared on the floor, but that by reason of respondent's default she was confined in the room for an unnecessary period, and that by reason of such unnecessary detention under the circumstances she was prevented from extinguishing or pro-

curing to be extinguished the flames on her person, and her injuries thereby increased, I think that the appellant would be liable for such additional injuries if ascertainable."

A safe landing place is an essential part of an efficient fire escape. Hence evidence that a fire escape attached to a factory terminated above a chute extending into the basement of the building, so that persons attempting to descend landed in such chute, justifies a finding that the owners failed to provide a proper fire escape as required by the New York statute providing that factories shall be provided with suitable and proper fire escapes connecting with each floor. *Johnson v. Steam Gauge & Lantern Co.* (1893) 72 Hun, 535, 25 N. Y. Supp. 689.

¹⁰ In *Sewell v. Moore* (1895) 166 Pa. 570, 31 Atl. 370, it was held that the owner of a building is not liable for injuries caused by a fire where he had erected a sufficient fire escape, although the door on one floor leading to such fire escape was locked, so as to prevent its being reached, where such door was locked by his tenants, over whom he had no control.

¹¹ In *Huda v. American Glucose Co.* (1897) 154 N. Y. 474, 40 L.R.A. 411, 48 N. E. 897, it was held that screwing down the windows of a factory so that there is no access to fire escapes except by breaking the windows, and forbidding employees to open the windows, in order to preserve a high temperature, which is necessary for the business, does not violate a statute requiring the construction and maintenance of fire escapes on such buildings, where the windows are so light in frame as to offer but the slightest difficulty in breaking through, if there is not time to unscrew them. The court said: "The interior of the factory was connected with each balcony upon the fire escape, through windows easily accessible by an unobstructed passage, and the requirement of the statute was thus met. If the windows, as 'openings,' were readily approached from the interior and could be passed through, it cannot be said that the

with the statute.¹² Under statutes requiring certain designated public officials to test fire escapes, and, if satisfactory, to give certificates of approval, such certificates are held to be conclusive proof of a compliance with the law.¹³

necessity of having to break them, which the testimony showed was easily done, constituted any greater obstruction than would have been the necessity of uncatching and of lifting them. The reading of the provisions of the statute upon the subject of fire escapes in factories must be reasonable and in view of the demands of the case. The construction of the fire escapes must be as prescribed for the outside of the factory building, and, unquestionably, that part of the law which requires a connection to exist with the interior is not to be slighted. But it would be wholly unreasonable to interpret the law as requiring a condition as to the openings upon the fire escapes which the successful prosecution of the business would forbid. There had to be a closed window during the manufacturing process, and whether it was composed of one sash or of two sashes fastened together was immaterial; so long as it was readily removable by breaking through, and a ready access to and through it was preserved."

The conjecture or bare possibility that an employee who was burned in a building might have attempted to escape by a fire escape, and have been prevented by open blinds which closed over a portion thereof will not be sufficient to sustain a verdict against the owner of the building, where there is no proof that anyone was unable to reach the escape, but it is proved that one workman did in fact escape by that route, though unable to say how he did it. *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999.

¹² An iron ladder constituting a fire escape, which is extended from the upper story of the building to the roof, is a fit and suitable substitute for an inside ladder and scuttle required by statute. *Ibid.*

In *Dunlavy v. Racine Malleable & Wrought Iron Co.* (1901) 110 Wis. 391, 85 N. W. 1025, it was held that a building which was in part two stories and part three stories, and having five windows from the third-story part,

which opened out onto the flat roof of the two-story part, the middle window extending to the floor, and a strong ladder leading from the roof of the two-story part to the roof of a "lean to," which was 6 or 7 feet below the other roof, and about 7 feet from the ground, was within the statutory exception as being "supplied with a reasonable fire escape."

A cause of action is stated by an averment that, in order to escape a fire in a factory owned by the defendant, the plaintiff was compelled to jump from a window in the factory by reason of the negligence of the defendant in not providing fire escapes. *Maioresca v. Myers* (1909) 131 App. Div. 210, 115 N. Y. Supp. 923.

¹³ In *Bonbright v. Schoettler* (1903) 1 L.R.A. (N.S.) 1091, 64 C. C. A. 212, 127 Fed. 320, it was held that under a provision in a statute requiring the placing of fire escapes on buildings, that it shall be the duty of certain officers to test escapes, and, if they prove satisfactory, to give a certificate of approval, such certificate, when properly issued, must be taken as conclusive evidence of compliance with the law.

In the same case it was held that the provision of a statute requiring fire escapes on buildings, that a certificate by the proper official, approving a particular fire escape, shall relieve the owner of the building from liability for the penalty provided for noncompliance with the statute, without any mention of civil liability, does not prevent its also relieving him from the latter.

In *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999, an action for damages for the death of plaintiff's intestate because of the alleged failure of defendant to maintain proper fire escapes, it was held that the approval of the public officer appointed for that purpose shows a performance of the duty created and measured by the statute.

Where the statute provides that the certificate of approval "shall relieve from the liabilities of fines, damages,

Under the earlier English statutes, the owner of a building occupied by various tenants, some of whom did not operate factories, could not be required to erect fire escapes where they would interfere in any way with such tenants.¹⁴ But this serious defect in the early statute is cured by the later amendments. See statute as set out in § 1860, *ante*.

It has been held that the state labor law is applicable to New York city, although its enforcement is in the hands of the municipal authorities.¹⁵

1862. Sanitary condition of place of work.—The enactments in relation to the sanitary condition of the place of work contain various provisions designed to safeguard the health of the employees; they have regard to ventilation, the installing of fans and similar appliances for the removal of dust created by the work, the maintenance of wash rooms, dressing rooms, toilet rooms, etc.

England.—Factory and workshop 1901, § 1. The following provisions apply to every factory, except a domestic factory: (1) It must be kept in a cleanly state; (2) it must be kept free from effluvia arising from any drain, etc.; (3) it must not be overcrowded so as to be injurious to the health of employees; (4) it must be ventilated in such a manner as to render harmless, so far as is practicable, all the gases, vapors, dust, or other impurities generated in the course of the work, that may be injurious to health.

§ 3. The amount of air space which is to be allowed to each employee is specified.

and imprisonment imposed by this act," such certificate is conclusive evidence of nonliability. *Sewell v. Moore* (1895) 166 Pa. 570, 31 Atl. 370.

¹⁴ Where the second, third and fourth floors are factories, but the tenants of the basement and ground and first floors do not carry on businesses of a nature to render such floors factories neither the sanitary authority nor an umpire appointed pursuant to the act has jurisdiction to require the owner to provide as a means of escape in case of fire for the persons employed in such factories a staircase which would encroach upon the lower floors of the building. *London County Council v. Lewis* (1900) 69 L. J. Q. B. N. S. 277, 82 L. T. N. S. 195, 64 J. P. 39.

Where compliance with the notice given by the sanitary authority to the owner of a factory to provide certain means of escape from fire would have involved an act of trespass on premises occupied by third persons or other tenants of the owner, it has been held that

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the notice was not penal and conclusive against the owner, and that the mere fact of his not having claimed arbitration under the statute would not warrant his conviction for refusing to carry out the works as ordered. *London County Council v. Brass* (1901) 17 Times L. R. (Q. B. D.) 504.

¹⁵ The labor law applies to factories in the city of New York, except that, by virtue of the city charter, the enforcement of the act is vested in the municipal department of buildings, instead of in the state factory inspector. *Maierca v. Myers* (1909) 131 App. Div. 210, 115 N. Y. Supp. 923.

The labor law of 1897, which was passed nine days after the Greater New York charter, did not take away from the superintendent of buildings in the city of New York his exclusive jurisdiction over fire escapes. *New York v. Sailors' Snug Harbor* (1903) 85 App. Div. 355, 83 N. Y. Supp. 442, affirmed in (1905) 180 N. Y. 527, 72 N. E. 1140.

§ 7. In every room in any factory or workshop sufficient means of ventilation must be provided and sufficient ventilation maintained.

§ 9. Every factory and workshop must be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of the employees, and also, where persons of both sexes are employed, with proper separate accommodation for persons of each sex.

The special provisions as to the maintenance of certain atmospheric conditions in cotton factories are contained in §§ 90 *et seq.*

In §§ 73 *et seq.* are elaborate provisions for the regulation of establishments in which "dangerous and unhealthy industries" are carried on.

§ 74. It is provided that, where "any process is carried on by which dust, or any gas, vapor, or other impurity is generated and inhaled by the workers to an injurious extent," a factory inspector may direct that a fan or other mechanical means shall be provided for preventing such inhalation, if it appears to him that the inhalation can be to a great extent prevented in this manner.

Sec. 75. Suitable washing conveniences shall be provided for persons employed in a factory where any poisonous substance is used.

Sec. 5, subsec. (1). When it appears to an inspector that any act, neglect, or default, in relation to any drain, etc., or other matter in a factory or workshop, is punishable or remediable under the law relating to public health, but not under the factory act, he shall give notice in writing of the act, etc., to the district council in whose district the factory or workshop is situate, and it shall be the duty of such council to make such inquiry into the subject of the notice, and to take such action thereon, as seems proper for the purpose of enforcing the law. Subsec. (2). If proceedings for punishing or remedying the act, etc., are not taken within one month, the inspector may take the like proceedings.¹

Factory and workshop act 1907, amending in respect of laundries the principal act of 1901. By § 3 it is prescribed that in every laundry there shall be some efficient means provided for regulating the temperature in the ironing room, and for carrying away the steam in the washhouse; that stoves for heating irons must be sufficiently separated from any ironing room or ironing table; gas irons emitting any noxious fumes shall not be used; and that the floors shall be kept in good condition and drained properly.

California.—Act of February 22, 1899, as amended by acts 1901, chap. 176, and Acts 1909, chap. 52. In any factory, workshop, or other establishment where a work or process is carried on by which dust, filaments, or injurious gases are produced or generated, the employer is required to provide exhaust fans or blowers.²

Colorado.—Stat. Anno. § 2506k (act of 1911, § 10). All factories, workshops, etc., shall be provided with a sufficient number of water closets for the reason-

¹ It has been held under this section that the justices of petty sessions have no jurisdiction to inquire into the suitability or sufficiency of the sanitary accommodations existing at a factory, as required by a notice of an inspector. *Tracey v. Pretty* [1901] 1 Q. B. 444, 70 L. J. Q. B. N. S. 234, 65 J. P. 196, 49 Week. Rep. 282, 83 L. T. N. S. 767, 17 Times L. R. 200, 19 Cox, C. C. 593.

² In *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755, this statute was declared invalid, but merely on account of its providing for an unconstitutional delegation of power to the official entrusted with the duty of enforcing it.

able use of the persons therein, and, in case both male and female persons are employed, separate closets shall be furnished.

The proprietors of factories, etc., shall furnish dressing rooms for the women and children whenever required to do so by the inspector.

Sec. 2506c (act of 1911, § 3). All factories, mills, etc., shall be provided with sufficient ventilation and kept in a cleanly and sanitary state, and shall be ventilated so as to render harmless, so far as practical, all gases, vapors, dust, or other impurities; where laborers are employed or machinery is used in any inclosed room where dust is generated to an injurious extent, exhaust fans or other mechanical means shall be provided and maintained.

Connecticut.—Gen. Stat. 1902, § 4517. Sanitary condition of factories. All factories and buildings where machinery is used shall be well lighted, ventilated, and kept as clean as the nature of the business will permit.

Sec. 4518. Every person, firm, or corporation using stained, painted, or corrugated glass in factory windows, where the same is injurious to the eyes of the workmen therein, shall remove the same upon the order of the factory inspector.

Sec. 4519. Suitable water-closets in good sanitary condition to be provided in factories where more than five persons are employed.

Sec. 4521. Inspector may order introduction and operation of appliances to remove, as far as the nature of the business will permit, excessive dust or foreign matter generated by processes carried on.

Delaware.—Laws 1897, chap. 452, § 1. Separate dressing rooms and water-closets to be provided by anyone who employs ten or more females in Newcastle county.

Sec. 3. Rooms to be properly warmed.

Illinois.—Laws 1909, p. 205, § 10. Equitable temperature to be maintained as far as possible in all factories, mercantile establishments, mills, or workshops. No unnecessary humidity which would jeopardize the health of employees shall be permitted.

Sec. 11. Ventilation and air space in factories, etc., provisions as to.

Sec. 12. All factories, etc., to be kept free from gas or effluvia arising from any sewer, etc.

Sec. 13. Daily cleansing of factories. Adequate means to be provided for draining floors where process is carried on which makes them wet.

Sec. 19. Water-closets in factories, etc., provision as to.

Sec. 20. Adequate washing facilities to be provided in factories, etc.

Hurd's Rev. Stat. 1908, p. 1040 (Laws of 1897, p. 250). Factories or workshops wherein emery wheels or belts of any description are used shall provide the same with blowers to carry away the dust produced thereby. Such wheels shall be fitted with hoods, suction pipes, fans, or blowers, so as to carry out efficiently the purposes of the statute.

Indiana.—Burns's Anno. Stat. 1908, § 8029 (7087i). Exhaust fans of sufficient power shall be provided for the purpose of carrying off dust from emery wheels and grindstones, and dust-creating machinery from establishments where used. (Factory inspection law 1899, § 9.)

Sec. 8030. (7087j). Employers are required to maintain in a cleanly condition separate water-closets for employees of each sex.

Sec. 8035 (7087o). This section contains provisions regarding air space and ventilation in factories.

Sec. 8031 (7087k). Not less than sixty minutes shall be allowed for the noon-day meal.

Iowa.—Laws 1902, chap. 149, § 1 (Code Supp. 1907, § 4999-a1). Separate closets to be furnished for the use of persons of each sex.

Sec. 3 (Code Supp. 1907, § 499-a4). Blowers and pipes to be provided for carrying away dust thrown off from wheels, belts, and tumbling barrels.

Code 1902, § 4999c. Emery wheels or emery belts of any description, or tumbling barrels used for rumbling or polishing castings, shall be provided with blowers and pipes to protect the person or persons using same from the particles of dust produced or caused thereby.

Kentucky.—Stat. 1909, § 3249. Suitable and proper washrooms and water-closets shall be provided in each manufacturing establishment where any person under sixteen years of age is employed, and such water-closets shall be properly screened and ventilated, and kept at all times in a clean condition; and if girls under sixteen years of age be employed in any such establishment, the water-closet shall have separate approaches and be kept separate and apart from those used by men. All closets shall be kept free from obscene writing and marking. A dressing room shall be provided for such girls when the nature of their work is such as to require any change of clothing.

Sec. 3251. The walls and ceilings of each room in every manufacturing establishment where any person under sixteen years of age is employed shall be lime washed or painted, when, in the opinion of the labor inspector, it shall be conducive to the health or cleanliness of the persons working therein.

Louisiana.—Laws 1908, No. 301 (p. 453, § 14). Separate dressing rooms and water-closets to be provided for male and female employees. (For the earlier provision of a similar tenor, see Laws 1906, No. 34, § 4.)

Sec. 16. Every factory, mill, or workshop where women and children are employed is to be lime washed and painted, when deemed necessary and ordered by the authorities.

Sec. 19. Fans or some contrivance for removing dust or smoke or lint are to be provided in all establishments where they are generated by the process carried on, and where women, young persons, or children are employed.

Maine.—Rev. Stat. 1903, chap. 40, §§ 44, 45; Laws 1893, chap. 292. Inspector of factories to notify the board of health whenever any condition is found that endangers the health or lives of employees.

Maryland. Pub. Gen. Laws 1904, p. 860, § 243 (Pub. Gen. Laws 1888, art. 27, § 148). All factories, manufacturing establishments, or workshops shall be kept in a cleanly condition and free from effluvia arising from any drain, privy, or other nuisance; and no factory, manufacturing establishment, or workshop shall be so overcrowded while work is carried on therein as to be injurious to the health of the persons employed therein; and every such factory, manufacturing establishment, or workshop shall be well and sufficiently lighted and ventilated in such a manner as to render harmless, so far as practicable, all the gases, vapors, dust, or other impurities generated in the course of the manufacturing process or handicraft carried on therein, which may be injurious to health.

Laws of 1910, chap. 724, p. 139. The proprietors or managers of shirt factories are required under penalty to sprinkle the floors of said factories every morning with water.

Massachusetts.—Rev. Laws 1902, chap. 106, § 47. Every factory in which five or more persons are employed, and every factory, workshop, mercantile or other establishment or office in which two or more children under eighteen years of age, or women, are employed, shall be kept clean and free from effluvia arising from any drain, privy, or nuisance, and shall be provided, within reasonable access, with a sufficient number of proper water-closets, earth closets, or privies; and wherever two or more males and two or more females are employed together, a sufficient number of separate water-closets, earth closets, or privies shall be provided for the use of each sex, and plainly so designated; and no person shall be allowed to use a closet or privy for persons of the other sex.

Sec. 51. A factory in which five or more persons and a workshop in which five or more women or young persons are employed shall, while work is carried on therein, be so ventilated that the air shall not become so impure as to be injurious to the health of the persons employed therein, and so that all gases, vapors, dust, or other impurities injurious to health, which are generated in the course of the manufacturing process or handicraft carried on therein, shall so far as practicable, be rendered harmless. (Laws 1887, chap. 173.)

Rev. Laws 1902, chap. 104, § 1. All factories shall be well ventilated and kept clean.

Laws 1903, chap. 475. Emery or buffing wheels or belts to be provided with blowers and other apparatus for carrying away the dust.

Laws 1907, chap. 503. Factories and workshops to be kept lighted, ventilated, and cleaned; suitable receptacles for expectoration to be provided.

Laws 1906, chap. 250. The proprietor of every foundry engaged in the casting of iron, brass, steel, or other metal, and employing ten or more men, shall provide toilet rooms of suitable size and condition and equipment for the men to change their clothes, etc.

Laws 1902, chap. 322. Manufacturing establishments are required to provide fresh and pure drinking water, to which their employees shall have access during working hours.

Laws 1908, chap. 325. Water used for humidifying purposes in a factory or workshop shall be of sufficient purity as not to injure the health of the workmen.

Laws 1907, chap. 164. Every firm, person, or corporation operating a factory or shop in which machinery is used for any manufacturing purpose or for any other purposes except for elevators or for heating or hoisting apparatus shall at all times keep and maintain, free of expense to the employees, such a medical and surgical chest as shall be required by the local board of health, containing plasters, bandages, absorbent cotton, gauze, and all other necessary medicines, instruments, and other appliances for the treatment of persons injured or taken ill on the premises.

Michigan.—Comp. Laws 1897, § 5547 (Laws 1887, No. 136 [p. 150], § 1; How. Anno. Stat. § 1690; Laws 1895, No. 113, § 9). Emery wheels to be furnished with blowers to carry away the dust arising from their operation.³

A later enactment upon the subject was Laws 1899, No. 202.

The provision contained in Pub. Laws 1901, No. 113, § 9, requires that exhaust

³ Pronounced constitutional in *People* L.R.A. 853, 62 Am. St. Rep. 715, 66 N. v. *Smith* (1896) 108 Mich. 527, 32 W. 382.

fans shall be provided for the purpose of carrying off dust from emery wheels and grindstones, and dust-creating machinery, wherever deemed necessary by the factory inspector.

Laws 1907, No. 169, § 10. Washing and dressing rooms and separate water-closets to be furnished for women and girls. (Similar provision in Laws 1897, No. 92, and in Laws 1901, No. 113.)

Laws 1899, chap. 205. Architects are required to insert clause in all building specifications to effect that temporary water-closets shall be provided for workmen on building in course of erection. It is also provided that the contractors shall build them during the first week of work.

Minnesota.—Rev. Laws 1905, § 1814. Exhaust fans to be provided for carrying off dust from emery wheels and grindstones in factories, mills, and workshops.

Sec. 1818. Separate water-closets and dressing rooms to be provided for male and female employees in factories, mills, and workshops. (Laws 1893, chap. 7.)

Rev. Laws 1909, §§ 1824-4, 1824-5. Provisions for maintaining ventilation and fresh air for employees.

Sec. 1824-6. Factories and workshops where women and children are employed are to be lime washed or painted once every twelve months; and the floors are to be kept in a sanitary condition.

Missouri.—Rev. Stat. 1909, § 7833. Factories are to be lime washed.

Sec. 7835. Separate wash rooms to be provided for female employees in factories where unclean work has to be performed.

Sec. 7836. Separate water-closets for male and female employees.

Sec. 7837. All manufacturing, mechanical, mercantile, and other establishments shall be so ventilated as to render harmless all impurities, as near as may be.

Sec. 7839. Every person, firm, or corporation using any polishing wheel or machine of any character which generates dust, smoke, or poisonous gases in its operation, shall provide each and every such wheel or machine with a hood, which shall be connected with a blower or suction fan of sufficient power to carry off said dust, smoke, and gases, and prevent its inhalation by those employed about said wheel or machine. It shall be the duty of the factory inspector and his deputies to see that this section is enforced, and to prosecute any violations thereof.

Sec. 7840. Factory inspector may order that a fan or some other contrivance to prevent the inhalation of dust or smoke shall be put in whenever a process is carried on which generates dust or smoke.

Sec. 7841. Prohibits such overcrowding in factories as will, in the opinion of the inspector and a reputable physician, endanger health or safety.

Sec. 7856. Every person employing five or more persons in a factory, or employing children, young persons, or women, five or more in number, in a workshop, shall keep such factory or workshop in a cleanly state and free from effluvia from any drain, privy, or other nuisance. (Rev. Stat. 1899, § 10,099.)

Sec. 7859. If, in a factory or workshop included in § 7858 of this article any process is carried on by which dust is generated and inhaled to an injurious extent by the persons employed therein, and it appears to an inspector of factories that such inhalation could be to a great extent prevented by the use

of a fan or other mechanical means, and that the same could be provided without excessive expense, such inspector may direct a fan, or other mechanical means of a proper construction, to be provided within a reasonable time; and such fan or other mechanical means shall be so provided, maintained, and used. (Rev. Stat. 1899, § 10,102.)

Nebraska.—Comp. Stat. 1911, § 3793z. Water-closets to be provided; separate closets for each sex. Closets to be kept in sanitary condition.

Sec. 3793z1. Separate dressing rooms for females upon the requirement of state labor officials.

Sec. 3793-z2. Fans or such other mechanical devices as will substantially carry away all such dust or fumes or other impurities shall be provided.

Sec. 3793-z3. All factories shall be kept clean and free from effluvia arising from any drain, privy, or nuisance, and shall be ventilated and kept in a sanitary condition.

Secs. 3793-z4 to 3793-z7. All grinding machines, emery wheels, and emery belts of every description, shall be provided with blowers, hoods, and suction pipes to carry off the dust; no cracked or defective emery wheels or grindstones shall be used; such appliances shall not be run at an undue rate of speed.

New Jersey.—Labor law, §§ 29-32; Comp. Stat. 1910, p. 3027. Blowers are required to be maintained where emery wheels, etc., are used, with hoods and suction pipes, etc., attached. (Laws 1904, chap. 64, §§ 14-17.)

Secs. 34, 35 (p. 3028). A designated amount of air space must be provided for employees during the daytime, and an increased amount during the night, and a proper and sufficient means of ventilation shall be provided (§§ 19, 20).

Sec. 38 (p. 3028). Separate water-closets for each sex are to be furnished; also wash rooms (§ 23; earlier enactment in Laws 1896, chap. 172).

Sec. 39 (p. 3028). Factories and workshops in which women and children are employed and where dusty work is carried on shall be lime washed or painted at least once every twelve months (§ 24).

New York.—Labor law 1909, § 81 (as amended, Laws 1910, chap. 106). All grinding, polishing, or buffing wheels used in the course of the manufacture of articles of the baser metals shall be equipped with proper hoods and pipes, and such pipes shall be connected to an exhaust fan of sufficient capacity and power to remove all matter thrown off such wheels in the course of their use. Such fan shall be kept running constantly while such grinding, polishing, or buffing wheels are in operation; except that in case of wet grinding it is unnecessary to comply with this provision. All machinery creating dust or impurities shall be equipped with proper hoods and pipes, and such pipes shall be connected to an exhaust fan of sufficient capacity and power to remove such dust or impurities; such fan shall be kept running constantly while such machinery is in use; except where, in case of wood-working machinery, the commissioner of labor, after first making and filing in the public records of his office a written statement of the reasons therefor, shall decide that it is unnecessary for the health and welfare of the operatives.

Sec. 84 (amended, Laws 1910, chap. 114). The walls and ceilings of each work-room in a factory shall be lime washed or painted when, in the opinion of the commissioner of labor, it will be conducive to the health or cleanliness of the persons working therein. Floors are to be kept safe, clean, and sanitary. No person shall expectorate upon the walls, floors, or stairs of any building. Cuspidors

shall be provided, in the discretion of the commissioner of labor. Receptacles for refuse shall be provided and maintained in a sanitary condition.

Sec. 85. No more employees shall be required or permitted to work in a room in a factory between the hours of 6 o'clock in the morning and 6 o'clock in the evening than will allow to each of such employees not less than 250 cubic feet of air space; and, unless by a written permit of the commissioner of labor, not less than 400 cubic feet for each employee, so employed between the hours of 6 o'clock in the evening and 6 o'clock in the morning, provided such room is lighted by electricity at all times during such hours, while persons are employed therein.

Sec. 86. The owner, agent, or lessee of a factory shall provide, in each work-room thereof, proper and sufficient means of ventilation; in case of failure, the commissioner of labor shall order such ventilation to be provided.

Sec. 88 (amended, Laws 1910, chap. 229; Laws 1912, chap. 336). In every factory there shall be provided at all times for the use of employees a sufficient supply of clean and pure drinking water. Suitable and convenient wash rooms adequately equipped with sinks and proper water service shall be maintained in every factory; wherever lead, arsenic, or other poisonous substances, or other injurious or noxious fumes or gases are present, the washing facilities shall include hot water and individual towels. Dressing or emergency rooms shall be provided for the use of female employees. In brass or iron foundries suitable provision shall be made for drying the working clothes. Suitable and convenient water-closets for each sex shall be maintained, which shall be kept clean and sanitary. The water-closets shall be maintained inside the factory whenever practicable, and in all cases when required by the commissioner of labor.

Sec. 92. A shop, room, or building where one or more persons are employed in doing public laundry work by way of trade or for the purposes of gain is a factory within the meaning of this chapter, and shall be subject to the visitation and inspection of the commissioner of labor and the provisions of this chapter in the same manner as any other factory. No such public laundry work shall be done in a room used for a sleeping or living room. All such laundries shall be kept in a clean condition and free from vermin and all impurities of an infectious or contagious nature. This section shall not apply to any female engaged in doing custom laundry at her home for a regular family trade.

Sec. 168. Suitable and proper washrooms and water-closets shall be provided in, adjacent to, or connected with, mercantile establishments where women and children are employed. Closets assigned to female employees shall be separate from those assigned to male employees.

Sec. 169. If a lunch room is provided in a mercantile establishment where females are employed, such lunch room shall not be next to or adjoining the water-closets, unless permission is first obtained from the health authorities.

Ohio.—Gen. Code 1910, § 1009 (Laws 1898, p. 35, § 1). Separate toilet rooms to be provided for women in manufacturing, mechanical, and mercantile establishments.

Sec. 1022. Similar provisions. Earlier enactments, Laws 1891, chap. 75; Laws 1898, p. 35.

§ 1027 (11)–(15). Blowers, exhaust fans, suction pipes, etc., to be provided in factories where emery wheels or belts or other dust-creating machinery is used. (Laws 1900, p. 42, § 1.) (Earlier enactment, Laws 1898, p. 155, amending Laws 1896, p. 186.)

Sec. 1023. Factories and closets to be kept clean. (92 v. 317, § 2.)

Secs. 12,591, 12,592. Provisions concerning the heating apparatus in such buildings.

Sec. 12,590. System of ventilation to be provided.

Laws 1908, p. 30, § 4. Specifies duties of visitors of factories in regard to the inspection of sanitary condition, dangerous machinery, open vats, etc., and fire escapes in factories where women and children are employed.

Oklahoma.—Comp. Laws 1909, § 4031 (Laws of 1907–8, p. 509). Workrooms, halls, and stairs leading to workrooms, shall be lighted when deemed necessary by the factory inspector.

Sec. 4033 (Laws of 1907–8, p. 510). Separate washrooms and toilet rooms are to be provided whenever men and women are employed.

Oregon.—Gen. Laws 1910, § 5041 (Laws 1907, chap. 158, p. 303, § 1). Factories, mills, and workshops where machinery is used to be kept well ventilated; and if dust is generated to an injurious extent, mechanical means of carrying off the dust shall be provided.

Pennsylvania.—Purdon's Dig. Supp. 1904–1908, p. 5484, § 13; Laws 1905, No. 226, § 8. Every person, firm, or corporation employing males and females in the same establishment shall provide for them suitable and proper wash and dressing rooms and separate water-closets for males and females.

Sec. 16; § 11. Exhaust fans of sufficient power, or other sufficient devices, shall be provided in every establishment for the purpose of carrying off poisonous dust from emery wheels, grindstones, or other machinery creating dust.

Sec. 18; § 13. No less than 250 cubic feet of air space to be provided for every person in every workroom.

Rhode Island.—Gen. Laws 1909, chap. 78, § 8. Separate water-closets and dressing rooms to be provided for female employees when deemed necessary by the inspector.

Sec. 16. All manufacturing establishments shall provide fresh drinking water for employees.

South Carolina.—Code 1912, § 869. Every factory, mercantile, or other establishment or office where two or more males and two or more females are employed together shall be provided with separate water-closets, which are to be kept clean.

South Dakota.—Laws 1897, chap. 93. Smelting or dry crushing reduction works are required to use exhaust pans and dust chambers for removal of gases and dust.

Tennessee.—Laws 1897, chap. 98. Employers of female help in manufacturing or mercantile business must provide separate water-closets. Similar provision in Laws 1899, chap. 401, § 5.

Laws 1899, chap. 401, § 3. Factories and workshops to be ventilated and kept in a cleanly condition.

Washington.—Rem. & Bal. Codes & Stat. § 6588. Ventilation of factories prescribed by a provision similar to New York labor law, § 86.

West Virginia.—Code 1906, § 446; Acts 1901, chap. 19. All factories, etc., are to be kept in a clean condition; the sanitary and hygienic regulations shall be such as not to endanger the lives and health of the employees.

Sec. 444; Acts 1901, chap. 19. Suitable places are to be provided where females are employed to perform any unclean work, for washing and changing the cloth-

ing; stairs in use by females shall be properly screened; separate water-closets shall be provided.

Wisconsin.—Sanborn & S. Stat. Supp. 1906, §§ 1636–39 *et seq.*; Laws of 1899, chap. 189; Laws 1905, chap. 147. All emery wheels or belts shall, when deemed necessary by the factory inspector, be provided with blowers or similar apparatus to carry away the dust arising or thrown off from such wheel.

Secs. 1636–10 *et seq.*; Laws 1899, chap. 79, §§ 1 *et seq.* Regulations as to sanitary conditions of cigar factories.

Secs. 1636–31 *et seq.*; Laws 1903, chap. 323, §§ 1 *et seq.* Separate water-closets and dressing rooms to be provided for male and female employees in every factory, mill, or workshop, mercantile or mechanical establishment, where eight or more persons are employed; same to be clean and sanitary.

Secs. 1636–34; Laws 1903, chap. 323, § 4. Factories, mills, workshops, mercantile or mechanical establishments, to be ventilated and kept in a sanitary condition.

Sanborn & B. Anno. Stat. § 1636f (1). Overcrowding in factories prohibited.

Ontario.—Stat. 1904, chap. 26. The provisions in this statute (which amended the factories act, Ont. Rev. Stat. 1897, chap. 256, §§ 15, 16) with regard to the necessary conveniences for employees and sanitation of the place of work are contained in §§ 3, 4. They resemble those in the English statute.

Stat. 3 Edw. VII. § 45. It shall not be lawful to have a bedroom or sleeping place on the same floor as a shop, bake-house, or factory, nor to have any bedroom or sleeping place in the same building as a shop, bake-house, or factory without the written consent of the inspector.

It shall not be lawful to have a stable under the same roof as a factory unless there is between the stable and factory a sufficient brick or other partition wall approved by the inspector.

Quebec.—Industrial establishments act, 57 Vict. chap. 30, § 3021 (2). Industrial establishments must be kept in the cleanest possible manner; be sufficiently lighted and have a sufficient quantity of air for the number of persons employed; be provided with effective means for expelling the dust produced in the course of the work, and also the gases and vapors which escape and the refuse which results from it; in a word, fulfill all sanitary conditions necessary for the health of the persons employed, as required by the provincial board of health.

Sec. 3025. One hour to be allowed at noon each day for meals, if the inspector so direct.

Victoria.—Factories act 1905, No. 1975, § 35. In workrooms where there are processes in which dust is generated and inhaled to an injurious extent by employees, an inspector may require the use of a fan or other mechanical means for preventing such inhalation.

New Zealand.—Shops and offices act 1904, No. 52, § 28 (a). Shops or offices to be kept in a cleanly state and free from smell arising from drains, etc. (b) Separate privy accommodations for both sexes. (c) Overcrowding forbidden. Ventilation such as will provide a sufficient supply of fresh air, and carry off, as far as practicable, all gases, fumes, dust, and other impurities. (f) Cubic air space, amount of, to be fixed by inspector. (h) Supply of fresh drinking water.

New South Wales.—Factory act 1909, No. 28, § 8 (amending factory act 1896). Provision as to furnishing dressing room for females.

1863. Construction and effect of these enactments.—The effect of one case is that, in order to bring a factory within the scope of a clause prescribing the use of an appliance for preventing the inhalation of impurities “to an injurious extent,” it is not necessary to prove that the health of any particular employee has been injured, but merely that the conditions to which the workers are exposed are such as have a tendency to injure them.¹ The purpose of the exhaust fans required by the statute to be provided for emery wheels is to carry off the dust given by the wheel as well as other dust in the room.² And it may be found that the purpose is also to carry particles of such size as to cause injury by the physical impact.³

Regulation 11 of the regulations of 26th February, 1906, made under § 79 of the factory and workshop act 1901, which requires that occupiers of factories in which wet spinning is carried on shall provide suitable and convenient accommodation “in which” to keep the clothing of the workers taken off before starting to work, does not impose an obligation on such occupiers to have a separate cloak room outside the workroom.⁴ In the case of buildings erected before 30th June, 1905, it does not necessarily follow as a matter of law that if such accommodation is provided in a workroom, it must take the form of a press or wardrobe.⁵

A complaint is sufficient which shows that no exhaust fans were

¹ *Hoare v. Ritchie* [1901] 1 K. B. 434, 70 L. J. K. B. N. S. 279, 84 L. T. N. S. 54, 49 Week. Rep. 351, 65 J. P. 261 (decided with reference to § 74 of the English factory act 1901).

² In *Indianapolis Foundry Co. v. Bradley* (1909) 45 Ind. App. 530, 89 N. E. 505, it was held that § 8029, Burns's Anno. Stat. 1908, which provides that exhaust fans of sufficient power shall be provided for the purpose of carrying off dust from emery wheels and grindstones and dust-creating machinery from establishments where used, was intended to safeguard employees from the danger of injury from particles thrown off from the emery wheels, etc., as well as from the other dust in the room. The court said: “One purpose of the statute is to reduce the hazards incident to the operation of emery wheels. It requires that exhaust fans of sufficient power shall be provided for

the purpose of carrying off dust from ‘emery wheels and grindstones and dust-creating machines,’ appellee testified that the dust thrown off the wheel in question was ‘emery and iron.’ We think the legislature failed in its purpose if the statute did not apply to the particles of created matter thrown and blown from the wheels while in operation, as well as any dust likely to be present in rooms in which dust-creating machines are operated.”

³ The court cannot say as a matter of law, that the exhaust fans required by the statute to be furnished for emery wheels were not intended to carry away any particles of metal resulting from the use of the wheels, large enough to cause injury if they should strike the eye. *Muncie Pulp Co. v. Hacker* (1906) 37 Ind. App. 194, 76 N. E. 770.

⁴ *Eraut v. Ross Bros.* [1910] 2 I. R. 591, 44 Ir. Law Times, 217.

⁵ *Ibid.*

provided for the emery wheels, that without the exhaust fans they were dangerous, and that it was practical to operate the emery wheels with proper exhaust fans.⁶

The factory and workshop act of 1883 (46 & 47 Vict. chap. 53), § 2, which declares that it shall be unlawful to carry on a white lead factory, unless it is certified by an inspector that the owner has complied with the directions of the act with regard to ventilation, etc., has been held not to be applicable to a factory in which a process was employed which was invented after the passage of the act, and produced an article which, although it presented the same appearance and was adapted for the same uses, differed in some essential respects from that previously manufactured,—especially in regard to the fact of its being much less dangerous to the workmen.⁷

1864. Same subject. Provisions specifically applicable to bakeries.—

Some of the provisions concerning the sanitary condition of bakeries have been adopted specifically for the protection of employees, but, owing to the nature of the business to which they relate, necessarily enure to the benefit of the public also. Others are either included in general health laws, or indicate by their phraseology that they have been enacted primarily in the interest of the public, and only incidentally with a view to the health of employees. Having regard to the double aspect under which, irrespective of the actual object which they were intended to subserve, they are susceptible of being considered, it is deemed sufficient for the purposes of the present treatise to tabulate them in a note.¹ They have relation to such matters as

⁶ *Muncie Pulp Co. v. Hacker* (1906) 37 Ind. App. 194, 76 N. E. 770.

⁷ *Creevy v. Harnay's Patents Co.* (1889) 16 Sc. Sess. Cas. 4th series, 993, 26 Scot. L. R. 679.

¹ *England*.—Factory act 1901, § 97. *Connecticut*.—Gen. Stat. 1902, §§ 2569–2572; Laws 1897, chap. 174; Laws 1899, chap. 140.

Indiana.—General health act. Burns's Anno. Stat. 1908, §§ 7629 (6725a), *et seq.*

Maryland.—Laws 1896, chap. 273.

Massachusetts.—General health act. Rev. Laws 1902, chap. 75, §§ 28 *et seq.* (Laws 1896, chap. 418).

Minnesota.—Rev. Laws 1905, § 1819. Sanitation of bakeries and confectionery establishments.

Missouri.—Rev. Stat. 1909, §§ 7863–7869, repealing §§ 17, 18 of act of April 20, 1891.

New Jersey.—P. L. 1905, pp. 203–206 (Comp. Stat. 1910, pp. 3035–3037). Earlier provisions are in Laws 1896, chap. 181, §§ 2–6.

New York.—Labor law 1909, §§ 110 *et seq.*, as amended by Laws of 1911, chap. 637 (earlier enactment, Laws of 1895, chap. 518, as amended by Laws of 1896, chap. 672).

Ohio.—Laws 1896, p. 393.

Pennsylvania.—Purdon's Dig. Supp. 1905–1909, p. 5486, § 22 (Laws 1905, P. L. 357, § 17). Earlier enactment, act of May 27, 1897, chap. 95.

Rhode Island.—Laws 1910, chap. 576. Various provisions regarding sanitary conditions of bakeries, confectionery or ice cream manufactories.

Wisconsin.—Laws 1897, chap. 375; Sanborn & S. Anno. Stat. § 1636–61, as amended by Laws 1907, chap. 486. See also Sanborn & B. Stat. Supp. 1906, §§ 1636–62 to 1636–67.

general cleanliness, lime washing, and painting, drainage, ventilation, washrooms and sleeping rooms of employees, the rejection of employees affected with certain diseases, the regulation or prohibition of underground bakehouses,² and the footing upon which the pecuniary liabilities of owners and occupiers are to be adjusted in cases where the statutory requirements cannot be satisfied unless certain structural alterations in the premises are made.³

1865. Meals of employees.—The enactments under this head are divisible into two classes:

(1) Those which prescribe that employees in certain descriptions of establishments shall be allowed a specified time for their noonday or other meals.

England.—Factory and workshop act 1901, § 33 (1). All women, young persons, and children employed shall have the time allowed for meals at the same time of the day.

Delaware.—Laws 1904, 1905, chap. 123. Children under sixteen years, employed in a factory or workshop, shall be allowed thirty minutes at noon for mealtime.

Louisiana.—Laws 1908, No. 301, § 4. One hour to be allowed for the midday meal in every factory, mill, warehouse, manufacturing establishment, workshop, or store. Time may, at the request of employees, be reduced to thirty minutes. (Earlier enactments, Laws 1900, No. 55; Laws 1904, No. 195; Laws 1906, No. 34.)

Massachusetts.—Rev. Laws 1902, chap. 106, §§ 36–38. Women and young persons, five or more in number, who are employed in the same factory, shall be allowed their mealtimes at the same hour, except that those who begin work at a later hour may be allowed their mealtimes at a different time.

Sec. 37. No woman or young person shall (except in certain specified cases) be employed more than six hours at one time in a factory or workshop in which

Ontario.—Shops regulation act. Ont. Rev. Stat. 1897, chap. 257, §§ 25 *et seq.*

See also 3 Edw. VII., § 45.

² In § 101 of the English factory act, which provides that an underground bakehouse shall not be used as a bakehouse, unless it was “so used at the commencement of this act.” An underground bakehouse which had been vacated by the tenant and was being advertised for rent as baker’s premises at the time the factory and workshop act of 1895 went into effect was held to be within the similar exception in that statute. *Schwerzerhof v. Wilkins* [1898] 1 Q. B. 640, 78 L. T. N. S. 229, 62 J. P. 247, 19 Cox, C. C. 22, 67 L. J. Q. B. N. S. 476. The *ratio decidendi* was that, for the purposes of the act,

trying to let the premises was equivalent to using them.

³ With reference to § 101 (8) of the English factory act 1901, it has been held that the decision of the “court of summary jurisdiction” to which an occupier is to apply when he alleges that the owner ought to bear the whole or a part of the expenses of alterations is subject to review by the high court. *Stuckey v. Hooke* [1906] 2 K. B. (C. A.) 20, 94 L. T. N. S. 723, 22 Times L. R. 508, 75 L. J. K. B. N. S. 504, 70 J. P. 393, 54 Week. Rep. 509, 4 L. G. R. 815, following *Horner v. Franklin* [1905] 1 K. B. 479, 74 L. J. K. B. N. S. 291, 69 J. P. 117, 92 L. T. N. S. 173, 21 Times L. R. 225, 3 L. G. R. 423 (decided with reference to a similar provision in the factory act 1891, § 7, subsec. 2).

five or more such persons are employed, without an interval of at least half an hour for a meal.

Minnesota.—Rev. Laws 1909, § 1824-3; Laws 1909, chap. 499, § 3. In every factory, workshop, store, or mill, at least sixty minutes shall be allowed for the noonday meal.

New York.—Labor law 1909, § 89. In each factory at least sixty minutes shall be allowed for the noonday meal, unless the commissioner of labor shall permit a shorter time. Such permit must be in writing and conspicuously posted in the main entrance of the factory, and may be revoked at any time. Where employees are required or permitted to work overtime for more than one hour after 6 o'clock in the evening, they shall be allowed at least twenty minutes to obtain a lunch, before beginning to work overtime.

Sec. 161. In mercantile establishments not less than forty-five minutes is to be allowed for the noonday meal of male employees under sixteen years of age, and female employees under twenty-one years of age.

Ohio.—Gen. Code 1910, § 12,997 (Laws 1908, p. 30, § 1). A boy or girl employed as provided in the next preceding section shall be entitled to not less than thirty minutes for mealtime, which shall not be included as a part of the work hours of the day or week. (99 v. 30 § 1.)

Pennsylvania.—Purdon's Dig. Supp. 1905-1909, p. 5484, § 14; Laws 1905, No. 226, § 9. Not less than one hour shall be allowed for the noonday meal in any manufacturing establishment. (Forty-five minutes in Laws 1901, p. 322, § 11.)

Ontario.—Shops regulation act. Ont. Rev. Stat. 1897, chap. 257, § 7 (3). Not less than one hour to be allowed to children, young girls, or women employed in shops for their noonday meal, and not less than forty-five minutes when they are employed after 6 P. M.

Quebec.—Factories act (48 Vict. chap. 32), Rev. Stat. § 3027. Each child, young girl, and woman in a factory to be allowed not less than one hour for meals at noon.

(2) Those which relate to the conditions under which meals shall be eaten.

England.—Factory act 1901, § 75. Persons employed in a factory where any poisonous substance is used shall not take their meals, or remain during mealtime, in any room where the use of such a substance gives rise to dust or fumes.

Sec. 78. A woman, young person, or child, must not be allowed to take a meal, or remain during mealtimes, in parts of factories where certain specified processes calculated to render the air impure are carried on.

Sec. 33 (2). A woman, young person, or child shall not, during any part of the times allowed for meals in the factory or workshop, be employed therein, or be allowed to remain in a room in which a manufacturing process or handicraft is then being carried on.

Illinois.—Laws 1909, p. 204, § 8. No employee to take food into any room in any factory, mercantile establishment, mill, or workshop, where poisonous substances or noxious fumes, dusts, or gases are present as the result of the business conducted. Notice to this effect to be posted. Provision not applicable

to employees whose presence during meal hours is necessary for the proper conduct of the business.

New York.—Labor law 1909 (as amended, Laws 1912, chap. 336), § 89a. No employee shall take or be permitted to take any food into a room or apartment in any factory, etc., where lead, arsenic, or other poisonous substances or injurious or noxious fumes, dust, or gases exist in harmful quantities as an incident of the business conducted by such factory, etc. No employee shall be permitted to remain in any such apartment during the time allowed for meals.

Ontario.—Factories act, Ont. Rev. Stat. chap. 256, § 9. No child, young girl, or woman shall be allowed to take their meals in a room where a manufacturing process is being carried on.

Victoria.—Factories and shops act 195, No. 1975, § 32. No employee shall be permitted to take his meals in any room in which any manufacturing process is being carried on.

New Zealand.—Employment of females act 1881, § 7, subsec. 2; Factories act 1894, § 44. So far as females are concerned, the prohibition against remaining during mealtimes in a room where work is being carried on is the same as in § 33 (2) of the English act, *supra*.

The only reported decisions with regard to these enactments have turned upon the meaning of the expressions "employ" and "allow."¹

1866. Provision of seats for female employees.—In a large number of jurisdictions, statutes have been enacted which require the employer to furnish seats for female employees. These statutes vary somewhat in respect to the occupations to which they are applicable, and also in respect to the conditions under which the seats may be used. The English enactment to this effect does not specify the circumstances under which the employees shall be permitted to use the seats.¹

In a number of statutes requiring seats to be provided for female employees it is prescribed that they shall be permitted the use there-

¹ In *Prior v. Slaithwaite Spinning Co.* [1898] 1 Q. B. 881, 78 L. T. N. S. 532, 67 L. J. Q. B. N. S. 615, 46 Week. Rep. 488, 62 J. P. 358, it was held with reference to the provision (§ 17 of the repealed English factory act of 1878 that the occupiers of a spinning mill were liable to a fine, where a young person in their employ, during the time allowed for a meal, oiled part of the machinery, notwithstanding he did so contrary to orders and for his own amusement. The position was that the servant, in doing what he would have done if he had been acting under orders, was "working" at a forbidden time, within the meaning of the act.

It has been held that the word "allow" must be taken as connoting active consent on the part of the employer, and that evidence of such consent must be given in order to support a conviction under the statute. *McBride v. Gamble* (1889) 7 New Zealand L. R. 396.

¹ Seats for shop assistants act 1899, § 1. Employers of female assistants in shops or in other premises where goods are actually retailed to the public are required to provide in suitable positions at least one seat for every three such female assistants.

of to such an extent as may be reasonable for the preservation of their health.²

But the purport of most of the enactments is that employees shall be permitted to use the seats when they are not actively engaged in their duties. The writer ventures to express the opinion that a provision of this tenor is greatly to be preferred to that which has been adopted in New York and some other states. In an establishment in which there are several employees who differ more or less from each other as regards their general physique, and whose individual condition varies considerably from time to time, it seems to be, for practical purposes, impossible to apply a criterion so vague as the requirements of hygiene.³

² *New York*.—Labor law 1909, § 17. Applicable to factories, hotels, and restaurants. (Earlier enactment, Laws 1897, chap. 415.)

Sec. 170. Applicable to mercantile establishments.

Minnesota.—Rev. Laws 1905, § 1802. Applicable to employers of females in any mercantile, manufacturing, hotel, or restaurant business.

South Carolina.—Act March 6, 1899, chap. 71. Applicable to any mercantile establishment or place where goods are offered for sale.

³ *Alabama*.—Crim. Code 1907, § 6857 (5512). Applicable to stores and shops.

Colorado.—Stat. Anno. 1911, § 3929 (Act of 1885, p. 297, § 1). Applicable to manufacturing, mechanical, or mercantile establishments.

Connecticut.—Gen. Stat. 1902, § 4703 (Act of April 25, 1893, chap. 77). Applicable in mercantile, mechanical and manufacturing establishments.

Delaware.—Laws of 1887, chap. 238 (Code 1893, p. 932). Applicable to manufacturing, mechanical, or mercantile establishments.

Florida.—Laws 1899, chap. 101. Applicable to merchants, storekeepers, and employers of male or female clerks, salesmen, cash boys or cash girls, or other assistants in mercantile or other business pursuits.

Georgia.—Code 1911, § 3150 (§ 2621). Applicable to manufacturing, mechanical, and mercantile establishments.

Illinois.—Laws 1909, p. 204, § 9. Applicable to factories, mercantile establishments, mills, or workshops.

Indiana.—Factory Inspection Laws 1899, chap. 142, § 10; Burns's Anno. Stat. 1908, § 8030. Applicable to manufacturing or mercantile establishments, laundries, renovating works, bakeries, and printing offices. Earlier enactment, act March 4, 1893, chap. 168, amending act March 6, 1891, chap. 120.

Iowa.—Code 1897, § 4999. Applicable to any mercantile or manufacturing business or occupation.

Kansas.—Gen. Stat. 1909, § 4658 (Laws 1901, chap. 187, § 1). Applicable to any mercantile establishment, store, shop, hotel, restaurant, or other place where women or girls are employed as clerks or help.

Kentucky.—Stat. 1909, § 3250. Applicable where girls under sixteen years of age are employed in any manufacturing, mechanical, or mercantile industry, laundry, workshop, renovating works, or printing offices.

Louisiana.—Wolf's Rev. Laws 1904-1908, p. 420, § 13. Applicable to any factory, mill, warehouse, manufacturing establishment, workshop, or store, or any other occupation or establishment mentioned in the act. At least one chair to be provided for every three females. (Earlier enactments, Laws 1892, chap. 47; Laws 1900, No. 55; Laws 1906, No. 34.)

Maryland.—Pub. Gen. Laws. 1904 (p. 859), art. 27, § 239. Applicable to stores and other places of business where salespeople and other female help are employed for the purpose of serving the public. (Act of April 2, 1896, chap. 14.)

Michigan.—Comp. Laws § 5373 (Laws

1893, chap. 91). Applicable to stores, shops, offices, and manufactories.

Missouri.—Rev. Laws 1909, § 7838 (Laws 1891, p. 179). Applicable to manufacturing, mechanical, mercantile, and other establishments. See also § 4493 (Criminal Code).

Nebraska.—Comp. Stat. 1911, § 7914c. Applicable to stores, offices, or schools.

Comp. Stat. 1907, § 6942 (Laws 1899, chap. 107). Applicable to every manufacturing, mechanical, or mercantile establishment, hotel, or restaurant.

New Hampshire.—Laws of 1895, chap. 16, § 1. Applicable to manufacturing, mechanical, and mercantile establishments.

New Jersey.—Laws of 1884, p. 222, § 1. (Comp. Stat. 1910, p. 3037). Applicable to mechanical and mercantile establishments.

Laws of 1909, p. 221, § 1 (Comp. Stat. 1910, p. 3041). Seats shall be provided for females engaged in operations incident to any commercial employment. (This act supersedes Laws of 1882, p. 227.)

North Carolina.—Laws 1909, chap. 857, § 1. Applicable to stores, shops, offices, and manufacturing establishments.

Ohio.—Gen. Code 1910, § 1008. Applicable to manufacturing, mechanical, or mercantile establishments.

Oklahoma.—Comp. Laws 1909, § 4039 (Laws of 1907-8, p. 512). Applicable to any mercantile establishment, store, shop, hotel, restaurant, or any other place where women or girls are employed as clerks.

Oregon.—Gen. Laws, 1910, § 5038 (Laws 1907, chap. 200, § 2). Applicable to any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or other establishment employing any female.

Pennsylvania.—Purdon's Dig. Supp. 1905-1909, p. 5484, § 12; Acts of 1905, No. 226, § 7. Applicable to every person, firm, or corporation employing girls or adult women, in any establishment. (The act of April 29, 1897, § 4, was applicable [by its title] to manufacturing establishments, mercantile industries, laundries, renovating works, and printing offices. The act of May 29, 1901, § 6, was applicable to every person, firm, association, individual, partnership, or corporation, employing girls or adult women in any manufac-

turing, mechanical, or mercantile industry, laundry, workshop, renovating works, or printing office.)

Rhode Island.—Gen. Laws 1909, chap. 78, § 8. Applicable to manufacturing, mechanical, and mercantile establishments.

Tennessee.—Laws 1905, chap. 171. Seats for women. Applicable to retail jobbing or wholesale drygoods stores, notion and millinery stores, and all other stores or business where female help are employed as saleswomen.

Utah.—Laws 1907, § 1339 (Laws 1897, chap. 11). Applicable to every store, shop, hotel, restaurant, or other place where women are employed.

Vermont.—Pub. Stat. 1906, § 1046, as amended, Laws 1910, act 70, § 3. Females under the age of eighteen years shall not be employed, permitted, or suffered to work in any capacity where such employment compels them to remain standing constantly. Every person who shall employ any female under the age of eighteen in any place or establishment mentioned in § 1 shall provide suitable seats, chairs, or benches for the use of females so employed, which shall be so placed as to be accessible to said employees; and shall permit the use of such seats, chairs, or benches by them when they are not necessarily engaged in the active duties for which they are employed, and there shall be provided at least one chair to every three females.

Virginia.—Code 1904, § 3657a (Laws 1897, p. 45). Applicable to shops, stores, offices, and manufactories.

Washington.—Rem. & Bal. Codes & Stat. Sec. 6566. Applicable to stores, offices, and schools. (Laws 1890, p. 104.)

Sec. 6567. Applicable to every establishment in which females are employed.

West Virginia.—Code 1906, § 445; Acts 1901, chap. 19. Applicable to manufacturing, mechanical, mercantile, and other establishments.

Wisconsin.—Sanborn & B. Stat. Supp. 1906, § 1728. Applicable to manufacturing, mechanical or mercantile establishments. Earlier enactments, Laws 1899, chap. 77; Laws 1899, chap. 157.

Wyoming.—Laws 1901, chap. 33, § 1; Comp. Stat. 1910, § 5815. Applicable to any manufacturing, mechanical, or mercantile establishment.

Ontario.—Shops regulation act; Rev.

1867. Work in tenements. Sweatshops.—It is only within comparatively recent times that the long-continued efforts of social reformers have been effectual to the extent of inducing legislatures to deal systematically with the terrible evils entailed by the unrestrained operation of the so-called "sweating system."¹

The committee of the House of Lords which was appointed in 1888 to inquire into the subject reported that they were unable to assign any exact meaning to the term "sweating," but the following conditions were enumerated as those to which that name was applied.

(1) A rate of wages inadequate to the necessities of the workers or disproportionate to the work done; (2) excessive hours of labor; (3) the unsanitary state of the houses in which the work is carried on.²

The main object of the statutes so far enacted has been to secure that the dwelling houses in which piecework of certain descriptions is done by employees shall conform to a certain sanitary standard. In some jurisdictions the hours of work have been prescribed as regards women, young persons, and children. In recent years there has also been some serious discussion concerning the expediency of prohibiting agreements under which the rate of remuneration is so low that the employees cannot, without impairing their health, earn enough to support themselves and their families. But whether an enactment to this effect would be constitutional in the United States is open to serious question.

England.—The whole of part 6 of the factory and workshop act 1901 is devoted to the regulation of home work. The essential object of the provision relating to this subject is to make the occupiers of factories and workshops, and contractors employed by them, responsible to a certain extent for the conditions under which piecework is carried on in the houses of the persons to whom it is given out.

Stat. 1897, chap. 257, § 11 (1). Applicable to employees in "shops," as defined in § 4 of the act. See § 1875, *post*.

New Zealand.—Shops & offices act 1901, No. 52, § 6. Applicable to female shop assistants; seats to be used at reasonable intervals.

¹A succinct dissertation on this subject under its economic and sociological aspects will be found in the *Encyclopædia Britannica*, vol. 33, 9th ed. p. 112.

²In 1776 the investigation of a Parliamentary committee into the condi-

tions of the stocking trade in various parts of England brought to light a degree of "sweating" scarcely paralleled even by the worst modern instances. A bill for the fixing of the wages of frame-work knitters was accordingly introduced, but defeated in the third reading. Webb. *Trade Unions*, p. 46.

Some of the repulsive consequences of the operation of the system in England about the middle of the nineteenth century were dealt with in Charles Kingsley's "Alton Locke."

By § 108 such occupiers and contractors are made liable to a fine if they give out work to be done in a place which is injurious or dangerous to the workers.

By §§ 109, 110, a similar liability is incurred if they give out work to be done in a dwelling house, or building occupied therefor, in which there is an infectious disease.

By § 111, provisions similar to those embodied in the earlier portions of the act are enacted with regard to the hours of work and mealtimes of women, young persons, and children.

By § 114, the act is declared not to be applicable to a private house or room in which certain handicrafts of a light description are carried on, and that the exercise in such places of manual labor in relation to the making, altering, or adaptation for sale of any articles, shall not of itself constitute them workshops, where the labor is exercised at irregular intervals, and does not furnish the whole or principal means of living to the family.

Connecticut.—Laws 1899, chap. 199. Inspector of factories to examine tenements and dwellings used wholly or in part as workshops.

Illinois.—Act of June 17, 1893, § 1; Starr & C. Anno. Stat. 1896, p. 1804, ¶ 17. This enactment regarding labor in domestic workshops is framed on lines similar to those of the Pennsylvania statute.

Indiana.—Burns's Anno. Stat. 1908, § 8034 (7087n). No room or rooms, apartment or apartments, in any tenement or dwelling house, shall be used for the manufacture of coats, vests, trousers, knee pants, overalls, cloaks, furs, fur trimmings, fur garments, shirts, purses, feathers, artificial flowers, or cigars, for sale, excepting by the immediate members of the family living therein. No person, firm, or corporation shall hire or employ any person to work in any room or rooms, apartment or apartments, in any tenement or dwelling house, at making, in whole or in part, any vests, coats, trousers, knee pants, fur, fur trimmings, shirts, purses, feathers, artificial flowers, or cigars, for sale, without obtaining first a written permit from the chief inspector. (Laws 1899, chap. 142, § 14.)

Maryland.—Pub. Gen. Laws 1904, §§ 245 *et seq.*; Laws 1894, chap. 302; Laws 1896, chap. 467. General provisions in regard to the manufacture of clothing in unsanitary places similar to the Pennsylvania act. No room or apartment in any tenement or dwelling house shall be used except by the immediate members of the family, which shall be limited to a husband and wife, their children, or the children of either, for the manufacture of the various articles of clothing, purses, feathers, artificial flowers, cigarettes, or cigars. No room or apartment in any tenement or dwelling house shall be so used until a permit shall be obtained.³

Massachusetts.—Rev. Laws 1902, chap. 106, § 56. A room or apartment in a tenement or dwelling house shall not be used for the purpose of making, altering, repairing, or finishing therein coats, vests, trousers, or wearing apparel of any description, except by the members of the family dwelling therein; and a family which desires to make, alter, repair, or finish coats, vests, trousers, or wearing apparel of any description in a room or apartment in a tenement or dwelling house shall first procure a license therefor from an inspector of factories and public buildings, which shall be approved by the chief of the district police.

³ It has been held that this act does other than sale. *State v. Hyman* (1904) 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 not apply to homes or places where wearing apparel is made for purposes Ann. Cas. 742.

A license may be applied for by and issued to any member of a family which desires to do such work. No person, partnership, or corporation shall hire, employ, or contract with a member of a family which does not hold a license therefor to make, etc., articles of wearing apparel as aforesaid in any room or apartment in a tenement or dwelling house as aforesaid. Every room or apartment in which garments or articles of wearing apparel are made, etc., shall be kept in a cleanly condition, and shall be subject to the inspection of the inspectors of the district police for the purpose of ascertaining whether said room or apartment, or said garments or articles of wearing apparel, or any parts thereof, are clean and free from vermin and from infectious or contagious matter. A room or apartment in a tenement or dwelling house which is not used for living or sleeping purposes, and which is not connected with a room or apartment used for living or sleeping purposes, and which has a separate and distinct entrance from the outside, shall not be subject to the provisions of this section, nor shall the provisions of this section prevent the employment of a tailor or seamstress by any person or family for the making of wearing apparel for the use of such person or family. (Act of March 9, 1898, chap. 150, amending an act regulating employment of labor, Acts of 1894, chap. 508. For the original statute see act of April 24, 1893, chap. 246.)

Michigan.—Pub. Laws 1901, No. 113. Manufacture of wearing apparel, flowers, cigarettes, etc., forbidden in dwellings except on written permit of factory inspector, granted after inspection, stating number to be employed and that building is fit. Permit to be framed and posted in room. Firms giving out work shall require production of permit and keep register of persons to whom given. Family may employ seamstress. (Earlier provisions in Pub. Laws 1895, No. 184; Pub. Laws 1899, No. 233.)

Mississippi.—Act of June 2, 1899 (p. 273). Regulation of manufacturing in tenements.

Missouri.—Rev. Stat. 1909, § 7853. No room or apartment in any tenement or dwelling house shall be used by more than three persons, not immediate members of the family living therein, for the manufacture of any wearing apparel, purses, feathers, artificial flowers, or other goods for male or female wear. Every person, firm, or corporation contracting for the manufacture of any of the articles mentioned in this section, or giving out the complete material from which they are to be made, or to be wholly or partially finished, shall keep a register of the names and addresses of all persons to whom such work is given to be made, or with whom they have contracted to do the same. Such register shall be produced for the inspection, and a copy thereof shall be furnished to, the factory inspector on demand. (Rev. Stat. 1899, § 10,096; amended, Laws 1909, p. 866.)

New Jersey.—Laws 1904, chap. 64, § 31 (Comp. Laws 1910, p. 3030). Sweatshops regulated by a provision similar to that in the New York labor law, § 100. (Earlier provision, Laws 1893, chap. 216.)

New York.—Labor law 1909, § 95. Commissioner of labor given power to attach a sign "Unclean" to any tenant-factory in which he shall find evidence of contagious disease.

Sec. 100. No tenement house nor any part thereof shall be used for the purpose of manufacturing, altering, repairing, or finishing therein, any coats, vests, knee pants, trousers, overalls, cloaks, hats, caps, suspenders, jerseys, blouses, dresses, waists, waistbands, underwear, neckwear, furs, fur trimmings, fur garments,

skirts, shirts, aprons, purses, pocketbooks, slippers, paper boxes, paper bags, feathers, artificial flowers, cigarettes, cigars, umbrellas, or articles of rubber, nor for the purpose of manufacturing, preparing, or packing macaroni, spaghetti, ice cream, ices, candy, confectionery, nuts, or preserves, without a license therefor as provided in this article. But nothing herein contained shall apply to collars, cuffs, shirts, or shirt waists made of cotton or linen fabrics that are subject to the laundering process before being offered for sale. (Earlier provisions, Laws 1892, chap. 655; Laws 1893, chap. 173; Laws 1899, chap. 191.)

Ohio.—Laws 1896, p. 317. Prohibiting manufacture of clothing, tobacco, etc., in rooms used for family purposes. Requirements as to air space, water-closets, etc., for shops where such goods are made.

Pennsylvania.—Act of April 11, 1895, § 1 (P. L. 34), 3 Pepper & L. Dig. 1898, p. 302, as amended by act of May 5, 1897, No. 37, § 1. No room or apartment in any tenement or dwelling house shall be used except by the immediate members of the family living therein, for the manufacture of coats, vests, trousers, knee pants, overalls, cloaks, hats, caps, suspenders, jerseys, blouses, waists, waistbands, underwear, neckwear, furs, fur trimmings, fur garments, shirts, hosiery, purses, feathers, artificial flowers, cigarettes, or cigars. No person, firm, or corporation shall hire any person to work in any room or apartment in any rear building, or building in the rear of a tenement or dwelling house, at making any of the articles mentioned in this section, without first obtaining a written permit from the factory inspector or one of his deputies, stating the maximum number of persons allowed to be employed therein and that the building or part of building intended to be used for such work or business is thoroughly clean, sanitary, and fit for occupancy for such work or business.⁴

Wisconsin.—Sanborn & B. Stat. Supp. 1906, § 1636-71; Laws 1899, chap. 232; Laws 1901, chap. 239. Regulating manufacture of clothing and tobacco goods in dwellings.

Ontario.—The Shops regulation act, 60 Vict. chap. 51; Ont. Rev. Stat. 1897, chap. 257. This statute provides for the safety, health, etc., of employees in places of business other than those covered by the factories act, and regulating the age at which such employees may be hired and the number of hours they may work.

Victoria.—Factory act 1905 (No. 1975), § 21. Every occupier of a factory or workroom who has work done elsewhere than in his factory or workroom shall keep a record of the work, names, and addresses of the persons employed, and the prices paid.

New Zealand.—Factories act 1901, §§ 28-30. These provisions are framed on the same lines as those of the English statute, but are considerably shorter.

1868. Places to which the English acts are applicable. Generally.—By the workmen's compensation act 1897, § 7 (2), it was provided

⁴The term "rear building" may include all such rooms or apartments as are connected with the tenement or dwelling house where the family resides, but which are separated from the other part of the house by walls, partitions, or doors. A "building in rear" must be held to be one that is built separate and apart from the tenement or dwelling house proper, and in the rear of it. *Tenement House Inspection* (1896) 17 Pa. Co. Ct. 191, 4 Pa. Dist. R. 783.

that the word "factory," as used in the statute, should have the same meaning as in the factory and workshop acts 1878 to 1891, and also include any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the factory acts is applied by the factory and workshop act 1895, and every laundry worked by steam, water, or other mechanical power. (See chapter LXXVII. *ante.*) As the portion of the workmen's compensation act 1897 in which this provision was inserted has been omitted from the new act of 1906, the decisions under the former act, which turned upon the meaning of the expression "factory," are no longer relevant as precedents in actions for personal injuries caused by accidents. But they are still binding as authorities in cases which involve the question whether a given establishment is within the factory and workshop act 1901. In this point of view they may appropriately be cited together with those which have been rendered with immediate reference to that statute and its predecessors *in pari materia*.

1869. Provisions with regard to manufacturing establishments, properly so called.—The effect of the definition clauses in § 149, of the factory and workshop act 1901, is as follows:

Subsec. (1). The expression "textile factory" means any premises wherein or within the close or curtilage of which steam, water, or other mechanical power, is used to move or work any machinery employed in preparing, manufacturing, or finishing, in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china grass, cocoanut fibre, or other like material, either separately or mixed together, or mixed with any other material, or any fabric made thereof: Provided that printworks, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works, shall not be deemed to be textile factories.

The expression "nontextile factory" means—(a) Any works, warehouses, furnaces, mills, foundries, or places named in part 1 of schedule 6 of the act—in which are enumerated [1] printworks, [2] bleaching and dyeing works, [3] earthenware works, [4] lucifer match works, [5] percussion-cap works, [6] cartridge works, [7] paper-staining works, [8] fustian-cutting works, [9] blast furnaces, [10] copper mills, [11] iron mills, [12] foundries, [13] metal and india-rubber works, [14] paper mills, [15] glass works, [16] tobacco factories, [17] letter-press printing works, [18] bookbinding works, [19] flax scotch mills, [20] electrical stations); (b) Any premises named in part 2 of schedule 6 (*viz.*, [21] hat works, [22] rope works, [23] bakehouses, [24] lace warehouses, [25] shipbuilding yards, [26] quarries, [27] pit banks, [28] day cleaning, carpet beating, and bottle washing works), wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (c) Any premises wherein or within the close or curtilage or precincts of which any manual labor is exercised by way of trade or for purposes of gain in or incidental

to any of the following purposes, namely: (1) the making of any article or of part of any article; or (2) the altering, repairing, ornamenting, or furnishing of any article; or (3) the adapting for sale of any article; and wherein and within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression "factory" means a "textile factory" or "nontextile factory," or either of those descriptions of factories.

The expression "tenement factory" means a factory where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft.

The expression "workshop" means—

(a) Any premises or places named in part 2 of schedule 6 which are not a factory.

(b) Any premises, room, or place, not being a factory, in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labor is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely: (1) The making of any article or of part of any article; or (2) the altering, repairing, ornamenting, or finishing of any article; or (3) the adapting for sale of any article; and to or over which premises, room, or place the employer of the persons working therein has the right of access or control.

Subsec. (4). Where a place situate within the close, curtilage, or precinct forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of a factory for the purposes of the act, but shall, if otherwise it would be a factory or workshop, be deemed a separate factory or workshop, and be regulated accordingly.

Subsec. (5). A place or premises shall not be excluded from the definition of a factory or workshop, by reason only that the place or premises is or are in the open air.

Subsec. (6). The exercise by any young person or child, in any recognized efficient school, during a portion of the school hours, of any manual labor, for purpose of instructing the young person or child in any art or handicraft, shall not be deemed to be an exercise of manual labor for the purpose of gain, within the meaning of the act.

The provisions of the factory acts, which were incorporated in the workmen's compensation act 1897, as § 93, were these:

Factory act 1878, § 93. The expression "nontextile factory" in this act means (1) any works, warehouses, furnaces, mills, foundries, or places named in part one of the fourth schedule of this act; (2) also any premises or places named in part two of the said schedule, wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (3) also any premises wherein, or within the close or curtilage or precincts of which, any manual labor is exercised by way of trade, or for purposes of gain in, or incidental to, the following purposes, or any of them; that is to say,—(a) in or incidental to the making of any article or of part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any

article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression "factory" in this act means textile factory and nontextile factory, or either of such descriptions of factories.

The expression "workshop" in this act means (1) any premises or places named in part two of the fourth schedule to this act, which are not a factory within the meaning of this act; (2) also any premises, room, or place, not being a factory within the meaning of this act, in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labor is exercised by way of trade, or for purposes of gain in, or incidental to, the following purposes or any of them; that is to say,—(a) in or incidental to the making of any article or of part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control.

A part of a factory or workshop may, for the purposes of this act, be taken to be a separate factory or workshop; and a place solely used as a dwelling shall not be deemed to form part of the factory or workshop for the purposes of this act.

Where a place situate within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop, and be regulated accordingly.

Any premises or place shall not be excluded from the definition of a factory or workshop by reason only that such premises or place are or is in the open air.

Factory act 1895, § 23. (1) The following provisions, namely, (i) § 82 of the principal act, (ii) the provisions of the factory acts with respect to accidents, (iii) § 68 of the principal act, with respect to the powers of inspectors, (iv) §§ 8 to 12 of the act of 1891, with respect to special rules for dangerous employment, and (v) the provisions of this act with respect to the power to make orders as to dangerous machines, shall have effect as if (a) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (b) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word "factory," and the purpose for which the machinery is used were a manufacturing process; and as if the person who, by himself, his agents, or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory.

(2) The provisions of this act with respect to notice of accidents and the formal investigation of accidents shall have effect as if—(a) any building which exceeds 30 feet in height, and which is being constructed or repaired by means of scaffolding; and (b) any building which exceeds 30 feet in height, and in which more

than twenty persons, not being domestic servants, are employed for wages, were included in the word "factory;" and as if, in the first case, the employer of the persons engaged in such construction or repair, and, in the second case, the occupier of the building, were the occupier of a factory.

These provisions are now incorporated, with some additions, in the factory and workshop act 1901.

1870. Places deemed to be within the scope of these provisions.—

a. Premises within which "mechanical power is used in any process incident to the manufacture" of certain articles.—Premises within which cotton sewing thread was wound by mechanical means have been held to be a "factory."¹

Premises in which iron plates used in the manufacture of a ship are cut and shaped are a factory, although the ship itself cannot be considered an article within the factory act. (30 & 31 Vict. chap. 103, § 3 [1].)^{1a}

But a gas main used to supply gas to the consumers is not a part of a factory.²

b. "Premises wherein steam, water, or other mechanical power is used in aid of the manufacturing process."—With reference to these descriptive words it has been held that a yard in which stones are dressed by manual labor, and in which there is an engine house in which the workmen's tools are sharpened, is a "nontextile factory;"³ but that the preliminary washing of bottles by a rotary brush driven by a small gas engine is not a process used "in aid of" the bottling, and consequently that a place where such work is carried on is not within the purview of the act.⁴

¹ *Haydon v. Taylor* (1863) 4 Best & S. 519, 33 L. J. Mag. Cas. N. S. 30, 9 L. T. N. S. 382, 12 Week. Rep. 103 (decided with reference to 7 & 8 Vict. chap. 15).

^{1a} *Palmer's Shipbuilding & Iron Co. v. Chaytor* (1869) L. R. 4 Q. B. 209, 10 Best & S. 177, 38 L. J. Mag. Cas. N. S. 63, 19 L. T. N. S. 638, 17 Week. Rep. 401.

² *Spacey v. Dowlais Gas & Coke Co.* [1905] 2 K. B. 879, 22 Times L. R. 29, 75 L. J. K. B. N. S. 5, 54 Week. Rep. 138, 93 L. T. N. S. 685.

³ *Weir v. Petrie* (1900) 2 Sc. Sess. Cas. 5th series, 1041, 37 Scot. L. R. 795, 8 Scot. L. T. 75.

⁴ *Lair v. Graham* (1901) 2 K. B. 327 (decided with reference to the definition in § 93 of the repealed factory and workshop act 1878). In course of the

opinion it was said: "I am of opinion that, having regard to the earlier part of § 93, and to the provisions with respect to manufacturing processes, and to the 4th schedule, the washing of the bottles by mechanical means cannot be fairly called a process which is used 'in aid of' the bottling of the beer. It is true that the bottles must be clean, and that the respondents wash them because they are going to put beer into them; but, in my opinion, that operation is not 'in aid of' in the sense in which those words are used in the section. Therefore, though the case is near the line, I think the justices were right. With regard to *Weir v. Petrie*, *supra*, I do not wish to be thought to dissent from that decision, because there, in a sense, the actual condition of the tools might have a great deal to do with the

But bottle-washing works are now specifically included in the list of nontextile factories in part 2 of schedule 6 of the factory act 1901.

As machinery operated by hand power is not within this description, the user of such machinery does not constitute the premises in which it is employed a "factory."⁵ Nor can the expressions in question be so construed as to bring within the category of "factories" a threshing machine and traction engine, which, at the time of the accident, were in transit to a place where they were to be used for threshing, the engine being connected with the machine for no purpose but that of haulage.⁶

The provision in the factory and workshop act of 1883 (46 & 47 Vict. chap. 53), § 2, which declared that it should be unlawful to carry on a white lead factory, unless it was certified by an inspector that the owner had complied with the directions of the act with regard to ventilation, etc., was held not to be applicable to a factory in which a process was employed which had been invented after the passage of the act, and produced an article which, although it presented the same appearance and was adapted for the same uses, differed in some essential respects from that previously manufactured, —especially in regard to the fact of its being much less dangerous to the workmen.⁷

A cellar in a store containing a gas engine for the purpose of grinding sausage, cleaning dried fruit, etc., is a factory, as the gas engine is mechanical power within the meaning of the statute.⁸

c. "*Premises wherein . . . any manual labor is exercised . . . for purposes of gain.*"—With reference to these words as used in the

dressing of the stone for sale. Whether or not I should have decided the case the same way I need not now consider; but I do not, in what I have said, intend to dissent from the decision, because I think a distinction may be drawn between it and the case now before us."

⁵ *Willmott v. Paton* [1902] 1 K. B. 237, 71 L. J. K. B. N. S. 1, 66 J. P. 197, 50 Week. Rep. 148, 85 L. T. N. S. 569, 18 Times L. R. 48.

A workman injured while engaged in the erection of a machine for which no mechanical power is needed is not within the protection of the statute, although mechanical power was necessary to carry the parts of the machine to the floor of the building upon which the ma-

chinery was erected. *Murphy v. O'Donnel* (1906) 54 Week. Rep. (C. A.) 149.

The plaintiff was not engaged "in or about" a factory where he was injured in a shed which was about half a mile away from his employer's factory, and in which no mechanical power was used. *Ferguson v. Barclay* (1902) 5 Sc. Sess. Cas. 5th series, 105, 40 Scot. L. R. 58, 10 Scot. L. T. 350.

⁶ *George v. Macdonald* (1901) 4 Sc. Sess. Cas. 5th series, 190, 39 Scot. L. R. 136, 9 Scot. L. T. 267.

⁷ *Creedy v. Hannay's Patents Co.* (1889) 16 Sc. Sess. Cas. 4th series, 993, 26 Scot. L. R. 679.

⁸ *Hunt v. Grantham Co-op. Soc.* 112 L. T. Jo. 364.

clause in which a "nontextile factory" is defined, it has been held that this term is applicable to the refuse despatch works of a city, where the salable parts of the city refuse are separated from the unsalable part by processes in which steam power is used,⁹ and to a tripe manufactory where steam is used to force water into a boiler, and then to heat the water.¹⁰ But a workman who was employed by a farmer on his farm to drive a movable steam engine, for the purpose of working a mill for grinding meal intended to be used for food for stock on the farm, and not for sale, is not employed on, in, or about a "factory."¹¹

It has also been held that a room in which the owner of a fishing boat employs persons to mend his nets for use in his calling is not a "workshop;"¹² but that a shop used at night for the purposes of packing in boxes sweetmeats which were retailed during the day-time might properly be found to be within the scope of this expression.¹³

A laundry which is part of the equipment of a hotel, in which is laundered the hotel linen, the clothing of the employees, as a part of their compensation, and also such clothing as the guests might desire, which was paid for by the guests, has been held not to be operated for "purposes of gain."¹⁴

d. Premises in which "manual labor is exercised in adapting an article for sale."—These descriptive words were in one case held to be applicable to premises where beer was charged by mechanical power with gas, and then allowed to flow into bottles under the pressure of the gas through a tap, the nozzle of which was pulled down into the necks of the bottles.¹⁵

e. "Place in the open air."—It would seem that, in the absence of an express provision relative to the inclusion of places in the open air, the term "factory" cannot be treated as covering such place.¹⁶

⁹ *Henderson v. Glasgow* (1900) 2 Sc. Sess. Cas. 5th series, 127, 37 Scot. L. R. 857, 8 Scot. L. T. 118.

¹⁰ *Doswell v. Cowell* (1906) 95 L. T. N. S. 38, 22 Times L. R. 628.

¹¹ *Nash v. Hollinshead* [1901] 1 K. B. (C. A.) 700, 70 L. J. K. B. N. S. 571, 75 J. P. 357, 49 Week. Rep. 424, 84 L. T. N. S. 483, 17 Times L. R. 352. The court was of the opinion that the word "gain" signified direct gain only. For a similar construction of the phrase "purposes of gain," compare *Mather v. Lawrence* [1899] 1 Q. B. 1000, 68 L. J. Q. B. N. S. 714, § 1901, note 1, *post*.

¹² *Curtis v. Shinner* (1906) 70 J. P. 272, 95 L. T. N. S. 31, 22 Times L. R. 448.

¹³ *Fullers v. Squire* [1901] 2 K. B. 209.

¹⁴ *Caledonian R. Co. v. Paterson* (1898) 1 Sc. Sess. Cas. 5th series, 26, 36 Scot. L. R. 60, 6 Scot. L. T. 194, 2 Adam, 620. See § 1872, note 14, *post*.

¹⁵ *Hoare v. Truman* (1902) 71 L. J. K. B. N. S. 380, 86 L. T. N. S. 417, 50 Week. Rep. 396, 66 J. P. 342 (factory act 1878).

¹⁶ A slate quarry, a large open space

But see § 149, subsec. (5) of the act of 1901, which expressly provides that the fact that the place of work is in the open air will not prevent it from being a factory within the act.

f. "*Bleaching or dyeing works.*"—The effect of § 93, subsec. (1) of the act of 1878, when construed in connection with schedule 4, part 1, § 2, is that premises in which the processes of hooking, lap-

extending over an area of 400 acres, the works of which are carried on in the open air, the only buildings being sheds, and in which more than fifty persons were employed in splitting the rock into slates and shaping them for sale, is not "a factory" within the meaning of 30 & 31 Vict. chap. 103, § 3, subsec. 7. *Kent v. Astley* (1869) L. R. 5 Q. B. 19. This was an information for employing a minor without procuring the statutory certificate of age. Cockburn, Ch. J., observed: "I take it to be customary that the soil should be converted into slates either in the quarry itself, or in a place immediately adjoining it, and I do not think that in using the word 'premises' the legislature intended to include sheds erected in the quarry merely as a protection against the weather; they are only accessories to the quarry and the quarrying processes; and the legislature has not as yet declared that open air works shall be within the scope of the factory acts. No doubt the object of the legislature was to prevent the crowding together of workmen, and their detention at labor for an undue time, and the mingling of sexes. By degrees the legislature has extended the operation of the acts to manufactures not originally within their scope. But, except in cases which have been specially provided for, it has not as yet included works carried on in the open air, because they are less exposed to the evils incident to manufactures carried on in buildings. Where the mischief is the same, the remedy ought to be applied, but we ought not to outstrip the legislature, and apply these statutes to circumstances to which the legislature appears to have considered that they could not be properly applied. I cannot think it was intended that where a process like this is carried on in the immediate proximity to a quarry, it is to be included in statutes meant to apply to manufactures carried on in buildings. It has been ar-

gued that the facts of the present case fall within the mischief contemplated by the legislature. They may embrace some, but they do not embrace all, of the evils which the legislature intended to remedy. Here the sexes are not mingled together; women, girls, and very young children are not employed. It is true that facilities ought to be afforded for the education of children, but children employed in agriculture, as well as those employed in quarries, are deprived of this advantage. The legislature may hereafter interfere, but it is not for us to introduce into acts of Parliament provisions which do not seem to us to be included in them. Looking at the circumstances of the case, I find that the process of manufacturing slates was practically carried on in the open air within the boundaries of the quarry, and that the evils of crowding and mingling of the sexes do not occur, and therefore I think we shall be straining the statute if we decided that the word 'premises' is applicable to this quarry."

Premises which consisted of 10 acres, and contained mills, kilns, shed, etc., for manufacturing cement, the process being carried on practically in the open air, were held not to be a factory within a clause of the factory act 1867, § 3 (7), defining a "factory" as "any premises . . . in, on, or within the precincts of which, fifty or more persons are employed in any manufacturing process." *Redgrave v. Lee* (1874) L. R. 9 Q. B. 363 (information against employer for failing to hang up a notice of the names and addresses of the factory inspector and subinspector for the district). Cockburn, Ch. J., observed: "I am of opinion that this case is governed by the decision in *Kent v. Astley* (1869) L. R. 5 Q. B. 19, 10 Best & S. 802, 39 L. J. Mag. Cas. N. S. 3, 21 L. T. N. S. 425, 18 Week. Rep. 185. No doubt it is very difficult to draw the line; but the definition of 'factory' and of 'manufactur-

ping, making up, and packing cloth are carried on, are a "factory," even if none of those processes are carried on as incidental to bleaching and dyeing.¹⁷

g. "Shipbuilding yard."—The fact that repairs are being done to a ship does not make the dock a "shipbuilding yard" within the meaning of the factory act 1878, schedule 4, part 2 (24) (equivalent to schedule 6, part 2 [25] of the act of 1901). Under such circumstances, therefore, the dock was not deemed to be a "factory" for the purposes of the compensation act.¹⁸

h. Bottle-washing works.—These descriptive words do not apply where the bottle washing is merely ancillary to the main business that is carried on.¹⁹

i. "Tenement factory."—This expression is not applicable to a building occupied by two or more different persons who produce their own mechanical power.²⁰

ing process' does seem to imply something more than a process which is carried on to all intents and purposes in the open air. If buildings predominated, this might be factory; but the whole may be said to be carried on in the open air. By the late act, brickfields have been, to a certain extent, brought under the operation of the factory acts; but the legislature have not thought proper to go further, and extend the general definition of factory."

¹⁷ *Rogers v. Manchester Packing Co.* [1898] 1 Q. B. 344. Day, J., said: "In order to come to a conclusion as to whether the premises in question are a factory, . . . it is necessary to consider whether they are 'bleaching and dyeing works,' as defined by § 2 of part 1 of schedule 4, . . . and not whether they come within the natural meaning of those words, without reference to the statutory definition."

¹⁸ *Spencer v. Livett* [1900] 1 Q. B. (C. A.) 498, 69 L. J. Q. B. N. S. 338, 64 J. P. 196, 48 Week. Rep. 323, 82 L. T. N. S. 75, 16 Times L. R. 179.

¹⁹ The wine cellars of a hotel, in which there are two small revolving brushes, worked, when desired, by water power from a tap, for washing the interior of the bottles, the cellars being primarily used for storage, and the processes of corking and bottle washing being merely ancillary to that object, are not a "bottle-washing work," and therefore not a factory. *Kavanagh v. Caledonian R. Co.* (1903) 5 Sc. Sess.

Cas. 5th series, 1128, 40 Scot. L. R. 812, 11 Scot. L. T. 281. The court said: "The legislature did not include every place in which bottles are washed, but only places where either the sole or principal business carried on is bottle washing."

A claim for compensation under the workmen's compensation act 1897, by a spirit salesman against a spirit merchant, which set forth that the claimant received the injuries on account of which he claimed while engaged in the respondent's service, washing bottles in a store which "is used for the purpose of bottling beer and washing beer bottles, and is a factory within the meaning of the workmen's compensation act 1897," is irrelevant, in respect that it did not set forth that steam, water, or other mechanical power was used in the respondent's store. *Campbell v. M'Nee* (1903) 5 Sc. Sess. Cas. 5th series, 1151, 11 Scot. L. T. 277, 40 Scot. L. R. 824.

See also *Law v. Graham*, cited in note 4, *supra*.

²⁰ *Toller v. Spiers* [1903] 1 Ch. 362, 87 L. T. N. S. 578, 72 L. J. Ch. N. S. 191, 51 Week. Rep. 381, 67 J. P. 234, 19 Times L. R. 119: followed in *Brass v. London County Council* [1904] 2 K. B. 336, 91 L. T. N. S. 344, 73 L. J. K. B. N. S. 841, 68 J. P. 365, 53 Week. Rep. 27, 20 Times L. R. 464 (for the facts of this case and a decision thereon under the earlier factory acts, see § 1861, note 14, *ante*; see also the other cases cited in the same note).

j. Electrical stations for lighting any "street, public place," etc.— These terms have been construed in a few cases cited in the note.²¹

1871. Provisions with regard to establishments other than those in which manufacturing processes are carried on.—

By § 104 of the factory and workshop act 1901, it is declared that the provisions of the act with respect to (1) power to make orders as to dangerous machines (§ 17), (2) accidents, (3) regulations for dangerous trades, powers of inspectors (§ 119), and fines in case of death or injury (§ 136), shall have effect as if every dock, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbor, or canal, were included in the word "factory," and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who, by himself, his agents, or workmen, uses any machinery or plant for the before-mentioned purposes, were the occupiers of the premises; and that, for the purpose of the enforcement of these provisions, the person having the actual use or occupation of a dock, quay, or warehouse, or of any premises within the same, or forming part thereof, and the persons using any such machinery or plant, shall be deemed to be the occupier of a factory.¹

By § 105 it is declared that the provision of the act with respect to the same details as those mentioned in § 104 shall have effect as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a factory were included in the word "factory," and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose, were the occupiers of the said premises; and for the purpose of the enforcement of those provisions the person so using any such machinery shall be deemed to be the occupier of a factory.

By the same section it is declared that the provisions of the act with respect to accidents shall have effect as if (a) any building which exceeds 30 feet in height, and which is being constructed or repaired by means of a scaffolding; and (b) any building which exceeds 30 feet in height, and on which more than twenty persons, not being domestic servants, are employed for wages, were included in the word "factory," and as if, in the first case, the employer of the

²¹ A workhouse which has an engine house and machinery used for the purpose of generating electricity for lighting purposes is a public place within schedule 6, part 1, clause 20, and is therefore a nontextile factory within the meaning of § 149, subsec. 1, of the factory and workshop act 1901. *Mile End Guardians v. Hoare* [1903] 2 K. B. 483, 72 L. J. K. B. N. S. 651, 67 J. P. 395, 89 L. T. N. S. 276, 19 Times L. R. 606, 20 Cox, C. C. 536.

A stoker and assistant engineer in the electrical station of a training ves-

sel moored in the river Thames, and used for training for sea service pauper boys under the charge of the metropolitan parishes and unions, is within the act, since the vessel is a "factory" and the employers were undertakers. *Benson v. Metropolitan Asylums Board* (1908) 124 L. T. 403.

¹ The above section and the one next mentioned take the place of similar but less elaborate provisions in subsecs. (a) and (b) of § 23 of the repealed factory and workshop act 1895.

persons engaged in the construction or repair, and, in the second case, the occupier of the building, were the occupier of a factory.

By § 106 it is declared that any railway line or siding used in connection with a factory or workshop shall, with respect to the provisions mentioned in § 104, be regarded as part of the factory or workshop.

Sec. 38 of the public health (London) act 1891 enacts that every factory, workshop, or workplace shall be provided with sufficient and suitable accommodation in the way of sanitary convenience, regard being had to the number of persons employed in or in attendance at such building.²

1872. Places within the scope of these provisions.—*a. "Dock, wharf, quay."*—The combined effect of the workmen's compensation act 1897 and the factory acts was that every dock, wharf, or quay was deemed to be a "factory," within the meaning of the former act, whether steam power was or was not being used in the work on which the servant claiming compensation was engaged.¹ While this construction of the act is not apparently questioned in any subsequent decision, it is to be noted that it does not imply that every workman injured on a dock, wharf, or quay is entitled to compensation. See notes 4 *et seq.*, *infra*, and § 1849, *a. ante*.

A floating structure carrying cranes for loading and unloading ships, which is moored in a river 500 feet from the shore by chains fastened to piles driven into the bed of the river, but is not connected with the shore except by boats, is a "wharf."²

Whether a space not immediately contiguous to the area appropri-

² A stable yard and stables at which a large number of men were daily employed is a workplace within the meaning of this section. *Bennett v. Harding* (1900) 2 Q. B. 397. The court said: "The act is passed for the benefit of persons who, like those employed in factories and workshops and those in attendance at them, are kept in large numbers and for long periods on certain premises, and are therefore likely to require the accommodation of sanitary conveniences which the act says shall be provided for them. In that view, I think these stables and this cabyard were analogous to a factory or a workshop, since a number of people were occupied about them, and were kept on the premises for some time. So that, even if a workplace must be construed as being something analogous to a factory or a workshop, this was, in my opinion, within the meaning of that word. I think that a workplace must be a place where some work is

being perpetually or permanently done. I do not say that the mere presence of workmen in repairing a private house would make it a workplace; but in my opinion these premises did constitute a workplace within the meaning of the act."

¹ *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627. In that case the respondents admitted that the construction of the act specified in the text was the correct one, and the admission was referred to by the lord chancellor as being "very frank and proper."

The doctrine of the House of Lords has been also applied in Scotland. *Strain v. Sloan* (1901) 38 Scot. L. R. 475, 3 Sc. Sess. Cas. 5th series, 663, 8 Scot. L. T. 498.

² *Ellis v. Cory* [1902] 1 K. B. 38, 71 L. J. K. B. N. S. 72, 50 Week. Rep. 131, 85 L. T. N. S. 499, 18 Times L. R. 28, 66 J. P. 116.

ated to the ships themselves is embraced under one or other of the terms "dock, wharf, or quay" is determined as a question of fact, with reference to the elements of distance, the intervention of barriers, and the uses to which the space was put.³

Whether or not the act of 1897 was applicable to a workman injured while at work upon a ship lying in a dock does not seem to have been definitely decided before the act was superseded by that of 1906. A number of the earlier decisions were apparently to the effect that the statute was not applicable under such circumstances.⁴ But later, in a case in the House of Lords, it was held that com-

³ An accident happened to a workman, while engaged in removing timber from a stack upon a piece of land which was within the ambit of a system of docks belonging to a railway company, and which had been let by the company to timber merchants for the storage of timber. This piece of land was about 40 yards from the water of the dock. Between it and the water ran the lines of a dock railway or tramway, but it was not separated from the adjoining wharf or quay space by any fence or other physical barrier. Timber had sometimes been landed from the before-mentioned dock and brought to the said piece of land, but during the year 1900 all the timber stacked thereon had been landed from other docks forming part of the dock system, more or less remote, and brought to the said piece of land by rail. Held, that there was evidence to support a finding that the place where the accident happened was a "factory," as being a "dock, wharf, or quay," and that the court was bound by such finding. *Kenny v. Harrison* [1902] 2 K. B. (C. A.) 168, 71 L. J. K. B. N. S. 783, 87 L. T. N. S. 318.

For the purpose of unloading timber from timber ships a dock board provided quay or wharf space inland for 150 yards from the water's edge; at the further end of this space was a fence, with gates at intervals, behind which came a series of yards leased by the dock board to different timber merchants for storing their timber, the whole being the property of the dock board, and separated by a wall from the surrounding property. A workman employed by a firm of carters was killed while moving a log of timber in one of the yards leased to a firm of timber merchants. Held, that the word

"wharf" must be construed in its ordinary and popular signification of a place contiguous to water, over which goods pass in the process of loading and unloading; that the yard where the accident happened was not a wharf within the meaning of those sections; and that the employment of the deceased was therefore not one to which the compensation act applied. *Haddock v. Humphrey* [1900] 1 Q. B. 609, 82 L. T. N. S. 72, 69 L. J. Q. B. N. S. 327, 64 J. P. 86, 48 Week. Rep. 292, 16 Times L. R. 143 (Rigby, L. J., dissenting).

⁴ In *Flowers v. Chambers* [1899] 2 Q. B. 142, where a laborer engaged in discharging refuse and manure from a vessel into barges was injured while engaged in moving a barge by falling from one deck of the vessel to another, compensation was denied squarely upon the ground that the laborer was not injured while working on, in, or about a factory. A. L. Smith, L. J., said: "The question for our decision is not whether this dock was a factory within the meaning of the act, and I do not decide that point; the only question for us is whether a man employed on a ship lying in a dock is employed on, in, or about a dock within the meaning of this act. I think that he is not."

Following *Flowers v. Chambers*, *supra*, it was held in *Durrie v. Warren* (1898) 15 Times L. R. (C. A.) 365, that a boy working on a staging outside a ship, being engaged in assisting to screw up the doors of the ship after the loading was completed, was not within the statute, since the ship was not a "dock," and the staging was not machinery or plant used in the process of loading and unloading.

In *Hall v. Snowden* [1899] 2 Q. B.

pensation was recoverable where one of a gang of ship repairers fell from the gangway leading to the vessel, which was lying in the dock for repairs.⁵ This decision was construed to mean that every dock and wharf was a "factory," and all work of whatsoever kind done on a ship in a dock was within the statute.⁶

But in 1905 there was another House of Lords decision to the effect that the mere fact that a workman is injured while at work in a vessel which is floating in a dock does not entitle him to com-

136, where a carter who was engaged in removing soil from a wharf was injured while he was leading his horse at a point in the street immediately adjoining the wharf, it was held that the wharf was not a factory within the meaning of the statute, since no provisions of the factory acts were applicable to the wharf. Collins, L. J., said: "We must, I think, place a limited construction on § 18 of the act of 1895; the provisions of that section can only apply to a wharf when an accident has occurred on the wharf, which may then become a factory for the purposes of that section; but that was not the case here, and that section is inapplicable."

To the same general effect were the following Scotch decisions: *Low v. Abernethy* (1900) 2 Sc. Sess. Cas. 5th series, 722, 37 Scot. L. R. 506, 7 Scot. L. T. 423; *Jackson v. Rodgers* (1900) 2 Sc. Sess. Cas. 5th series, 533, 37 Scot. L. R. 390, 7 Scot. L. T. 76 (where the court emphasized the fact that the fitting of the engines in a steamer, the work in which the servant was engaged, was being done without the aid of any steam power); *Laing v. Young* (1900) 3 Sc. Sess. Cas. 5th series, 31, 38 Scot. L. R. 28, 8 Scot. L. T. 230 (act held not to be applicable to a lighter fitted with machinery, the property of and worked by stevedores, which was employed in raising goods from the hold to the deck of a vessel, moored between the lighter and the quay); *Healy v. Macgregor* (1900) 2 Sc. Sess. Cas. 5th series, 634, 37 Scot. L. R. 454, 7 Scot. L. T. 402 (act held not to be applicable where the work of loading or unloading a ship is done by servants on board her, and by means of her own machinery); *Aberdeen Steam Traveling & Fishing Co. v. Peters* (1899) 1 Sc. Sess. Cas. 5th series, 786, 36 Scot. L. R. 573, 6 Scot. L. T. 378 (act held not to be applicable to the work of loading or un-

loading machinery which forms part of the apparatus of a ship lying in a dock); *Aberdeen Steam Traveling Co. v. Kemp*, cited in Rugg, Employers' Liability, 4th ed. p. 211, note (x).

⁵ *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627.

The decision in *Merrill v. Wilson*, [1901] 1 K. B. 35, 70 L. J. Q. B. N. S. 97, 65 J. P. 53, 49 Week. Rep. 161, 83 L. T. N. S. 490, 17 Times L. R. 49, in which it was not disputed that the quay upon which the applicant was working in unloading a vessel was capable of being a factory, was approved, and the inference was drawn by later cases that the House of Lords intended to overrule the earlier decisions, which it was apparently assumed were in conflict with the decision, in *Raine v. Jobson*, but as a matter of fact the only mention of any of the earlier cases was a statement by one of the Lords that, as between *Merrill v. Wilson* and *Flowers v. Chambers*, *supra*, he preferred the former case.

⁶ Following *Raine v. Jobson*, it was held that every dock and wharf is a factory within the act. *Barrett v. Kemp Bros.* [1904] 1 K. B. 517, 73 L. J. K. B. N. S. 138, 68 J. P. 196, 52 Week. Rep. 257, 90 L. T. N. S. 305, 20 Times L. R. 162 (applicant was in employ of firm of contractors, and was at work on a private road leading to the wharf).

And in *Griffin v. Houlder Line* [1904] 1 K. B. 510, 73 L. J. K. B. N. S. 202, 68 J. P. 213, 52 Week. Rep. 323, 90 L. T. N. S. 142, 20 Times L. R. 255, it was held that a seaman injured while clearing out the hold of a vessel moored to buoys preparatory to going to sea was within the statute. This case was, however, subsequently reversed by the House of Lords. See note 7, *infra*.

pensation, and that a seaman injured while discharging his ordinary duties in such ship is not within the act.⁷

There is nothing apparently in the actual decision which conflicts with the earlier decision of the same court, but from the language used by the various judges it is exceedingly difficult to determine the precise ground of this decision. The following extract from the judgment of Romer, L. J., in the court of appeal,⁸ seems to be a fair

A workman engaged in loading or unloading a vessel lying in a dock is within the act. *Cattermole v. Atlantic Transport Co.* [1902] 1 K. B. 204, 50 Week. Rep. 129, 85 L. T. N. S. 513, 18 Times L. R. 102, 71 L. J. K. B. N. S. 173, 66 J. P. 4.

A ship which is being unloaded, while lying at quay, by means of a steamwinch derrick on board of it, is a factory. *Reid v. Anchor Line* (1903) 5 Sc. Sess. (as. 5th series, 435, 40 Scot. L. R. 352, 10 Scot. L. T. 591.

A firm of employers engaged in painting and plumbing a ship lying in a dock, who sent employees to do the work, are occupiers of the vessel, notwithstanding that some members of the crew were in charge of the ship for the owners. *Bartell v. Gray* [1902] 1 K. B. 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70.

A workman who had served as ship's carpenter on board a ship during one voyage, and was engaged for her next voyage, and in the interval between the voyages was employed by the shipowners in the work of repairing the ship, is, while engaged in unshackling the ship's cable, in order to turn it end for end, employed as a workman in the repair of a ship in or about a "factory," and the shipowners are liable to pay compensation, notwithstanding he was doing work that he might have been required to do at sea. *Cayzer v. Dickson* (1905) 7 Sc. Sess. Cas. 5th series, 723.

Lord McLaren said: "Comparing *Raine v. Jobson* with *Boulder Line v. Griffin*, it is plain that the supreme court of appeal has kept clearly in view the distinction between the case where the dock is hired by the shipowner for the purposes of repairing a ship, and the case where a ship is being repaired while lying in the water space of the dock, and surrounded by the structure of a dock which is un-

der the administration of a company or public body."

A laborer (not a seaman) employed to bring his employers' barges, which were kept in the employers' dock at night, from their places in the dock, when the dock gates were opened, alongside vessels in an adjoining river, for the purpose of taking cargo into the barges and bringing it back to the quay of the dock, to be there unloaded, is within the statute, since the dock is a "factory" and the employers are the "occupiers" of it. *Hanton v. North City Mill Co.* (1903) 2 I. R. 163.

⁷ *Houlder Line v. Griffin* [1905] A. C. 220. The Earl of Halsbury, L. C., said: "It appears to me that the court was misled by the case of *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, but in that case the persons sought to be made responsible, and held to be responsible, were persons who had hired the dock for the purpose of repairing a vessel, and whether there was a vessel in it or not, they were liable if a workman met with an accident in that dock while engaged in working there. The court there proceeded upon the assumption that the then defendants were in the use and occupation of a dock which they had hired, and the fact that there was the wooden structure of a ship in it, being repaired, did not prevent the application of the section which rendered the occupiers of a dock the occupiers of a factory within the meaning of the act. If in that case the then defendants had the actual use and occupation of the dock, as they clearly had, it was impossible to deny that they were 'the undertakers.' This is a totally different case, and does not come within the meaning of that decision."

⁸ *Smith v. Standard Steam Fishing Co.* [1906] 2 K. B. 275.

statement of the principles laid down in that decision: "Now it appears to me that the case is really governed by the principle of the decision in *Houlder Line v. Griffin* (*supra*); for, doing the best I can (and I hope I have been successful) to extract from the judgments of the majority of the Lords who decided that case, the principles upon which they decided it, I think it appears that two principles were laid down: (1) That seamen employed in performing their ordinary duties as seamen afloat and on board the ship were outside the general provisions of the workmen's compensation act 1897, unless, of course, there was anything special in their work to take them outside the ordinary position of seamen; and (2) that a ship afloat in a dock does not of necessity become part of the dock or premises within the dock, so that the owner of a ship which was afloat within a wet dock would not, merely because of that circumstance, become 'the person having the actual use or occupation of a dock or of any premises within the same or forming part thereof,' so as to be deemed to be the occupier of a factory. You must look, as I gather from that case, to the circumstance to see whether the owners have brought themselves or not, by something special that they are doing, within the operation of the act."

The lower courts, however, do not agree as to the precise grounds of this decision, and the practical effect, so far as the decisions following it are concerned, is to revert to the rules applied prior to the decision in *Raine v. Jobson*.⁹

⁹ A seaman employed on a steamer, who is injured while attending the boilers, is not entitled to compensation, although the vessel was, at the time, moored to a wharf, since the injury occurred while the applicant was attending to his usual duties as a seaman. *Owens v. Campbell* [1904] 2 K. B. 60, 73 L. J. K. B. N. S. 634, 68 J. P. 410, 52 Week. Rep. 481, 90 L. T. N. S. 811, 20 Times L. R. 459. This decision is squarely in line with the actual decision of the House of Lords in *Houlder Line v. Griffin*.

In *Smith v. Standard Steam Fishing Co.* [1906] 2 K. B. 275, 75 L. J. K. B. N. S. 640, 54 Week. Rep. 582, 95 L. T. N. S. 42, 22 Times L. R. 578, following *Houlder Line v. Griffin*, the actual decision was that a carpenter engaged in repairing a trawl board of a steam trawl moored to a jetty was not entitled to compensation for injuries received while engaged in that duty. It

appears from the judgments given that one of the judges based the decision upon the ground that the carpenter was not injured while on the stone structure adjacent to the water, but in the ship, which was entirely water borne, while another judge apparently based his judgment upon the ground that since the trawl was floating in the water, the owners of it could not be said to be persons having the actual use or occupation of a dock.

And a "rigger" on a vessel in a dock is not at work "in, on, or about" a "factory." *Thompson v. Sinclair* [1906] 2 K. B. 278, note.

And in another case the same court held that millwrights who sent an employee onto a vessel in a dry dock to make some repairs in connection with the insulating of the refrigerators of the vessel are not the occupiers of a factory, and therefore not undertakers within the meaning of the act. *Burdon v.*

b. Warehouse.—In one case it was urged that the leading idea of the section (104) in which this expression is used was indicated by the preceding words “dock, wharf, or quay,” and that the doctrine of *ejusdem generis* required that a warehouse, in order to be a factory within this section, should be near water. But the contention did not prevail.¹⁰

In one case the term “warehouse” was held to involve the idea of “a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise.”¹¹

A place used in connection with a wholesale business for the purpose of storing goods is a warehouse;¹² but if the storage of goods is

Gregson [1906] 2 K. B. 283, 75 L. J. K. B. N. S. 644, 95 L. T. N. S. 45.

In *Hanford v. Clark* [1907] 2 K. B. 409, where compensation was denied an employee of engine makers who was injured while at work on an engine in a vessel, the court said: “The mere fact that a vessel is moored alongside a quay is not of itself enough to make the person who meets with an accident in the ship employed in, on, or about a factory.” See also *Harrison v. Oceanic Steam Nav. Co.* [1907] 2 K. B. 420 note, 97 L. T. N. S. 466 (workman injured while replacing shaft in ship, denied compensation). In the latter decision the expression that a ship was a factory was criticized; all that had ever been decided was that a dock might be a factory, and consequently a workman in a ship in a dock might be employed “in a factory.”

Fireman engaged in such ordinary work as sponging the tubes of a steamship's boiler, while it is lying in a dock, cannot recover on the ground that the ship was at the time a “factory.” *Coyne v. Glasgow S. Coasters Co.* (1906-1907) Sc. Sess. Cas. 112. Lord Kylliech said: “It is the dock which, under the act, is the factory. The ship comes in only when it becomes constructively part of the dock. Now the repairs here in question involved no use of the docks at all. They had no connection with the dock or the ship's presence in the dock.” Lord Atwell said: “I think that it was incumbent upon the applicant to show that this dock was factory for one of two reasons: either that it was then

being occupied for the purpose of loading or unloading, and that the accident occurred in the course of loading or unloading the particular ship; or otherwise, that it was being used for proper factory work, such as repairing the ship or the ship's machinery; and repairing in the proper sense of the term; viz., executing such repairs as are not merely incidental to every voyage on which the ship is engaged, but such as might be let out to a proper contractor or engineer to perform.”

Ship repairers while at work on a vessel in a wet dock are not the occupiers of the dock. *Morgan v. Tydvil Engineering & Ship Repairing Co.* (1908) 98 L. T. N. S. 762, 24 Times L. R. 403 (employee of ship repairers was taking notes of work to be done). It is to be noted that in this decision of the House of Lords there is nothing conflicting with either of the earlier decisions.

¹⁰ *Willmott v. Paton* [1902] 1 K. B. 237, 71 L. J. K. B. N. S. 1, 66 J. P. 197, 50 Week. Rep. 148, 85 L. T. N. S. 569, 18 Times L. R. 48 (holding that a yard or depot 5 acres in extent, and having sheds upon it, which was used for storing old iron, is a warehouse).

In *M'Ewan v. Perth* (1905) 7 Sc. Sess. Cas. 5th series, 714, the term “warehouse” was construed as meaning only a warehouse connected with shipping work.

¹¹ *Colvine v. Anderson & Gibb* (1902) 5 Sc. Sess. Cas. 5th series, 255, 40 Scott. L. R. 231, 10 Scot. L. T. 482.

¹² *Green v. Britten* [1904] 1 K. B.

merely ancillary to a retail business, the place where they are stored is not a warehouse.¹³

An open space is not a warehouse simply because it is used for the storage of goods.¹⁴

A transit shed on a dock, taken by the postoffice for the storage of parcels during the Christmas season, is a factory, so that an employee of a firm of carriers employed by the postoffice, who is injured while at work therein, is within the act.¹⁵

c. "*Machinery used in the process of loading or unloading a ship.*" —These words import either a landing of something from a ship, or a loading on the ship from the land.¹⁶ They are sufficiently comprehensive to cover the work of replacing the iron beams across a

350, 73 L. J. K. B. N. S. 126, 68 J. P. 139, 52 Week. Rep. 198, 89 L. T. N. S. 713, 20 Times L. R. 116.

¹³ A loft used for the storage of goods sold by a co-operative store in the ordinary course of business, storage being merely ancillary to the business carried on, is not a warehouse. *Hunt v. Grant-ham Co-op. Soc.* (1904) 112 L. T. (County Ct.) 364.

Where the storage of goods is merely ancillary to the general business of a retail store, it is not a warehouse merely because goods are stored on the premises. *Burr v. William Whiteley* (1902) 19 Times L. R. (C. A.) 117.

A shop in which nearly all the business done is retail although considerable quantities of goods are stored on the premises is not a warehouse. *Clark v. Hume* (1902) 5 Sc. Sess. Cas. 5th series, 252, 40 Scot. L. R. 229, 10 Scot. L. T. 509. To the same effect was the decision in *Colvine v. Anderson & Gibb* (1902) 5 Sc. Sess. Cas. 5th series, 255, 40 Scot. L. R. 231, 10 Scot. L. T. 482, in which Lord Kinross said: "While it may be difficult to define 'warehouse,' I am of opinion that, as used in the act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of the goods in bulk or in large quantities might naturally arise."

But in *Moreton v. Reeve* [1907] 2 K. B. 401, 76 L. J. K. B. N. S. 850, 97 L. T. N. S. 63, it was said that there is no absolute rule of law that a store attached to a retail business cannot be a warehouse within the workmen's com-

pensation act, and the case was sent back to the county court judge because he had so held. In this case the respondent was a furniture dealer having two shops in different streets and also a building consisting of two stories, which he called a warehouse, in which he kept old furniture which he repaired, and also a quantity of new furniture; the respondent also kept materials for repairs in the building in large quantities. The court of appeal said that such a building might be found to be warehouse.

¹⁴ An uncovered yard used to store material for the repair of roads and drains and for other works executed by the owners is not a warehouse in the ordinary sense of the word, and therefore not a factory within the meaning of the workmen's compensation act 1897. *M'Ewan v. Perth* (1905) 7 Sc. Sess. Cas. 5th series, 714.

So, a dumping ground is not a warehouse or factory, even if some of the old material is sometimes sold. *Buckingham v. Fulham* (1905) 69 J. P. 297, 53 Week. Rep. 628, 21 Times L. R. 511, 3 L. G. R. 926.

¹⁵ *Fogarty v. Wallis* (1903) 2 I. R. 522.

¹⁶ Where a ship was unloading in a dock by means of a crane on the quay hired by her owners, and a workman employed by them in unloading her was killed by the explosion of a case of percussion caps which he was placing in a basket attached to the chain of a crane for the purpose of its being hoisted out of the ship onto the quay, it was held that the accident arose out of, and in the course of, the workman's employ-

hatchway after the actual stowing of the goods has been completed.¹⁷ But they are not applicable to a steam winch on a ship's deck, which is being used for the purpose of loading goods from a lighter;¹⁸ nor to gangway doors through which cargo is taken into or discharged from a ship;¹⁹ nor to a staging outside a ship, on which the servant was standing to screw up the iron doors of a ship after the loading was completed.²⁰

d. "*Machinery temporarily used for the purpose of the construction of a building.*"—With reference to the clause of which these words form a portion, it was in one case held that an engine shed and room containing a steam engine connected with a mortar pan for mixing mortar for use on a building near at hand was a "factory" within the meaning of the workmen's compensation act.²¹

e. *Laundries carried on by way of trade or for purposes of gain.*—A laundry which is merely ancillary to some other business is not a "factory" within the act.²²

ment on or about machinery used in the process of unloading to a quay within the meaning of the act of 1897. *Woodham v. Atlantic Transport Co.* [1899] 1 Q. B. (C. A.) 15, 68 L. J. Q. B. N. S. 17, 79 L. T. N. S. 395, 47 Week. Rep. 105, 15 Times L. R. 51.

This decision was followed in another, where a workman was killed while engaged in making up sets of bags to be hoisted from the hold of a ship by means of a crane operated by a man on the quay. *Lawson v. Atlantic Transport Co.* (1900) 82 L. T. N. S. (C. A.) 77, 16 Times L. R. 181.

A factory includes machinery used to unload a ship in a navigable river. *Stevens v. General Steam Nav. Co.* [1903] 1 K. B. 890, 72 L. J. K. B. N. S. 417, 67 J. P. 415, 51 Week. Rep. 578, 88 L. T. N. S. 542, 19 Times L. R. 418. It was there held that the modification mentioned in the interpretation act 1889 includes additions; and that consequently, in the definition of a "factory" in the workmen's compensation act 1897, the reference to the factory and workshop act 1895 must be construed as if it were a reference to the provisions of § 104 of the factory and workshop act 1901, so as to include in the definition, among other things, machinery used in the process of unloading a ship in a navigable river.

¹⁷ *Stuart v. Nixon* [1901] A. C. 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49

Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156.

¹⁸ *Hennessey v. McCabe* [1900] 1 Q. B. 491. Collins, J., said: "The statute is so drawn that it is difficult to discover what it really means, and it is indeed not easy to deal with it upon the broad ground of common sense."

¹⁹ *Medd v. MacIver* (1899) 15 Times L. R. (C. A.) 364.

²⁰ *Durrie v. Warren* (1899) 15 Times L. R. (C. A.) 365.

²¹ *McNicholas v. Dawson* [1899] 1 Q. B. (C. A.) 773, 68 L. J. Q. B. N. S. 470.

²² In *Caledonian R. Co. v. Paterson* (1898) 1 Sc. Sess. Cas. 5th series (Just. Cas.) 26, 36 Scot. L. R. 60, 6 Scot. L. T. 194, 2 Adam, 620, it was held that a laundry attached to a hotel in which was done the work of washing the hotel linen, the clothes of the hotel servants without charge and as a part of their remuneration, and of the clothing of visitors, who paid per article in the ordinary way, was not within the factory act 1895, § 22 (1), which declares that, so far as regards sanitary provision, etc., the factory act should apply to "any laundry carried on by way of trade or for purposes of gain." Lord Travnor, referring to the work done for visitors, said: "It is done as a convenience for persons resident in the house, and who expect such an accommodation from the servants of the house they live in for the time. But affording

1873. "Occupier of a factory," when a person is deemed to be.—Shipowners who, while acting as their own stevedores, have the temporary use of a part of a quay for the purpose of unloading a ship, are occupiers of a factory.¹ Stevedores loading a vessel in a dock by means of machinery are the occupiers of a factory, namely, the machinery, within the factory act.² And the occupants of a small hut on a dock, engaged in supplying horses and men for hauling wagons loaded with coal, are "occupiers" of the dock.³ But a person who has a mere casual interest in a warehouse by being the owner or purchaser of a parcel of goods stored therein is not an "occupier" thereof.⁴

Persons engaged in repairing a factory or the machinery in it are not "occupiers" of a factory.⁵ Persons engaged in repairing or putting machinery into a ship are not "occupiers" of the dock.⁶ Per-

such an accommodation or convenience can scarcely with propriety be termed carrying on a laundry for the purposes of gain. I regard the statutory provisions as intended to apply to a laundry to which anyone may resort, and which holds itself out as a place where anyone, for certain charges, can have laundry work done."

¹In *Merrill v. Wilson Sons & Co.* [1901] 1 K. B. 35, 17 Times L. R. 49, 70 L. J. Q. B. N. S. 97, 65 J. P. 53, 49 Week. Rep. 161, 83 L. T. N. S. 490, it was held that where the owners of a ship moored alongside of a quay had the use of a portion of the quay alongside of which their ship lay for the purpose of unloading the ship's cargo, they have the "actual use" of a portion of the quay, and consequently are occupiers of it.

In *Hainsborough v. Ralli Bros.* (1902) 18 Times L. R. 21, it was held that the consignees of a cargo of wheat, who were also the owners of the vessel in which the wheat was carried, are the occupiers of the quay alongside of which the vessel is lying while being unloaded.

²*Stuart v. Nixon* [1901] A. C. 79, 70 L. J. Q. B. N. S. 170, 65 J. P. 388, 49 Week. Rep. 636, 84 L. T. N. S. 65, 17 Times L. R. 156.

In *Carrington v. Bannister* [1901] 1 Q. B. (C. A.) 20, 70 L. J. Q. B. N. S. 31, 83 L. T. N. S. 457, it was held that the person having possession and sole control of machinery which was in use in the process of loading a ship from the quay is the occupier of a factory.

³*Pacific Steam Nav. Co. v. Pugh* (1907) 23 Times L. R. 622.

⁴*Ramsay v. Mackie* (1904) 7 Sc. Sess. Cas. 5th series. 106.

⁵*Purves v. Sterne & Co.* (1900) 2 Sc. Sess. Cas. 5th series. 887, 27 Scot. L. R. 696 (installing machinery).

In *Francis v. Turner Bros.* [1900] 1 Q. B. 478, 69 L. J. Q. B. N. S. 182, 64 J. P. 53, 48 Week. Rep. 228, 81 L. T. N. S. 770, 16 Times L. R. 105, it was held that employers who send a workman on their business to the factory of a third party are not, while the workman is engaged therein, the occupiers of said factory.

And in *Cooper v. Adam* (1905) 7 Sc. Sess. Cas. 5th series, 681, it was held that a firm of boiler makers were not "occupiers" of a factory while repairing a boiler in a spinning mill belonging to another person.

In *Malcolm v. McMillan* (1900) 2 Sc. Sess. Cas. 5th series, 525, 37 Scot. L. R. 383, 7 Scot. L. T. 364, it was held that an iron founder was not liable to the widow of a workman who was killed by falling from a scaffold while he was doing some work in a soap factory to which he had been sent for that purpose.

⁶Ship repairers, while at work on a vessel in a wet dock, are not the "occupiers" of the dock. *Morgan v. Tydvil Engineering & Ship Repairing Co.* (1908) 98 L. T. N. S. 762, 24 Times L. R. 403.

In *Handford v. Clark* [1907] 2 K. B. 409, 76 L. J. K. B. N. S. 958, 97 L. T. N. S. 124, it was held that a firm of

sons under contract to furnish coal to vessels in a dock are not, merely because of that, occupiers of the dock.⁷

To render an employer an occupier, his possession need not be exclusive, but only sufficient for doing the work in hand.⁸

marine engine builders are not the "occupiers" of a factory while installing machinery in a vessel.

Millwrights who send an employee onto a vessel in a dry dock to make some repairs in connection with the insulating of the refrigerators of the vessel are not the "occupiers" of a factory. *Burdon v. Gregson* [1906] 2 K. B. 283, 75 L. J. K. B. N. S. 744, 95 L. T. N. S. 45.

In *Low v. Abernathy* (1900) 2 Sc. Sess. Cas. 5th series, 722, 37 Scot. L. R. 506, 7 Scot. L. T. 423, it was held that the mere fact that a steamship was lying in a dock while a workman employed by a firm of engineers was engaged in repairing the boilers did not make the firm "occupiers" of the dock.

⁷In *Stewart v. Darngavil Coal Co.* (1902) 4 Sc. Sess. Cas. 5th series, 425, 39 Scot. L. R. 302, 9 Scot. L. T. 378, it was held that a coal dealer who was under contract to deliver coal to the steamers of a packet company at a particular berth, who sends the coal from his own premises to the dock when required, is not the occupier of the dock.

So, in *Bruce v. Henry* (1900) 2 Sc. Sess. Cas. 5th series, 717, 37 Scot. L. R. 511, 7 Scot. L. T. 421, it was held that shipping agents who had contracted with the owners of a vessel lying at a dock to load her were not the "occupiers" of the dock.

A steamship company is not an "occupier" of a quay within the sense of § 7, subsec. 2, of the act, so as to be liable for compensation to the servant of a contractor engaged in trimming coal on the wharf, preparatory to putting it on board one of the company's vessels, which had not yet arrived, although a particular berth in the harbor was allowed the company for loading and unloading its vessels, and it had an office and a staff of servants constantly employed in the receipt and discharge of cargo, where the same berth was also used by another steamship company, which also had an office there, and when the berth was not required by either of these companies the harbor master allowed other vessels to load or discharge

at the berth. *Stewart v. Dublin & G. Steam Packet Co.* (1902) 5 Sc. Sess. Cas. 5th series, 57, 40 Scot. L. R. 41, 10 Scot. L. T. 343.

⁸A firm of employers engaged in painting and plumbing a ship lying in a dock, who sent employees to do the work, are occupiers of the vessel, notwithstanding that some members of the crew were in charge of the ship for the owners. *Bartell v. Gray* [1902] 1 K. B. 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70. A similar doctrine was laid down in *Jackson v. Rodger* (1889) 1 Sc. Sess. Cas. 5th series, 1053, 36 Scot. L. R. 851, 7 Scot. L. T. 76.

The decision in *Bartell v. Gray* was based upon *Raine v. Jobson* [1901] A. C. 404, 70 L. J. K. B. N. S. 771, 49 Week. Rep. 705, 85 L. T. N. S. 141, 17 Times L. R. 627, the effect of which was greatly modified by later decisions. See § 1872, *ante*. The ultimate decision in the *Bartell* Case is apparently in conflict with other decisions cited *supra*.

Persons who had entered into a contract to erect pigeon-holes in what was admittedly a warehouse within the act, and who had such use or occupation of the premises as was necessary for the performance of that work, which was essential to the use of the warehouse for the purposes for which it was required by the government, are the occupiers of the warehouse within the meaning of the act. *Weavings v. Kirk* [1904] 1 K. B. 216, 73 L. J. K. B. N. S. 77, 68 J. P. 91, 52 Week. Rep. 209, 89 L. T. N. S. 577, 20 Times L. R. 152. Collins, M. R., said: "It appears to me that this question is really decided by the case of *Bartell v. Gray* [1902] 1 K. B. 225, 71 L. J. K. B. N. S. 115, 66 J. P. 308, 50 Week. Rep. 310, 85 L. T. N. S. 658, 18 Times L. R. 70. The respondents in this case had all such occupation of a considerable space in a warehouse as was necessary to enable them to carry out the work which they had contracted to do. It was argued that they did not occupy any part of the warehouse *qua* warehouse. I do not

1874. Establishments embraced within the purview of American statutes.—In some instances the descriptions of establishments to which the statutes are applicable are defined by general interpretation clauses.¹

know that it is necessary that they should so occupy for the purposes of the act, or that we ought to go beyond the words of the section itself in this respect; but, assuming that it is necessary, it is essential to the existence of a warehouse, and its use as such for the purposes for which it is required, that works or repairs of the kind which the respondents had contracted to do should be performed within it."

¹*Colorado*.—Anno. Stat. 1911, chap. 47a, which is the factory act of that state, specifically refers in the various provisions to "factories, mills, workshops, bakeries, laundries, stores, hotels, or any kind of an establishment wherein laborers are employed or machinery used."

Sec. 2506L (act of 1911, § 11). Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and in addition to the foregoing, any other kind or character of manufacturing establishment wherein any natural product or articles or materials of any kind in a raw or unfinished or incomplete state or condition are converted into a new or improved or different form.

Illinois.—Hurd's Rev. Stat. 1908, p. 1037 (Laws of 1893, p. 69). The words "manufacturing establishment," "factory," or "workshop," wherever used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages. Whenever any house, room, or place is used for the purpose of carrying on any process of making, altering, repairing, or finishing for sale or for wages any coats, vests, trousers, knee pants, overalls, cloaks, shirts, ladies' waists, purses, feathers, artificial flowers, or cigars, or any wearing apparel of any kind whatsoever, intended for sale, it shall, within the meaning of this act, be deemed a workshop for the purposes of inspection. And it shall be the duty of every person, firm, or corporation to keep a complete list of all

such workshops in his, their, or its employ, and such list shall be produced for inspection on demand by the board of health or any of the officers thereof, or by the state inspector, assistant inspector, or any of the deputies appointed under this act.

P. 1039 (Laws of 1897, p. 90). The words "manufacturing establishment," "factory," or "workshop," as used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, dyed, cleaned, or sorted, stored or packed, in whole or in part, for sale or for wages, and not for personal use of the maker, or his or her family or employer.

Kansas.—Gen. Stat. 1909, § 4682. Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form.

Massachusetts.—Rev. Laws 1902, chap. 106, § 8. "Workshop" shall mean any premises, room, or place, which is not a "factory," wherein manual labor is exercised by way of trade or for purposes of gain in or incidental to a process of making, altering, repairing, ornamenting, finishing, or adapting for sale any article or part of an article, and to which or over which premises the employer of the persons working therein has the right of access or control; but the exercise of such manual labor in a private house or private room by the family dwelling therein or by any of them, or, if a majority of the persons therein employed are members of such family, shall not of itself constitute such house or room a "workshop."

"Mercantile establishment" means any premises used for the purposes of trade

In others the scope of the statutes is fixed by the expression or expressions used in the enacting clauses themselves. If the generic

in the purchase or sale of any goods or merchandise, and any premises used for the purposes of a restaurant, or for publicly providing and serving meals.

"Factory" means any premises where steam, water, or other mechanical power is used in aid of any manufacturing process there carried on.

Mississippi.—Laws 1908, chap. 99, § 9. With regard to child labor, it is declared that the provisions of the act apply only to manufacturing establishments engaged in manufacturing cotton, wool, or other fabrics, and to those in which children are employed indoors at work injurious to health, or in operating dangerous machinery.

Louisiana.—Wolf's Rev. Laws 1904–1908, p. 506; Laws 1904, No. 30, p. 37, § 2. That, in the foregoing section, the words or expression "manufacturing or industrial establishment" shall embrace and include any and all mills, factories, manufactories, chemical works, foundries, machine shops, repair shops, distilleries, and establishments for printing, or publishing, or bookbinding, or woodworking, or making, manufacturing, or compounding any article or substance used in trade or commerce; and the words or expression "machinery and appliances" shall include and embrace any and all boilers, engines, motors, shafting, wiring, fixtures, machines, presses, type, tools, rollers, filters, mixers, retorts, devices, apparatus, and appurtenances of every kind and character used in such establishments.

Minnesota.—Rev. Stat. Supp. 1909, § 1797. The words "factory" and "mill," as used in this chapter, shall mean any premises where water, steam, or other mechanical power is used in aid of any manufacturing or printing process there carried on. The term "workshop," as so used, shall mean any premises, room, or place, not factory or mill as above defined, wherein manual labor is exercised by way of trade, or for purposes of making, altering, repairing, cleaning, ornamenting, finishing, or adapting for sale any article or part thereof, and to or over which premises, room, or place, the employer of such labor has the right of access or control; but the exercise of such labor in a private house or room by members of the family dwelling

therein, or by persons, a majority of whom are members of such family, shall not of itself constitute such house or room a workshop. The term "engineering work," as so used, shall mean any work of construction, operation, alteration, or repair of a railroad or street railway, of the works of any gas, telephone, telegraph, water, electric light, or mining company, or upon any sewer, bridge, tunnel, or building erected by a municipality. But nothing herein shall interfere with the powers conferred by law upon the board of railroad and warehouse commissioners.

Missouri.—Mo. Rev. Stat. 1909, § 7861. The following expressions used in this article shall have the following meanings: The expression "person" means any individual, corporation, partnership, company, or association. The expression "child" means a person under the age of fourteen years. The expression "young person" means a person of the age of fourteen years and under the age of eighteen years. The expression "woman" means a woman of the age of eighteen years and upward. The expression "factory" means any premises where steam, water, or other mechanical power is used in aid of any manufacturing process there carried on. The expression "workshop" means any premises, room, or place, not being a factory as above defined, wherein any manual labor is exercised by way of trade, or for purposes of gain, in or incidental to any process of making, altering, repairing, ornamenting, finishing, or adapting for sale any article or part of an article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control: Provided, however, that the exercise of manual labor in a private house or room by a family dwelling therein shall not in itself constitute such house or room a workshop within this definition. (Rev. Stat. 1899, § 10,104.)

New York.—Labor law 1909, § 2. The term "employee," when used in this chapter, means a mechanic, workman, or laborer who works for another for hire.

The term "employer," when used in this chapter, means the person employ-

term "factory" is used, it is construed in its ordinary sense as an industrial establishment in which the work carried on is entirely or mainly concerned with the making, not the selling, of certain articles.²

ing any such mechanic, workingman, or laborer, whether the owner, proprietor, agent, superintendent, foreman, or other subordinate.

The term "factory," when used in this chapter, shall be construed to include also any mill, workshop, or other manufacturing or business establishment where one or more persons are employed at labor.

The term "mercantile establishment," when used in this chapter, means any place where goods, wares, or merchandise are offered for sale.

The term "tenement house," when used in this chapter, means any house or building, or portion thereof, which is rented, leased, let, or hired out, to be occupied, or is occupied, as the home or residence of three families or more, living independently of each other, and doing their cooking upon the premises, and having a common right in the halls, stairways, yards, water-closets or privies, or some of them, and for the purposes of this chapter shall be construed to include any building on the same lot with any dwelling house, and which is used for any of the purposes specified in § 100 of this chapter.

Sec. 94. A tenant-factory within the meaning of the term as used in the labor law is a building, separate parts of which are occupied and used by different persons, and one or more of which parts is used so as to constitute in law a factory.

Ohio.—Gen. Code 1910, § 1002. The term "shops and factories" shall include the following establishments: Manufacturing, mechanical, electrical, mercantile, art, and laundering establishments, telegraph and telephone offices, railroad depots, hotels, memorial buildings, tenements and department houses. (90 v. 190, § 2573a.)

Sec. 1005. The term "manufacturer," as used in the preceding two sections, shall include a person who, as owner, manager, assignee, receiver, contractor, or as agent, makes or causes to be made, or deals in, any kind of goods or merchandise, or who controls or operates a street railway or laundering

establishment, or who is engaged in the construction of buildings, bridges, or other structures, or in loading or unloading vessels or cars, moving heavy materials, or operating dangerous machinery, or engaged in the manufacture or use of explosives. (93 v. 43, § 2.)

Sec. 1023. If more than one room is used under the direction of one employer engaged in the manufacture of wearing apparel or tobacco goods, each room shall be regarded as a factory in the application of the statute respecting sanitary conditions.

Oklahoma.—Comp. Laws 1909, § 4028 (Laws of 1907-8, p. 508). The words "manufacturing establishments," "factory," or "workshop," whenever used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned, or sorted, in whole or in part, for sale or for wages.

Pennsylvania.—Purdon's Dig. Supp. 1905-1909, p. 5482, § 1 (Laws 1905, P. L. 352, § 1). The word "establishment," when used in the factory act, shall mean any place other than where domestic, coal mining, or farm labor is employed, where men, women, and children are engaged and paid a salary or wages by any person, firm, or corporation, and where such men, women, or children are employees in the general acceptance of the term.

Wisconsin.—Sanborn & S. Stat. Supp. 1906, § 1728. The words "manufacturing establishment," "factory," or "workshop," as used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, dyed, cleaned, or sorted, stored or packed, in whole or in part, for sale or for wages, and not for the personal use of the maker or his or her family or employer.

² A druggist's establishment in which the only part of the wares manufactured is that which is produced in a laboratory, the entire output being only about 2 per cent of the business, is not a "factory" within the meaning of a statute requiring fire escapes. *Hernis-*

It has been held that these acts embrace a railway repair shop;³ grain elevators;⁴ detached engine houses;⁵ premises where scrap metal is put into marketable condition;⁶ premises in which engines, pumps, fans, etc., are manufactured;⁷ premises on which garters and hose supporters are manufactured;⁸ a commercial ice house.⁹ But the New Jersey act has been held not to apply to shafting and other appliances used to gather natural ice.¹⁰ It has been held that it is for the court to say what significance should be given to the word "manufacturing," as used in the Illinois fire-escape law of 1885, but after the definition is given by the court, it is for the jury to say whether a particular building was used for manufacturing purposes.¹¹

chel v. Texas Drug Co. (1901) 26 Tex. Civ. App. 1, 61 S. W. 419.

³ A shop maintained by a street railroad company, where the principal work was in the way of repair for the purpose of keeping the cars and other appliances in condition to carry on the business of the company, is within the statute as a "workshop." *Hoffmeyer v. State* (1906) 37 Ind. App. 526, 77 N. E. 372. The court said: "We cannot admit that the legislature intended to be less mindful of the employer of hired labor in a shop where repair work only is done than when the same laborer is employed in an establishment engaged in manufacturing articles from raw material, when in both places the same conditions exist as to machinery and the hazards encountered."

⁴ Minn. Rev. Laws 1905, § 1814, requiring the owner of every factory, mill, or workshop to furnish, if practicable, belt shifters for the purpose of shifting belts, applies to the owners of grain elevators. *Sorseleil v. Red Lake Falls Mill Co.* (1910) 111 Minn. 275, 126 N. W. 903.

In *Hahn v. Plymouth Elevator Co.* (1907) 101 Minn. 58, 111 N. W. 841, it was assumed by the court and counsel that the statute applied to grain elevators.

⁵ A detached pumphouse containing an engine and a pump constitute a factory, mill, or workshop within the Iowa statute. *Thomas v. Chicago G. W. R. Co.* (1910) 112 Minn. 360, 128 N. W. 297.

A small engine house is included in "factory, mill, or shop." *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1909) 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

⁶ An establishment wherein railroad iron, old stoves, old waste iron and scrap iron of every description is cut into lengths known as grade No. 1, grade No. 2, and busheling scrap, by means of machines known as alligator shears and operated by power, to meet standing specifications of mills which purchase the product, is a "manufacturing establishment" within the meaning of the factory act. *Caspar v. Levin* (1910) 82 Kan. 604, — L.R.A.(N.S.) —, 109 Pac. 657.

⁷ *Crawford & M. Co. v. Gose* (1907) — Ind. App. —, 82 N. E. 984.

⁸ *Landgraf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501.

⁹ A commercial ice house, which is extensively equipped with machinery, and in which numerous operators are employed, is a "factory" within Laws (N. Y.) 1898, chap. 415. *Rabe v. Consolidated Ice Co.* (1902) 51 C. C. A. 535, 113 Fed. 905.

¹⁰ *Griffith v. Mountain Ice Co.* (1907) 74 N. J. L. 272, 65 Atl. 853. The court said: "We think that the defendant's plant does not come within the statutory language 'factories and workshops,' not only because those words import a building in which the machinery is so placed as to be dangerous to operatives, but, also, and chiefly, because such words in their statutory context imply that the places to which they refer are those where machinery is employed in the work of fabrication; i. e., of making or manufacturing something. Such is the common meaning of a factory or workshop."

¹¹ *Landgraf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501.

1875. —of statutes in the British colonies.—In a few of the British colonies, the statutes themselves define the places to which they are applicable.

Ontario.—Rev. Stat. 1897, chap. 256, § 2. “Factory” shall mean:

(a) Any building, workshop, structure, or premises of the description mentioned in schedule A to this act, together with such other building, structure, or premises as the Lieutenant Governor in Council from time to time adds to the said schedule; and the Lieutenant Governor in Council may, from time to time, by proclamation published in the Ontario Gazette, add to or remove from the said schedule such description of premises as he deems necessary or proper.

(b) Any premises, building, workshop, structure, room, or place wherein, or within the precincts of which, steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incidental to the preparing, manufacturing, or finishing of any article, substance, material, fabric, or compound, or is used to aid the manufacturing process carried on there.

(c) Any premises, building, workshop, structure, room, or place wherein the employer of the persons working there has the right of access and control, and in which, or within the precincts of which, any manual labor is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them, that is to say: the making of any article or part of any article; the altering, repairing, ornamenting, or finishing of any article; or the adapting for sale of any article.

Rev. Stat. 1897, chap. 257, § 4. “Shop” shall mean any building or portion of a building, booth, stall, or place where goods are handled or exposed or offered for sale, and any such building, or portion of a building, booth, stall, or place where goods are manufactured, and to which the Ontario factories act does not apply, and laundries wherein neither steam, water power, nor electric power is used in aid of the work carried on; but shall not include any place where the only trade or business carried on is that of a tobacconist, news agent, hotel, inn, tavern, or any premises wherein under license, spirituous or fermented liquor is sold by retail for consumption on the premises.

Quebec.—Industrial establishment act, 57 Vict. chap. 30 (which supersedes the earlier factories act, § 3019). The expression “industrial establishment” or “establishment” is defined as meaning “manufactories, works, workshops, work-yards, mills of all kinds, and their dependencies.”

New Zealand.—Factory act 1894. The expressions “factory” or “workshop” were defined as “any office, building, or place in which two or more persons are engaged, directly or indirectly, in working for hire or reward in any handicraft.”

Amendatory act of 1896, § 2. “The following provisions shall apply in the case of occupiers of factories or workrooms in which textile goods are manufactured or worked upon, and also in the case of persons who issue textile or shoddy materials, for the purpose specified in § 23 of the principal act” (*i. e.*, of being made up by pieceworkers or home workers), “and are thereby deemed to be occupiers of factories for the purposes and within the meaning of that section:—

(1) In any case, where any such occupier of a factory or workroom lets or gives out work in connection with such goods or material to be done by any

person elsewhere than in such factory or workroom, or issues such material for the purpose of being made up by the persons referred to in the aforesaid § 23, it shall not be lawful for any such person—

(a) To in any way, directly or indirectly, sublet any such work, whether by way of piecework or otherwise; nor

(b) To in any way do such work except on his own premises, and by himself or by his own workpeople, to whom he pays wages therefor.

Factories act 1901, § 2, subsec. 3. One of the definitions of "factory" is: "Every building or place in which steam or other mechanical power or appliance is used for the purpose of preparing or manufacturing goods for trade or sale, or packing such goods for transit."

A few cases construing these or similar provisions are cited below.¹

¹ A registered occupier of a factory regularly employing a number of persons, and to whom shirting is issued by merchants for the purpose of being made up into shirts, the occupier furnishing other materials and being paid at so much per dozen, is, by virtue of the last clause of § 23 of "the factories act 1894," which provides that "every merchants, etc., who shall issue textile or shoddy material for the purpose of being made up by pieceworkers or home workers into articles for sale, shall be deemed to be the occupier of a factory for the purposes and within the meaning of this section," and § 2 of the amendment of 1896, prohibiting from subletting any part of such work or doing any part of it in any way except on his own premises, and by himself and his own workpeople to whom he pays wages. *Mayer v. Shanaghan* (1897) 16 New Zeal. L. R. 442. The court said: "The section defines two classes of persons,—namely, persons to whom work is let out by the actual occupier of a factory, and persons to whom material is given out to be worked up, whether by the actual occupier of a factory or not."

On the ground that the word "handicraft," as here used, must be construed in its popular sense, it has been held that the room of a dentist where apprentices are employed at weekly wages in carrying on the mechanical work of the business is a "factory." *Armstrong v. Maxwell* (1895) 13 New Zeal. L. R. 636.

The defendant occupied, as manager of a shipping company, a building where bales of wool and flaxseed were "dumped" (*i. e.*, compressed), for the

purpose of reducing their bulk, this work being performed by means of a gas engine in the building. Held, that this process was "packing goods for transit." *Haggen v. Bennet* (1908) 27 New Zeal. L. R. 503.

The proprietor of a private hotel business is not a "hotel keeper" within the meaning of § 15, clause (a), par. 2, which enumerates certain excepted descriptions of business. Accordingly, if he combines with that business the business of a restaurant keeper, he is within the provisions of clause (a), par. 1 of section 15, and is bound to give each assistant employed in his refreshment room a half holiday in each week, on such day in the case of each assistant as he may think fit. *Pinnock v. Aldridge* (1907) 27 New Zeal. L. R. 341. The court said: "The object of the statute was to give each assistant in all the excepted trades a half holiday on some day in the week, optional to the employer, but to take away that privilege if he combined with the excepted business some other business within the provisions of § 4, and outside the exceptions of § 15."

A refreshment room or restaurant is a "shop," within the meaning of the shops and offices act 1904, whether the refreshments there sold are to be consumed on or off the premises. *Aldridge v. Fairway* (1907) 27 New Zeal. L. R. 333.

Where sleepers are made or altered directly for purposes of gain, though not for purposes of trade or sale, the premises upon which the work is done is a factory within the definition in § 2 of the act. *Ross v. Smith* (1909) S. Austr. L. R. 128.

In *Alderson v. Gold* (1909) Vict. L. R. 219, premises on which workpeople were employed in sorting, weighing, and packing into boxes, nails manufactured by the defendant in his factory close by, were held to be a "factory," as the workpeople came within the scope of the phrase in § 5, "employed in preparing articles for sale."

In *Newman v. Mellick* (1908) Queensl. St. Rep. 1, a tradesman was erecting by day labor, on his own land, a building which he intended to use as part of his business premises. A laborer having

fallen from a scaffold, it was held he could not recover on the ground that the building work was carried on by his master as "part of his trade or business," under § 3, subsec. 1 of the act, but there was evidence to warrant a finding that he was employed in "hazardous" work carried on as an "investment with a view to profit," under § 3, subsec. 3.

A department store is a factory. *Carnahan v. Robert Simpson Co.* (1901) 32 Ont. Rep. 328.

CHAPTER LXXIX.

STATUTES RELATIVE TO THE SAFETY AND HEALTH OF EMPLOYEES ON RAILROADS.

- 1876. Structures above or beside the track.
 - a. Generally.
 - b. Warning signals at bridges and other structures, above the track,
- 1877. Blocking of frogs, guard rails, and switches.
 - a. Enactments.
 - b. Construction and effect of these enactments.
- 1878. Rolling stock.
 - a. Generally.
 - b. Brakes and brake power.
 - c. Automatic couplers on cars.
 - d. Drawbars.
 - e. Grab irons on cars.
 - f. Platforms of cars.
 - g. Ladders and steps.
 - h. Self-dumping ash pans on locomotives.
- 1878a. Construction and effect of these enactments.
 - a. In general.
 - b. General rules of construction; burden of proof.
 - c. Interstate commerce; Federal statute.
 - d. Brakes and brake power.
 - e. Automatic couplers.
 - f. Grab irons.
- 1879. Competency of employees.
- 1880. System.
 - a. Generally.
 - b. "Full-crew" statutes.
- 1881. Health of employees.

1876. Structures above or beside the track.—a. Generally.—As to the liability of a railroad company at common law for injuries caused by objects above or beside the track, see §§ 969, 970, 985, *ante*.

As to the statutory and constitutional provisions requiring railway companies to receive and forward foreign cars, see § 1078, *ante*.

The following enactments have been passed relative to the con-

struction or maintenance of structures whose proximity to the tracks of a railroad render them a source of danger to employees.

Indiana.—Burns's Anno. Stat. 1908, § 5289 (Acts 1907, p. 186). No structures must hereafter be built which will be within 18 inches of any locomotive or car used.

Sec. 5288 (Acts 1907, p. 186). Bridges over tracks on which freight trains are operated must be 21 feet above the rails.

Kentucky.—Stats. 1909, § 776. Bridges constructed in future over railroads to be not less than 22 feet above the tracks. Warning appliances to be provided whenever a bridge, tunnel, or other obstruction is less than 7 feet above the freight cars used on the road.

Missouri.—Rev. Stat. 1909, § 7844. All platforms, passageways, steps, flag offices, and other structures or arrangements in and around all railroad yards, switches, roundhouses, switch offices, freight houses, and passenger depots shall be located, placed, and arranged so as to insure, as far as possible, the safety of employees from injury or accident. (R. S. 1899, § 6488.)

New Hampshire.—Laws 1893, chap. 39, § 1. Covered bridges are to be 21 feet between the top of the rails and the overhead structure; and no freight car is to be hauled exceeding 14 feet in height from the rails to the top of the running board.

Ohio.—Gen. Code 1910, § 8903, act of May 21, 1894, chap. 313. Bridges, viaducts, overhead roadways, footbridges, wire or other structure hereafter constructed, must be 21 feet from top of rails.

Sec. 8975. All telegraph and other wires shall clear the top of the rails at least 25 feet. (93 v. 154, § 1.)

Sec. 12,552. Mail cranes and livestock chutes must be at least 18 inches from the nearest point of contact with the cab of the widest engine used on the railroad.

Rhode Island.—Gen. Laws 1909, chap. 215, § 28. Bridges over railroads hereafter constructed to be 18 feet above the rails.

Vermont.—Pub. Stat. 1906, § 4462. Single track bridges to be constructed with a clear space of 15 feet between their inner sides, and with a clear space of 22 feet from the covering of the bridges to the top of the rails. Space between inner sides of double-track bridges to be 27 feet. Overhead bridges, wires, ropes, or other obstructions to be not less than 22 feet above the top of the rails.

b. Warning signals at bridges and other structures above the track.—Other enactments require signals of some kind wherever bridges or other structures over railroads are a source of danger to employees whose duty requires them to be on the trains.

Louisiana.—Laws 1882, Act 39, p. 51. Ropes properly knotted to be suspended the entire width of the track low enough to warn train hands by its touch.

Massachusetts.—Rev. Laws 1902, chap. 111, § 184. Suitable bridge guards, to be approved by the railroad commissioner, to be maintained at every bridge or other structure, any portion of which crosses the railroad above the track. (Earlier provision, Pub. Stat. chap. 112, § 160.)

New Hampshire.—Pub. Stats. 1901, chap. 160, § 26. Guards to be maintained at bridges or other structures less than 18 feet above the track.

New York.—Railroad Law, § 49 (Consol. Laws 1909, p. 3477). Warning signals to be maintained at every road bridge or structure which crosses the railroad above the tracks where such signals may be necessary for the protection of employees.

Vermont.—Pub. Stats. 1904, § 4463. Warning signals to be placed at all overhead structures less than 22 feet above the top of the rails. (Laws 1892, chap. 65.)

Virginia.—Code 1904, § 1294d. Warning signals to be maintained where a track passes under any bridge, tunnel, or structure not sufficiently high to admit of the passage of cars with employees standing on them. (Laws 1900, chap. 328.)

In interpreting the New Hampshire statute above referred to, it has been held that the court could not say, as a matter of law, that a telltale with wires which did not come down as low as the under surface of a bridge was suitable, where the telltale had been erected in accordance with the statute, but where the commissioners, who were required to approve it, had not yet acted in the matter;¹ and the provision of the Massachusetts statute requiring guards at every structure where some portion of such structure "crosses" the railroad does not apply to the cornice of a roof over a station platform which only approaches to within 1 foot and 5 inches of the outside rail.² The New York statute requiring the maintenance of warning signals above the track at all low bridges has been held not to render low bridges illegal. Therefore in order to recover for an injury to a servant struck by such a bridge it is necessary to show a defect in a "telltale," or the absence of such a signal.³ Such a statute, however, it has been declared, does not relieve the company from the exercise of due care in the construction or maintenance of a bridge at a proper height above the tracks.⁴ In Louisiana it is held

¹ *Hardy v. Boston & M. R. Co.* (1896) 68 N. H. 523, 41 Atl. 179.

² *Quinn v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 150, 55 N. E. 891.

³ *Harrison v. New York C. & H. R. R. Co.* (1909) 195 N. Y. 86, 87 N. E. 802.

⁴ *Chesapeake & O. R. Co. v. Rowsey* (1908) 108 Va. 632, 62 S. E. 363. The court, in referring to the Virginia statute (Code, § 1294d [36]), said: "The section mentioned was not intended to diminish the liability of railroads, but to increase it. If the railroad whose tracks pass under any bridge, tunnel, or structure not sufficiently high to admit the safe passage of cars upon the tracks

with the servants and employees at their posts of duty on said cars, fails to maintain at proper distances on each side of said tunnel or structure warning signals of approved design and in general use, those operating such railroads are made liable in damages for the death or injury of any employee or servant resulting from the insufficient height of such bridge, and no contract, express or implied, and no plea of, or defense based upon, the contributory negligence of such servant, shall relieve such railroad from liability. Railroads having the structures denounced by this statute, who do not erect the danger signals for which it provides, are de-

that the risks assumed by a brakeman are the ordinary risks, and not the risks arising from a railroad company's failure to erect "tell-tales" or warning signals required by statute.⁵

1877. Blocking of frogs, guard rails, and switches.—a. Enactments.

—By some enactments it is made the duty of the railroad company to block securely all switch frogs and guard rails. As to the existence of this duty at common law, see § 968, *ante*.

As these enactments closely resemble each other, it is deemed sufficient to refer to them in a note.¹

prived of all defense, and made liable for whatever injury may have resulted from their conduct. But where the warning signals are placed, we do not understand that the railroad company is thereby made immune from dangers resulting from its negligent act in having a bridge or other structure not sufficiently high to admit of the safe passage of its cars with its servants and employees standing at their posts of duty on said cars."

⁵ *Hailey v. Texas & P. R. Co.* (1904) 113 La. 533, 37 So. 131.

¹ *Colorado*.—Rev. Stat. 1908, § 5507. Switch, guard, wing, and split rails to be guarded.

Florida.—Laws 1891, p. 113, chap. 4071.

Indiana.—Burns's Anno. Stat. 1901, § 708.

Iowa.—Code 1888, § 2002.

Kansas.—Gen. Stat. 1909, § 7125.

Kentucky.—Stats. 1909, § 5329; Act April 5, 1893.

Maine.—Rev. Stat. 1903, chap. 52, § 82. Frogs and guard rails, with the exception of guard rails on bridges, shall be blocked in a manner satisfactory to the railroad commissioners.

Massachusetts.—Rev. Laws 1902, chap. 111, § 183. The frogs, switches, and guard rails, except guard rails on bridges which are in or connected with the railroad tracks operated or used by any railroad corporation, shall be kept so blocked by some method approved by the board as to prevent employees from being caught therein.

Michigan.—Comp. Laws, § 6313 (How. Stat. § 3397 [a]). Frogs, switches, and guard rails, in all yards, divisional and terminal stations, where trains are made up, must be adjusted, filled, or blocked, so as to prevent the feet of employee or other person from

being caught therein. (Pub. Laws 1883, p. 191.)

Missouri.—Rev. Stat. 1909, § 3163.

Ohio.—Act of March 23, 1888 (Rev. Stat. § 9822; Bates's Anno. Stat. § 3365-78; Gen. Code 1910, § 9009).

By the amending act of April 25, 1898, p. 342, railroad companies are required to adjust, fill, or block all angles in frogs, switches, and crossings in all yards and stations where trains are made up, with the best known sheet steel spring guard or wrought iron appliances.

Rhode Island.—Gen. Laws 1909, chap. 215, § 5 (Laws 1894, chap. 1282).

Texas.—Acts 1891, p. 25, chap. 24.

Vermont.—Pub. Stats. 1904, § 4464.

Washington.—Rem. & Bal. Codes & Stat. § 8682 (Laws 1899), p. 49, § 1; Laws 1907, p. 265, § 1). (See also § 8654, for similar provisions.)

Wisconsin.—Sanborn & B. Anno. Stat. § 1809a. (Laws 1889, chap. 123.)

Wyoming.—Laws 1890-91, p. 350, chap. 80, § 17.

Dominion of Canada.—Rev. Stat. Can. 1906, chap. 37, § 288 (railway act, 51 Vict. chap. 29). The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than 5 inches in width, shall be filled with packing up to the under side of the head of the rail.

Subsec. 4. The space between any wing rail and any railway frog, and any guard rail and the track rail alongside of it, shall be filled with packing at their splayed ends, so that the whole splay shall be so filled where the width of the space between the rails is less than 5 feet.

Ontario.—Workmen's compensation for injuries act, 55 Vict. chap. 30; Rev. Stat. 1897, chap. 160, § 5, subsecs. 3

b. Construction and effect of these enactments.—The Ohio statute, it has been held, is designed for the protection, not only of employees who may step into frogs, but also of those who are dragged or pushed into them by an engine.² The Missouri act does not enure to the benefit of a mere licensee walking in defendant's yard.³ It has been held that a manufacturing company maintaining a number of tracks in its yards upon which a switch engine is used for shifting cars does not constitute a "railroad corporation operating a railroad, or a part of a railroad," within the meaning of a statute requiring the blocking of frogs,⁴ but that a belt railroad for receiving and transferring freight from one railroad line to another, and from manufacturing concerns located on the belt road, is a steam railroad within the meaning of a statute requiring switch lights.⁵ Where two railroad companies transact the business of transferring cars at a delivery track, an employee of one company whose duty is to

and 4. Want of blocking, when deemed a "defect," see § 1662, *ante*.

² *Cooper v. Baltimore & O. R. Co.* (1908) 16 L.R.A. (N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693.

The word "employee," in the Ohio statute (Rev. Stat. 7th ed. § 9822; 85 Ohio Laws, March 23, 1888), means all those who, "by rightful authority of the company, are engaged in the business of walking over these frogs and guard rails," although employed and paid by another company. *Atkyn v. Wabash R. Co.* (1889) 41 Fed. 193.

³ *Hufft v. St. Louis & S. F. R. Co.* (1909) 222 Mo. 286, 121 S. W. 120. This provision enures to the benefit only of employees or other persons necessarily on the track to transact business with the railroad company, or other persons who are there by its express invitation or direction.

As originally enacted, the provision was held unconstitutional on the ground that its subject had not been designated when the extra session of the legislature, during which it was passed, had been called by the governor of the state. *Wells v. Missouri P. R. Co.* (1892) 110 Mo. 286, 15 L.R.A. 847, 19 S. W. 530. But it was afterwards re-enacted as part of the Rev. Stats.

⁴ *Taggart v. Republic Iron & Steel Co.* (1905) 73 C. C. A. 144, 141 Fed. 910. The court said: "The act in terms applies to 'every railroad corporation operating a railroad or part of a railroad

in this state.' 93 Ohio Laws, p. 342. Failure to comply with the act subjects the railroad corporation to a punishment by fine. Although, by the law of Ohio, a manufacturing company may construct a railroad when such purpose is stated in its articles of incorporation (Rev. Stat. § 3866), and with respect to it is made subject to the general railroad laws of the state, we are not satisfied that the yard tracks and switches, operated by the defendant in the manner we have described, come within the intent and meaning of this statute. *United States v. Harris* (1900) 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609. They do not seem to us to constitute a railroad or make this manufacturing company a railroad corporation under the law of Ohio. We might as well hold that every private switch constitutes a railroad and makes the person or company owning and operating it a railroad corporation. These yard tracks are nothing more than private switches and were only used as such. There were some ten frogs in this yard, all unblocked, and covered with cinder, so their character was not open and obvious. The failure to block them, if not negligence as a matter of law under the Ohio statute, might have been held by the jury to be negligence in fact, under all the circumstances."

⁵ *Toledo, St. L. & W. R. Co. v. Bond* (1904) 35 Ind. App. 142, 72 N. E. 647.

take down numbers of its cars, inspect the seals, etc., as the trains are made up by the other, it has been declared, is an employee of the latter company, within the meaning and protection of a statute requiring railroad companies to block switches and guard rails in such a way as will protect the feet of the employees from being caught therein.⁶ It has also been held that a lumber company, licensed to operate log trains over a branch of a railroad, and maintaining a section gang to keep that part of the road in repair, is amenable to a statute requiring the blocking of switches, frogs, etc.⁷ A statute requiring the blocking of frogs has been held not to extend to the opening at the end of a guard rail opposite the frog.⁸ But whatever method of blocking is adopted, it would seem to go without saying that it must be effectual for the purpose.⁹ Under a statute not requiring a railroad company to block guard rails on bridges, the question of what constitutes a bridge has been held to be one for the jury.¹⁰ Where the place at which plaintiff's injury occurred

⁶ *Atkyn v. Wabash R. Co.* (1889) 41 Fed. 193.

⁷ *Coleman v. Himmelberger-Harrison Land & Lumber Co.* (1904) 105 Mo. App. 254, 79 S. W. 981.

⁸ *Com. v. Louisville & N. R. Co.* (1911) 143 Ky. 501, 136 S. W. 869.

In Canada the power conferred upon the railway committee by the railway act of the Dominion (51 Vict. chap. 29, § 262. subsec. 4), to allow "such filling to be left out from the month of December to the month of April in each year, both months included," refers only to the duty prescribed by subsec. 4, of filling the spaces between winged rails and railway frogs and between guard and track rails, and not to the duty prescribed by subsec. 3, of filling the spaces between and in front of railway frogs and crossings and between the fixed rails of switches where the spaces are less than 5 inches wide. *Grand Trunk R. Co. v. Washington* [1899] A. C. (P. C.) 275, 68 L. J. P. C. N. S. 37, affirming (1897) 28 Can. S. C. 184, which reversed (1897) 24 Ont. App. Rep. 183.

⁹ The duty imposed by the Michigan statute (Laws 1883, act No. 174, § 22; 3 How. Anno. Stat. § 3397 [a]) is not fulfilled by the adoption of a method of blocking which the ordinary use of the road renders ineffectual in two or three days,—in this case by the wheel flange wearing down the blocking so far that it became practically useless. The al-

ternative safe method suggested was to give the blocking a grooved or furrowed surface, so as to allow the flanges of the wheels to pass without interference. *Eastman v. Lake Shore & M. S. R. Co.* (1894) 101 Mich. 597, 60 N. W. 309.

Under Mich. Comp. Laws, § 6313, requiring railroad companies to block frogs, "it is the duty of the railroad companies to make the frogs as nearly safe as possible," and evidence that the blocking of a certain frog was old and worn by the flanges is sufficient to render the question of a company's negligence one for the jury. It is compliance with the statute, and not merely with the established practice, that is required. *Jones v. Flint & P. M. R. Co.* (1901) 127 Mich. 198, 86 N. W. 838.

¹⁰ By Ohio Rev. Stat. § 3365, it is provided that every railroad corporation operating in that state shall fill or block frogs, switches, and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. In a case where a servant was injured on a structure 18 feet high, by reason of defendant's failure to block the space between the main rail and the guard rail, it was held that the question whether such structure was a bridge, within the act, was a question for the jury. *Johns v. Cleveland, C. C. & St. L. R. Co.* (1900) 7 Ohio N. P. 592, 10 Ohio S. & C. P. Dec. 348.

was a short distance from the railroad company's freight station, and nine or ten switches radiated from the main track in the immediate neighborhood, and the train causing the injury was a yard train, this was held to be a yard where trains are made up within the meaning of the Ohio statute requiring the blocking of frogs in "yards, divisional and terminal stations where trains are made up," although there was no definite statement in the evidence that the trains were actually assembled in the immediate strip where the unblocked frog was located.¹¹ The facts that the air was filled with flying frost, and that, by reason of the haze, it was impossible for the decedent to see an open switch, have been held not to show that the day was "dark and foggy" within the meaning of a statute requiring switch lights.¹²

1878. Rolling stock.—*a. Generally.*—The statutes relative to the equipment of the rolling stock on railroads may be divided into the classes indicated by the titles of the following subsections.

By the South Carolina Code 1912, § 3144, the railroad commission of the state is given power to compel the installation and use by the railroads of any safety device which, in the opinion of a commission, shall have been proved to contribute materially to the safety and welfare of the employees.

By the Mississippi Code 1906, § 4871 (4317), it is provided that the railroad commission shall recommend to the several railroads the adoption of uniform automatic car couplers; and when any such appliances shall have been required by Congress to be used in interstate commerce, the commission is authorized to require railroads in this state to comply with the requirements, as concerns domestic commerce, within a reasonable time.

b. Brakes and brake power.—Statutes relative to brakes have been enacted in the following jurisdictions:

United States.—Acts of Congress, 1893, chap 196, § 1 (U. S. Comp. Stat. 1901, p. 3176). Driving-wheel brakes on locomotives and power brakes to be placed on a sufficient number of cars to enable the engineer to control the speed of trains on interstate railways.

California.—Penal Code 1905, § 369a. All persons or corporations operating cars for passengers on streets or roads in the state by cable, electricity, or compressed air, who operate a car or a dummy not fitted with a brake capable of bringing it to a stop within a reasonable distance, or without a fender for the purpose of removing obstructions on the track, are guilty of a misdemeanor.

¹¹ *Toledo, St. L. & W. R. Co. v. Kountz* (1909) 94 C. C. A. 244, 168 Fed. 832. ¹² *Chicago, I. & L. R. Co. v. Barker* (1908) 169 Ind. 670, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 14 Ann. Cas. 375.

Illinois.—Hurd's Rev. Stat. 1908, p. 1709 (Laws of 1905, p. 350). Railroad companies have been forbidden to operate any locomotive not equipped with a power driving-wheel brake and appliances for operating a train brake system, or any train which has not a sufficient number of cars in it so equipped with power or train brakes that the engineer can control its speed without requiring brakemen to use the hand brake.

Indiana.—Burns's Anno. Stat. 1908, § 5278 (Acts 1907, p. 186). Common carriers by railroad to equip locomotives with power driving-wheel brakes and appliances for operating the train brake system; trains to have 75 per centum of the cars equipped with power or train brakes, and have the brakes used and operated by the engineer of the locomotive.

Sec. 5283 (Acts 1907, p. 186). It is unlawful for any common carrier in this state operating an interurban railway by electric power to operate any motor car used in regular traffic which is not equipped with an approved power air brake, subject to the control and operation of the motorman in charge of such car.

Massachusetts.—Rev. Laws 1902, chap. 111, § 200. Brakes are to be attached to every car used for the transportation of passengers, and to every freight car used for the transportation of freight, except four-wheeled cars.

Sec. 201. Locomotives are to be equipped with a power driving-wheel brake and appliances for operating the train brake system. Trains are to be so equipped with train brakes that the speed can be controlled.

Minnesota.—Rev. Laws 1909, § 2037-3. Locomotives are to be equipped with power driving-wheel brakes and appliances for operating a train brake system; trains shall be equipped with power or train brakes.

Missouri.—Rev. Stat. 1909, § 3165. Locomotives or engines to be equipped with power drive-wheel brakes and air brake appliances.

Sec. 3168. At least 75 per cent of the cars composing any train shall be equipped with air or power brakes.

Sec. 3170. The provisions and requirements of §§ 3165 to 3172, inclusive, relating to power drive-wheel brakes, train brakes, automatic couplers, grab irons, and the standard height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar devices used on or by any railroad engaged in the transportation of persons and freight between points within the state of Missouri: Provided, however, that the provisions of said sections shall not apply to street railroads nor to tram railroads employed in the transportation of logs. (Laws 1907, p. 182.)

Nebraska.—Comp. Stat. 1911, § 4690v. Locomotive engines to be equipped with a proper and efficient power brake, commonly called a "drive brake."

Sec. 4690w. Sufficient number of cars on all trains equipped with some kind of efficient automatic or power brakes, so that the engineer upon the locomotive can control the train without requiring brakemen to go between the ends or on top of the cars to use, as now, the common hand brakes.

New York.—Consol. Laws 1909, p. 3361; Laws 1893, chap. 543. Engines to be equipped with power driving-wheel brake and appliances for operating train-brake system.

P. 3361. Freight cars to be equipped with continuous power or air brakes and locomotives with driving-wheel brakes.

Railroad Law 1909, § 49. Every passenger car to be equipped with automatic air brake or other form of power brake.

Ohio.—Gen. Code 1910, § 8946. Railway corporations required to equip with air brakes a sufficient percentage of its cars to provide at least 25 per cent of all the cars in each freight train with such brakes.

Sec. 8949. Unlawful to use locomotives not equipped with power or driving-wheel brakes and appliances for operating the train-brake system, or to run trains unless three fourths of the cars have brakes which can be operated from the engine.

South Carolina.—Code 1912, § 3217. Every railroad corporation shall cause a good and sufficient brake to be attached to every car used on its railroad for the transportation of passengers, and to every car used for the transportation of freight other than four-wheeled freight cars used only for that purpose.

Washington.—Rem. & Bal. Codes & Stat. § 8654 (Laws 1907, p. 556, § 14; Laws 1909, p. 224, § 24). Trains to be properly equipped with air brakes.

c. Automatic couplers on cars.—Automatic couplers on cars are required by statute in the following jurisdictions:

United States.—Acts of Congress, 1893, chap. 196, § 2 (U. S. Comp. Stat. 1901, p. 3176). Cars engaged in interstate commerce are to be provided with automatic couplers.

Illinois.—Hurd's Rev. Stat. 1908, p. 1709 (Laws of 1905, p. 350). Locomotives, tenders, cars, or similar vehicles shall be equipped with couplers coupling automatically by impact.

Indiana.—Burns's Anno. Stat. 1908, § 5279 (Acts 1907, p. 186). All locomotives, cars, tenders, or similar vehicles used in moving state traffic to be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Iowa.—Code 1907, § 2080. Automatic couplers on cars.

Massachusetts.—Rev. Laws 1902, chap. 111, § 202. Both ends of every freight car owned by any railroad corporation within the state to be equipped with such automatic or other safety coupler as the railroad commissioner shall direct.

Minnesota.—Rev. Laws 1909, § 2037-1. Cars to be fitted with automatic couplers.

Missouri.—Rev. Stat. 1909, § 3166. All locomotives, tenders, cars, or other vehicles for moving persons or freight, to be equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars for the purpose of affecting such coupling. Laws 1907, p. 182.)

Nebraska.—Comp. Stat. 1907, §§ 10,584, 10,585. Unlawful to use cars, either for the transportation of passengers or freight, unless they are equipped with automatic couplers.

New York.—Railroad law, § 49 (4) (Consol. Laws 1909, p. 3282). Every railroad corporation operating its road by steam is required to have, upon every new freight car built or purchased for use, couplers which can be coupled automatically, without the necessity of having a person guide the link, lift the pin by hand, or go between the ends of the cars.

Laws 1893, chap. 544 (Consol. Laws, p. 3362). Freight cars to be provided with automatic couplers.

Ohio.—Gen. Code 1910, § 8946. Railroad corporation required to equip all its cars with automatic couplers.

Sec. 8950. No common carrier shall haul or permit to be hauled on its line, a locomotive, car, or tender, not equipped with automatic couplers. (98 v. 76, § 1.)

Washington.—Rem. & Bal. Codes & Stat. § 8654 (Laws 1907, p. 556, § 14; Laws 1909, p. 224, § 24). Cars to be fitted with automatic couplers.

d. Drawbars.—In a few jurisdictions drawbars are required to be of standard height.

Illinois.—Hurd's Rev. Stat. 1908, p. 1709 (Laws of 1905, p. 350). The standard height of drawbars upon standard roads shall be $34\frac{1}{2}$ inches; upon narrow gauge roads 26 inches; and the maximum variation from such standard shall be 3 inches.

Indiana.—Burns's Anno. Stat. 1908, § 5281 (Acts 1907, p. 186). That it shall be unlawful for any such common carrier to use any locomotive, tender, car, or similar vehicle used in the movement of state traffic, that is not provided with drawbars of standard height.

Sec. 5282. Applies to passenger traffic, but not to street, interurban, or suburban railroads.

Massachusetts.—Rev. Laws 1902, chap. 111, § 205. All freight cars are to be equipped with standard drawbars.

Minnesota.—Rev. Laws 1909, § 2037-4. Locomotives, tenders, cars, and similar vehicles shall be equipped with standard drawbars.

Missouri.—Rev. Stat. 1909, § 3167. From and after the 1st day of January, 1908, it shall be unlawful for any person, persons, company, or corporation, operating any line of railroad, in whole or in part, within this state, whether as owner, lessee, or receiver, to use any locomotive, tender, car, or similar vehicle for the purpose of carrying persons or freight on its line of railroad, between stations wholly within the state, unless such locomotive, tender, car, or other similar vehicle shall be equipped with standard drawbars; that the standard height of drawbars on all standard gauge roads shall be $34\frac{1}{2}$ inches, measuring from the top of the track rails to the center of the drawbar; and upon narrow gauge roads such standard drawbar shall be 26 inches from the top of the track rails to the center of the drawbar, and the maximum variation from such standard height to be allowed between empty and loaded cars shall be 3 inches, whether or not the drawbars brought together are of the same kind, make, or type. (Laws 1907, p. 182.)

Ohio.—Gen. Stat. § 8952. Standard drawbars required.

e. Grab irons on cars.—The provision as to grab irons on cars are as follows:

United States.—Acts of Congress, 1893, chap. 196, § 4 (U. S. Comp. Stat. 1901, p. 3176). Grab irons to be placed on sides and ends of all cars engaged in interstate commerce.

Illinois.—Hurd's Rev. Stat. 1908, p. 1709 (Laws of 1905, p. 350). All locomotives, tenders, cars, and similar vehicles shall be provided with secure grab irons or hand holds.

Laws 1909, p. 306 (June 15). Size of caboose cars on railroads regulated; platforms to be equipped with guard rails, grab irons, and steps, and with at least two four-wheel trucks.

Indiana.—Burns's Anno. Stat. 1908, § 5280 (Acts 1907, p. 186). That it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving of state traffic, not provided with secure grab irons, or hand holds in the sides or ends thereof.

Massachusetts.—Rev. Laws 1902, chap. 111, § 204. All freight cars except flat cars are to be equipped with grab irons.

Minnesota.—Rev. Laws 1909, § 2037-2. Cars shall be provided with grab irons or hand holds.

Sec. 2026-1. Applicable to caboose cars.

Missouri.—Rev. Stat. 1909, § 3166. All locomotives, cars, etc., to be equipped with hand holds or grab irons.

Ohio.—Gen. Code 1910, § 8951. No common carrier shall haul or permit to be hauled, on its line, a locomotive, car, or tender not provided with secure grab irons or hand holds. (98 v. 76, § 3.)

Washington.—Rem. & Bal. Codes & Stat. § 8654 (Laws 1907, p. 556, § 14; Laws 1909, p. 224, § 24). Freight cars to be equipped with grab irons.

f. Platforms of cars.—In two states there are provisions requiring guard rails to be placed upon the platforms of caboose cars.

Illinois.—Laws 1909, p. 306 (June 15). Caboose platforms to be equipped with guard rails.

Minnesota.—Rev. Laws 1909, § 2026-1. Applicable to caboose cars.

g. Ladders and steps.—In a few states there are enactments requiring various provisions in regard to ladders and steps on cars.

Minnesota.—Rev. Laws 1909, § 2026-1. Caboose cars to be equipped with steps.

Vermont.—Pub. Stat. 1906, § 4465; Stat. 1894, § 3886. It is provided that no company shall run cars of its own with ladders on the side of the car, but that the ladders shall be on the ends of the car.

Washington.—Rem. & Bal. Codes & Stat. § 8654 (Laws 1907, p. 556, § 14; Laws 1909, p. 224, § 24). Freight cars to be equipped with ladders.

h. Self-dumping ash pans on locomotives.—In Ohio, a provision has been enacted requiring new locomotives to be equipped with self-cleaning ash pans.

Gen. Code, 1910, § 8944. Locomotives already constructed shall, where practicable, be equipped with a self-cleaning ash dump pan; the locomotives to be constructed shall be so equipped. (98 v. 46, § 1.) A similar provision is contained in § 12,558.

1878a. Construction and effect of these enactments.— a. In general.

—In dealing with the cases construing the statutes relative to the rolling stock on railroads, it has been deemed best to treat together in one subsection all of the cases dealing with the general rules of construction which are equally applicable to all of the enactments, and in subsequent subsections to discuss those cases which have to do with the particular requirements of each enactment.

As to the liability of a railroad company at common law for defects in its rolling stock, see § 987, *ante*.

b. General rules of construction; burden of proof.—In construing safety-appliance acts, the courts hold that it is necessary to keep in mind the object of such laws, which is to protect the lives and limbs of railroad employees;¹ and that, consequently, they must be so interpreted as to give effect to their intent as remedial statutes.² They must be so construed as to prevent the mischief and advance the remedy as far as the words fairly permit.³ There is little room

¹ *Wabash R. Co. v. United States* (1909) 93 C. C. A. 393, 168 Fed. 1.

The object of the Federal act in respect to couplers was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars. *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158. To the same effect, *Schlemmer v. Buffalo, R. & P. R. Co.* (1907) 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

The amendment of 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314) had three objects: First, to extend the safety-appliance act to traffic in the district of Columbia and the territories; second, to remove the doubt as to the meaning of the term "cars," as used in the act, created by the decision of this court in the *Johnson Case* (1902) 54 C. C. A. 508, 117 Fed. 462; third, to enlarge the scope of the safety-appliance act, so as to in-

clude not only "the cars, locomotives, tenders, and similar vehicles," etc., therein referred to, but also to embrace "all other locomotives, tenders, cars, and similar vehicles used in connection therewith." *Chicago & N. W. R. Co. v. United States* (1909) 21 L.R.A. (N.S.) 690, 93 C. C. A. 450, 168 Fed. 236, 237.

² *United States v. Southern R. Co.* (1909) 170 Fed. 1014; *United States v. Central of Georgia R. Co.* (1907) 157 Fed. 893; *United States v. Chicago, R. I. & P. R. Co.* (1908) 173 Fed. 684.

The Federal safety-appliance act is not to be construed so narrowly as to defeat its purpose. *Southern R. Co. v. Snyder* (1911) 109 C. C. A. 344, 187 Fed. 492.

³ *Chicago, M. & St. P. R. Co. v. Voelker* (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

In *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, in holding absolute strictness of construction unnecessary, the court said: "The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that

for difference of opinion as to the duty of carriers to equip their cars with safety appliances, as required by safety-appliance acts. This duty has been held absolute⁴ and non-delegable;⁵ and consequently it is generally declared not discharged by the exercise of due care in equipment.⁶ So, when cars are received from other railroads it has been held that the receiving carrier must know

statutes in derogation of the common law are to be construed strictly, 'They are also to be construed sensibly, and with a view to the object aimed at by the legislature.' *Gibson v. Jenney* (1818) 15 Mass. 205. The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs,—that rule not requiring absolute strictness of construction."

The proper construction of the act is that it is applicable to all servants of the carrier who are injured while acting in the performance of their duty in and about the operation of the cars, where the proximate cause of the injury is the movement of a car in interstate commerce, with a defective coupler. *Johnson v. Great Northern R. Co.* (1910) 102 C. C. A. 89, 178 Fed. 643.

⁴ *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456; *Johnson v. Great Northern R. Co.* (1910) 102 C. C. A. 89, 178 Fed. 643; *McGarvey v. Detroit, T. & I. R. Co.* (1911) 83 Ohio St. 273, 94 N. E. 424; *Wight v. Michigan C. R. Co.* (1910) 161 Mich. 216, 126 N. W. 414.

⁵ *Chicago Junction R. Co. v. King* (1909) 94 C. C. A. 652, 169 Fed. 372.

Failure to furnish proper and safe appliances whereby a servant is injured cannot be attributed to the negligence of a fellow servant. *Trozler v. Southern R. Co.* (1899) 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550.

⁶ *Delk v. St. Louis & S. F. R. Co.* (1911) 220 U. S. 580, 55 L. ed. 590, 31

Sup. Ct. Rep. 617; *United States v. Southern P. Co.* (1909) 94 C. C. A. 625, 169 Fed. 407; *United States v. Southern R. Co.* (1909) 170 Fed. 1014; *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456; *Norfolk & W. R. Co. v. United States* (1910) 101 C. C. A. 249, 177 Fed. 623; *United States v. Atchison, T. & S. F. R. Co.* (1908) 90 C. C. A. 327, 163 Fed. 517; *Luken v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

The plaintiff need not allege and prove that the defendant had not used due care or ordinary diligence in making an inspection, or in repairing such defects as that inspection may have disclosed. *United States v. Atlantic Coast Line R. Co.* (1907) 153 Fed. 918.

A railroad company does not comply with its statutory duty to furnish drawbars of the required height by furnishing cars properly constructed in this respect, and then by providing "shims" to competent inspectors with which to keep the drawbar at the required height, since the statutory duty is absolute. *St. Louis, I. M. & S. R. Co. v. Taylor* (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616. The court said: "It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dan-

at its peril that they are properly equipped.⁷ But the carrier's duty is not fully performed by equipping its cars with safety appliances; they must be kept in repair,⁸ and be in condition to

gerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar, the argument of hardship is plausible only when the attention is directed to the material interest of the employer, to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

But a different view seems to have been taken in Texas. In *Southern P. R. Co. v. Allen* (1907) 48 Tex. Civ. App. 66, 106 S. W. 441, it was said: "The fourth assignment of error complains of the court's giving plaintiff's fourth special instruction, which is as follows: 'At the request of the plaintiff you are further instructed that if you should find and believe from a preponderance of the evidence before you that the lift chain in question was too long, if it was too long, as alleged by plaintiff, and that said lift chain was attached to said drawhead at the time the same was purchased by the defendant, or that the same was placed on and made a part of said drawhead by the defendant at any time after same was purchased by it, then you are instructed as a matter

of law that the defendant had full knowledge of the defects in said chain, if any.' The propositions asserted under the assignment are: (1) That this charge withdrew from the jury the questions of notice and negligence. (2) That it made the defendant liable if the lift chain was in fact too long, regardless of whether it had or had not used proper and reasonable care in providing appliances and couplers in compliance with the 'safety-appliance act.' If, giving the charge its proper construction, it can reasonably be said to have had the effect claimed by either proposition, the assignment should be upheld. . . . If the defendant was charged by the law with knowledge that it was too long from the fact that it was too long at the time it was purchased, or when it was placed on and made a part of the drawhead after the purchase, it would follow that defendant must in the same manner be charged with its defect, and consequently be charged as a matter of law with negligence in equipping its cars with defective coupling appliances, without regard to whether it had exercised ordinary care to properly equip them with automatic couplers in compliance with the statute or not. Though the defendant may have known, or been charged with knowledge of, the length of the lift chain, yet it does not follow from such knowledge that he knew, either at the time or after it was purchased and made a part of the drawhead, that it was too long to perform its office as a part of the coupling appliance, nor that defendant failed to exercise ordinary care to properly equip its cars with automatic couplers and maintain such equipment in compliance with the 'safety-appliance act.' We therefore think that the effect of the special charge was to withdraw the question of negligence from the jury, and make the defendant guilty of negligence as a matter of law if the lift chain was too long, and that it was not relieved of such defect by the court's general charge."

⁷ *United States v. Southern P. Co.* (1908) 167 Fed. 699.

⁸ *Erlinger v. St. Louis & O. F. R. Co.*

work.⁹ There is a conflict of opinion, however, on the question of whether the carrier's duty in this respect is absolute, or whether it is satisfied by the exercise of ordinary care, or by a high degree of diligence.¹⁰

(1910) 152 Ill. App. 640, judgment affirmed in (1910) 245 Ill. 304, 92 N. E. 153; *United States v. Erie R. Co.* (1909) 166 Fed. 352; *Voelker v. Chicago, M. & St. P. R. Co.* (1902) 116 Fed. 867; *Southern R. Co. v. Carson* (1904) 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609.

⁹ *United States v. Great Northern R. Co.* (1906) 150 Fed. 229; *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456; *Norfolk & W. R. Co. v. United States* (1910) 101 C. C. A. 249, 177 Fed. 623; *Lukens v. Lake Shore & M. S. R. Co.* (1910) 154 Ill. App. 550, judgment affirmed in (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

Under the Federal act couplers must be in condition to work automatically by impact. *Philadelphia & R. R. Co. v. Winkler* (1903) 4 Penn. (Del.) 387, 56 Atl. 112.

Each coupler must be operative of its own mechanism. *United States v. Southern R. Co.* (1909) 170 Fed. 1014.

They must be in such condition as to enable coupling without requiring a man to go between the cars. *Lukens v. Lake Shore & M. S. R. Co. supra.*

It is a violation of the law if the car is so loaded as to prevent automatic couplers from working. *United States v. Illinois C. R. Co.* (1910) 101 C. C. A. 15, 177 Fed. 801.

Likewise if the tracks are so laid as to prevent the couplers from operating. *Hohenleitner v. Southern P. Co.* (1910) 177 Fed. 796. The court said: "The law does not require the carriers to adopt any specific design of coupler. That matter is left to them. They may adopt any design, kind, or make which they please, provided the cars equipped therewith shall couple automatically by impact, and can be coupled and uncoupled without the necessity of persons going between them. The cars must not only be provided with couplers, but the couplers must be such that, when used, they will couple together automatically. If the cars hauled or used by a carrier engaged in such commerce will not so couple, the law is violated, whether it

is due to the character of the car, the kind of equipment used, or, in my opinion, the manner in which tracks employees are required to use in coupling or uncoupling cars or making up trains are located or built. The ultimate end sought by the law is the coupling and uncoupling of cars used in interstate traffic without the necessity of going between them. This is the test of the compliance with it. As repeatedly pointed out by the courts, especially the Supreme Court in the Johnson Case (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, the design is to prevent the necessity of railroad employees going between cars in order to make a coupling, and thus protect their lives and limbs. The point to be accomplished by the law is that employees of railroad companies engaged in interstate commerce shall not be required to go between the cars for the purpose of coupling or uncoupling them, and this would be circumvented if the companies are permitted to so construct and maintain their tracks in yards or depot grounds, or other places where employees are required in the course of their employment, to couple or uncouple cars, in such a condition that the cars used by them will not couple automatically with the equipment provided."

It has been held that even if no duty rests on the master to provide grab irons, when they have been furnished, they must be kept in condition. *Campbell v. Chicago, R. I. & P. R. Co.* (1909) 149 Ill. App. 120, judgment affirmed in (1910) 243 Ill. 620, 90 N. E. 1106.

¹⁰ In *Delk v. St. Louis & S. F. R. Co.* (1911) 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing judgment (1908) 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233, it was held that the duty is absolute.

In *Wabash R. Co. v. United States* (1909) 97 C. C. A. 284, 172 Fed. 864, it was held that the company's duty was not satisfied by the exercise of due diligence to keep couplers in good repair.

To the same effect, *Chicago, B. & Q. R. Co. v. United States* (1911) 220 U.

But the company will in any event be guilty of a violation of a safety-appliance statute, if, after proper equipment of its cars, it

S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, affirming judgment (1909) 95 C. C. A. 642, 170 Fed. 556; *United States v. Wheeling & L. E. R. Co.* (1908) 167 Fed. 198; *Luken v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82, affirming (1910) 154 Ill. App. 550.

In *United States v. Southern R. Co.* (1905) 135 Fed. 122, the defendant introduced evidence tending to show care and diligence in the employment of inspectors and repairers, and, at the close of the case, asked the court to hold propositions of law based upon this theory of defense. The court said: "The construction contended for by defendant would practically nullify the act. The statute says that a common carrier shall not haul or use cars in a certain described condition. The defendant asks the court to hold, in effect, that they cannot haul the car in that condition, provided they have failed to use diligence to discover its defective condition, but that, if they have used due diligence they may haul the car in its defective condition. In all such cases it would be impossible for the officers of the government to determine in advance whether a statute has been violated or not; but before prosecution could be properly instituted, they should go to the defendant company; ascertain what care it had used in regard to a certain car; determine as a matter of fact and law, whether the acts of the defendant constituted due diligence, and from that determine whether a prosecution might be safely instituted. It is evident that such a defense would take the very life out of the act in question, and render its enforcement impossible except in a few isolated cases. The courts cannot by judicial legislation read into the act any language which will excuse offenders, any more than they can read into it language which would increase their liability. Courts must enforce the law as they find it."

So it has been held unnecessary for the plaintiff to show that defendant knew of the defects. *Erlinger v. St. Louis & O'F. R. Co.* (1910) 152 Ill. App. 640; *United States v. Chicago, B. & Q. R. Co.* (1907) 156 Fed. 180; *United States v. Oregon Short Line R. Co.*

(1908) 180 Fed. 483; *United States v. Southern P. Co.* (1907) 154 Fed. 897.

Or intentionally allowed them to exist. *Chicago, B. & Q. R. Co. v. United States* (1909) 95 C. C. A. 642, 170 Fed. 556.

But in the *Missouri P. R. Co. v. Brinkmeier* (1908) 77 Kan. 14, 93 Pac. 621, it is said: "In our view the law is satisfied as to any specific car whenever that car has been supplied with the prescribed appliance. Whenever an automatic coupler such as the act of Congress requires is attached to a railway car, it stands in the same category as all other appliances and instrumentalities used by railway companies. Thereafter it is the duty of the company to use reasonable and ordinary care and diligence to keep this and all other equipments in good repair and safe condition for the use of its employees, and a failure to do so constitutes negligence. This was the law before the act of Congress was passed, and that act did not change the law in this respect. It seems reasonable to assume that if Congress intended to impose a special duty upon common carriers to keep a particular appliance in repair, not applicable to all, such intent would have been expressed in clear and specific terms."

In *United States v. Atchison, T. & S. F. R. Co.* (1908) 90 C. C. A. 327, 163 Fed. 517, the court in its charge said: "The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. . . . And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict

fails to exercise ordinary care to keep them in condition;¹¹ but it is not necessary for the company to make repairs on the spot, as soon as the defective condition is discovered. This implies that the duty to keep appliances in condition is not so absolute as to deny the carrier all leeway.¹²

in favor of the defendant; otherwise, you should find for the United States."

In *United States v. Illinois C. R. Co.* (1909) 95 C. C. A. 628, 170 Fed. 542, a charge in effect that if the defendant equipped the cars with the proper appliances, as required by the act, and thereafter exercised the utmost degree of care and diligence in the discovery and correction of defects therein which could be expected of a highly prudent man under similar circumstances, it would have discharged its duty, and would not be liable to the penalty prescribed by the statute, was upheld. The *Taylor Case* (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, was distinguished on the ground that there the defect existed when the cars started on their journey, while in the case before the court it did not. But the court said: "We are of opinion that, when the government has proved that a car laden for interstate traffic, and with defective couplings, has been hauled upon its tracks, the railroad company is bound to prove exculpatory facts, such as that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault. We think, for example, that the court was in error in charging the jury that in the case of the cars coming from Mound City the jury might indulge the presumption that the appliances of the cars were in proper condition when they started, and that they remained so until such time as they were shown to be otherwise. We think the burden of proof was on the other party."

Upon the main contention as to the carrier's duty, the court said: "Now, as an original proposition, we are unable to understand why it was, if Congress intended to enact such a law as it is now contended this law is, it should, after having proposed to itself the enacting a law 'to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic

couplers,' and having used fitting language to carry that purpose into effect and nothing more, having failed to declare that, having so equipped its cars with the couplings, the carrier should be required at all times and in all circumstances when in use to have them in effective condition. To hold that Congress has done this is to insert an interpolation into the act, and to make this interpolation such as shall require things confessedly impossible, and to be apologized for by saying, as counsel for the government insist that we should, the law is so written; that it is a matter for the legislature, and not for the courts to determine."

¹¹ *McGarvey v. Detroit, T. & I. R. Co.* (1911) 83 Ohio St. 273, 94 N. E. 424; *St. Louis, I. M. & S. R. Co. v. York* (1909) 92 Ark. 554, 123 S. W. 376; *United States v. Southern R. Co.* (1905) 135 Fed. 122.

If diligence is to be recognized as a defense, certainly it must be the highest form of diligence. Without regard to what the rule of liability may be, the exercise of the greatest care in the matter of equipment and maintenance will keep coupling appliances in such condition as to exclude, except in very remote instances, the necessity of prosecutions for the enforcement of the act. *United States v. Indiana Harbor R. Co.* (1906) 157 Fed. 565.

¹² So it was held that the defendant was not liable under the Federal safety-appliance acts for an injury received while a defective car was being shifted about for the purpose of sending it to the repair shop. *Stegel v. New York C. & H. R. R. Co.* (1910) 178 Fed. 873.

The necessary movement of a defective car for repair does not subject the carrier to the penalties of the act. *United States v. Rio Grande Western R. Co.* (1909) 98 C. C. A. 293, 174 Fed. 399. But the court said that act did not apply because at the particular time the car was not being hauled or used in moving interstate traffic.

In *Norman v. Southern R. Co.* (1907)

The carrier, it seems, should establish repair shops along its line for the purpose of making necessary repairs.¹³

And defects should be remedied at the first opportunity.¹⁴ It has been held that the company performs its duty if it hauls the car to the nearest shop.¹⁵ The company, however, cannot escape liability for an injury due to defective appliances by merely placing a defective car notice on the car;¹⁶ and the question of the convenience of the carrier in the matter of remedying defective appliances, it is held, cannot be considered.¹⁷

119 Tenn. 401, 104 S. W. 1088, it is said: "Assuming it to be proven that these cars were used in moving interstate traffic, which does not definitely appear in the proof, and that the declaration avers a case under the statute, the statute has no application to the facts of this case. The couplers are shown to be automatic couplers. They were out of repair, and the defect was of such slight character that it could be repaired with the car in the yards, without the necessity of being taken to the shops. Had the defect been observed by the inspector before the car was detached from the train, the car would still have been detached and distributed, and the repairs thereafter made. To do this switching, when the defect is first discovered as the switching is being done, the failure to repair it at once without attempting to move the car to another place in the yards would not in any sense be a violation of the statute. No matter how skilfully machinery may be constructed, it will get out of repair, and a reasonable time within which to make the repair will be allowed. In this instance the discovery of the defect is simultaneous with the injury, and there is no evidence that the failure to discover it before the car reached the yards was negligence."

¹³ *United States v. Atchison, T. & S. F. R. Co.* (1908) 167 Fed. 696; *United States v. Southern P. Co.* (1908) 167 Fed. 699.

¹⁴ The company is not liable if an appliance becomes defective during the journey, unless the company fails to remedy the defect at the first opportunity after it is discovered. *United States v. Illinois C. R. Co.* (1907) 156 Fed. 182.

Where a car had been at rest for more than an hour in the carrier's yard, so

that an opportunity for inspection and for the discovery of defects in its automatic couplers was afforded, the carrier was bound at its peril to discover and repair the defect before again moving the car. *United States v. Philadelphia & R. R. Co.* (1908) 160 Fed. 696.

¹⁵ *United States v. Atchison, T. & S. F. R. Co.* (1908) 167 Fed. 696; *United States v. Chicago G. W. R. Co.* (1908) 162 Fed. 775.

But where coupler chains were either broken or missing, it was held that the carrier could not delay repairs until the car reached the terminal yards; nor could the repairs await the transportation of the car a considerable distance to repair shops. *United States v. Southern P. Co.* (1907) 154 Fed. 897.

Evidence of the condition of defective cars when last inspected, 37 miles distant, before they arrived at the station where the defects were discovered, and the material slips of the workmen who repaired them, have been held admissible in an action to recover penalties under the safety-appliance act. *United States v. Rio Grande Western R. Co.* (1909) 98 C. C. A. 293, 174 Fed. 399.

¹⁶ *United States v. Southern R. Co.* (1905) 135 Fed. 122; *United States v. Chicago, R. I. & P. R. Co.* (1908) 173 Fed. 684.

¹⁷ In *United States v. Southern P. Co.* (1907) 154 Fed. 897, it is said: "It is urged that the court should take into consideration the convenience and practicability of repairing the defects. To be understood, it should be said that the term 'impracticable' is not employed in the answer to indicate that it was impossible to set the cars out and take them to the repair shops before carrying them on their journey; but that it was impracticable so to do, in the sense

The Federal safety-appliance acts as to automatic couplers apply to every car used in interstate traffic, and require that each car, taken separately, shall be fully equipped.¹⁸ Consequently it has been held that each defective car, although hauled in one train, constitutes a separate violation of the law.¹⁹ When it is said that the acts apply

that it would unduly impede and interfere with the transportation of freight by cars, and in special instances might result in loss to either the shipper or carrier, or to both, as in the case where perishable goods were being transported. While Congress may have taken into consideration, and presumably did, the inconvenience to railroad companies in providing equipment of the character here under consideration, and in keeping the same in repair, yet by its positive enactment it manifestly considered the safety of the brakeman and employees who are charged with the duty of coupling and uncoupling cars paramount; and, having made no exception in terms, the natural conclusion is that the act was intended to apply in all cases where the cars were being used in moving interstate traffic. Admittedly, if a breakage occurs between stations where repair shops are located, and the repair cannot be made without taking the car to such a place, the company cannot be held liable until it has had the opportunity of making the repair; and in that event it would be justified in hauling the car in the train to the succeeding station where such repairs could be made. This does not, however, give to the company the discretion of carrying the car forward to repair shops at destination."

The mere fact that a defective car could be repaired more conveniently at another place does not justify its being moved in its defective condition. *Chicago Junction R. Co. v. King* (1909) 94 C. C. A. 652, 169 Fed. 372.

A charge declaring in substance that a movement of cars used in interstate traffic, not equipped as prescribed by the safety-appliance law, when and so far only as is reasonably necessary for repair, is not a violation of the law, was held erroneous in *United States v. Southern P. Co.* (1909) 94 C. C. A. 629, 169 Fed. 407. The court said: "Conformity to the requirements of the law, . . . it must be admitted, will often be inconvenient and sometimes imprac-

ticable; but Congress had before it for consideration the important question of promoting the safety of employees and travelers upon railroads, and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb, and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people."

¹⁸ *United States v. Atchison, T. & S. F. R. Co.* (1908) 167 Fed. 696; *United States v. Southern P. Co.* (1908) 167 Fed. 699; *Devine v. Illinois C. R. Co.* (1910) 156 Ill. App. 369; *United States v. Central of Georgia R. Co.* (1907) 157 Fed. 893; *United States v. Philadelphia & R. R. Co.* (1908) 160 Fed. 696.

¹⁹ *St. Louis Southwestern R. Co. v. United States* (1910) 106 C. C. A. 136, 183 Fed. 770.

In *United States v. St. Louis Southwestern R. Co.* (1910) 106 C. C. A. 230, 184 Fed. 28, the court said: "The defendant contends that there has been but one violation of the act, and that therefore the court ruled correctly in assessing only one penalty. The contention is that the defendant 'has committed only one act; that it, by one act, hauled three cars, in one movement, not equipped with safety appliances as required by law.' If this contention is well founded, a defendant who used on the same trip a defectively equipped engine and a defectively equipped car could be made to pay one penalty only, although the use of the engine is made unlawful by § 1 and the use of the car by § 2 or 4. It would also follow that a defendant who hauled or used 20 defective cars could not be made to suffer a larger penalty than a defendant who hauled or used only one defective car. It is difficult to believe that such was the intention of Congress. The words

to every car, this means empty cars as well as those that are loaded.²⁰ The same ruling has been made in interpreting the Illinois act.²¹

of the sections—2 and 4—designating the unlawful act, point, it seems to us, at the car, and not at the train. It is made unlawful to haul or use, 'any car.' If it had been made unlawful to haul any train containing a car or cars not equipped as required, it is easy to see that the number of defective cars would not increase the penalty. But the act makes the hauling or use of the defective car the unit of the offense, and prescribes the penalty 'for each and every such violation.' The hauling or use of each car is, it is admitted, a violation, for which the penalty may be inflicted. But the contention is that the hauling or use of each car must be separate, or there is but one offense. In view of the purpose of the act to protect life and limb by the enforced equipment of every car, and its being made unlawful to haul or use any car not equipped as required, it seems to us that the construction contended for by the defendant is so narrow as to defeat the intention of Congress. If the three defective cars had been hauled or used by the same engine, but only one moved at a time, at intervals of one minute or less, it is not denied by defendant's contention that three penalties could be recovered. The three penalties would have been recovered, for the reason that the statute makes unlawful the hauling or use of 'any car,' or each car not equipped as required. It seems strained to say that the statute requires for its complete application an interval, and that the condemnation and penalty is not the same if the three cars are hauled or used at the same time." The court declared that the precedents in criminal cases—in larceny cases, where it is held that the defendant being charged with the larceny of several articles, if indicted and convicted or acquitted of stealing one of the articles, it bars a prosecution for the larceny of the others, all of the articles having been stolen at the same time; and in cases of murder, where two persons were killed at the same time by a single act, and it is held to constitute but one crime, and, if the defendant is convicted or acquitted as to one of the homicides, he cannot be tried for the other—had no application.

In Ohio "car," and not "train," is held to be the unit in determining liability under both the Federal and Ohio statutes requiring automatic couplers. *Detroit, T. & I. R. Co. v. State* (1909) 31 Ohio C. C. 20.

But where a car is not properly provided with grab irons on a given day, and the train stops for a certain time, and then goes on again, there are not two violations of the law, although the train is so moved on two different days. *United States v. Boston & M. R. Co.* (1909) 168 Fed. 148.

²⁰ *United States v. Southern R. Co.* (1909) 170 Fed. 1014; *Louisville & N. R. Co. v. United States* (1909) 98 C. C. A. 664, 174 Fed. 1021; *Hohenleitner v. Southern P. Co.* (1910) 177 Fed. 796.

A car designed for interstate traffic, though at the time being hauled empty, must be equipped with automatic couplers. *Voelker v. Chicago, M. & St. P. R. Co.* (1902) 116 Fed. 867.

The empty car must be actually used or intended for use in interstate traffic. *United States v. Illinois C. R. Co.* (1907) 156 Fed. 182.

In *United States v. St. Louis, I. M. & S. R. Co.* (1906) 154 Fed. 516, the court said: "The law is intended to protect the employee, whether the cars are loaded or empty, the condition being that the cars are used in moving interstate traffic. It is as much in violation of this act to haul—that is, to pull, to drag, to draw—an empty car that is used in moving commodities of interstate commerce, and which is not equipped with automatic couplers, as it is to haul a car actually loaded with commodities of interstate commerce, not so equipped. The phrase, 'used in moving interstate traffic,' does not only mean that the car must be actually loaded with interstate traffic, and on its journey from state to state at the time of the alleged violation, but its more natural meaning is that it is a car that has been used for such purpose, stands ready, and is intended to be used for such purpose whenever needed."

²¹ *Luken v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

And this rule as to empty cars has been declared to apply to such cars while being hauled to the repair shop.²² A locomotive has been held a car within the meaning of the Federal safety-appliance act.²³ And a shovel car and locomotive tenders have been declared to be cars within the meaning of the Federal statute requiring automatic couplers.²⁴ But it has been held that a tender is not a car within the meaning of the Massachusetts act providing that employees do not assume the risk of the use of cars not having automatic couplers.²⁵ A train is said to be an aggregation of cars drawn by the same engine, and consequently when the engine is changed, it is a different train.²⁶

It has been held that a car, while being taken to the repair shop, is not being used "in moving traffic" within the meaning of the

²² The hauling by a railroad company from one state to another of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving in interstate commerce, is a use of the defective car in violation of the act of Congress, though it is empty and being transported to a repair shop in the state of its destination. *Chicago, M. & St. P. R. Co. v. United States* (1908) 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423.

To the same effect, *United States v. St. Louis, I. M. & S. R. Co.* (1906) 154 Fed. 516.

But in *Chicago & N. W. R. Co. v. United States* (1909) 21 L.R.A.(N.S.) 690, 93 C. C. A. 450, 168 Fed. 236, it was held that a carrier may move empty cars by themselves to repair shops without violating the Federal acts.

²³ *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing (1902) 54 C. C. A. 508, 117 Fed. 462; *United States v. Colorado & N. W. R. Co.* (1907) 85 C. C. A. 48, 157 Fed. 342; *United States v. Chicago & N. W. R. Co.* (1907) 157 Fed. 616.

²⁴ In *Schlemmer v. Buffalo, R. & P. R. Co.* (1907) 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, reversing (1903) 207 Pa. 198, 56 Atl. 417, it was held that a shovel car is a "car" within the meaning of the act of March 2, 1893, § 2, requiring any car used in

moving interstate traffic to be equipped with an automatic coupler.

In *Philadelphia & P. R. Co. v. Winkler* (1903) 4 Penn. (Del.) 387, 56 Atl. 112, a tender was held to be a "car" within the act.

²⁵ *Larabee v. New York, N. H. & H. R. Co.* (1902) 182 Mass. 348, 66 N. E. 1032. The court said: "It may be as some of us think, that the rear end of the tender is within the policy and object of the act, but the word 'car,' in its ordinary use and acceptance, does not include it. On the contrary, it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the legislature sought to prevent, it had in mind only cars properly so called. The prohibition, 'no railroad corporation shall haul,' hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine, from which they are detached daily, but also the tenders which are so much more closely associated with the source of power as almost to be regarded as one with it, and which only exceptionally, and with more or less difficulty, are taken apart from it."

²⁶ *United States v. Boston & M. R. Co.* (1909) 168 Fed. 148.

Massachusetts act requiring automatic couplers.²⁷ And a similar ruling has been made in respect to the Illinois statute,²⁸ but it has been held that a defective car left on a track in ordinary use in a switch yard, to be repaired by a switchman, and then coupled to other cars, was being "used" within the meaning of the Federal safety-appliance acts.²⁹ It has also been declared unnecessary that a car be hauled to complete an offense against the statute.³⁰ The Federal safety-appliance act of 1893 has been held not limited by the provisions of the interstate commerce act of 1887.³¹ It has been declared to confer rights which may be enforced in a state court.³² It provides no penalty, however, for failure of servants efficiently to operate proper appliances.³³ The Ohio statute requiring automatic couplers is inapplicable to electric cars.³⁴

The burden of proof is on the plaintiff to establish violations of safety-appliance acts,³⁵ and if the plaintiff establishes a prima facie case, the burden does not shift to the defendant, but it then becomes necessary for the latter to introduce evidence to overcome the case made by the plaintiff.³⁶ It has been held, however, that the burden of bringing the case within exceptions or provisos of such statutes rests on the carrier.³⁷ Although all courts agree that the burden is on the plaintiff to establish violations of the safety-appliance acts, there is a conflict of opinion as to the extent of this burden; and this depends upon the further question whether actions based on violations of such statutes are considered to be civil or penal, the weight of authority being in favor of the view that they are civil. The courts hold that the plaintiff has sustained his burden when he has established his case by a preponderance of evidence.³⁸ It has

²⁷ *Taylor v. Boston & M. R. Co.* (1905) 188 Mass. 390, 74 N. E. 591.

²⁸ *Kelley v. Illinois C. R. Co.* (1908) 140 Ill. App. 125.

So, in *Schlemmer v. Buffalo, R. & P. R. Co.* (1907) 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407, in construing the Federal act, it is said: "The words 'used in moving interstate traffic' are not to be taken in a narrow sense."

²⁹ *Erie R. Co. v. Russell* (1910) 106 C. C. A. 160, 183 Fed. 722.

³⁰ *United States v. St. Louis Southwestern R. Co.* (1910) 106 C. C. A. 230, 184 Fed. 28.

³¹ *Pacific Coast R. Co. v. United States* (1909) 98 C. C. A. 31, 173 Fed. 448.

³² *Atlantic Coast Line R. Co. v. Whitney* (1912) 62 Fla. 124, 56 So. 937.

³³ *United States v. Illinois C. R. Co.* (1907) 156 Fed. 182.

³⁴ *Cleveland & E. R. Co. v. Somers* (1902) 24 Ohio C. C. 67.

³⁵ *United States v. Philadelphia & R. R. Co.* (1908) 160 Fed. 696; *Winkler v. Philadelphia & R. R. Co.* (1902) 4 Penn. (Del.) 80, 53 Atl. 90; *United States v. Montpelier & W. R. Co.* (1910) 175 Fed. 874.

³⁶ *Shankweiler v. Baltimore & O. R. Co.* (1906) 78 C. C. A. 353, 148 Fed. 195, interpreting the Ohio act of 1890 (87 Ohio Laws, p. 149, § 2).

³⁷ *United States v. Atlantic Coast Line R. Co.* (1907) 153 Fed. 918.

³⁸ *United States v. Boston & M. R. Co.* (1909) 168 Fed. 148; *United States v. Central of Georgia R. Co.* (1907) 157 Fed. 893; *United States v. Phila-*

been held that a verdict cannot be directed for the defendant on the theory that a suit for a statutory penalty for a violation of the Federal safety-appliance acts is a prosecution for a criminal offense,³⁹ but the contrary view has also been expressed.⁴⁰ The United States has been declared entitled to a writ of error on the theory that such an action is civil.⁴¹

c. Interstate commerce; Federal statute.—It is apparent that the Federal safety-appliance acts apply only to cars engaged in interstate commerce, as distinguished from intrastate commerce. Consequently the question frequently arises whether a defective car was, at the time of the alleged violation of the act, employed in the movement of interstate traffic. The cases in which the interpretation of those statutes has come up in this connection include, of course, but a very small number of those which discuss the general question of what constitutes interstate commerce,—a subject which is manifestly beyond the scope of this treatise.⁴²

delphia & R. R. Co. (1908) 160 Fed. 696; *St. Louis Southwestern R. Co. v. United States* (1910) 106 C. C. A. 136, 183 Fed. 770; *United States v. Atchison, T. & S. F. R. Co.* (1908) 167 Fed. 696; *United States v. Nevada County Narrow Gauge R. Co.* (1908) 167 Fed. 695; *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456; *United States v. Illinois C. R. Co.* (1909) 95 C. C. A. 628, 170 Fed. 542; *United States v. Southern R. Co.* (1909) 170 Fed. 1014.

Every material fact must be proved by a fair balance of evidence to entitle the plaintiff to recover the penalty prescribed by law. *United States v. Montpelier & W. R. R. Co.* (1910) 175 Fed. 874.

But in *United States v. Illinois C. R. Co.* (1907) 156 Fed. 182, it was held that the Federal safety-appliance act is a criminal statute, requiring the plaintiff to establish the violation of the law beyond a reasonable doubt, the defendant being presumed innocent.

³⁹ A suit by the government for the statutory penalty provided by the safety-appliance act of Congress for failure to have proper equipments on cars is a prosecution for a criminal offense, in which a verdict cannot be directed for the defendant. *Atchison, T. & S. F. R. Co. v. United States* (1909) 27 L.R.A.(N.S.) 756, 96 C. C. A. 646, 172 Fed. 194.

⁴⁰ *United States v. Atlantic Coast Line R. Co.* (1910) 182 Fed. 284.

⁴¹ *United States v. Illinois C. R. Co.* (1909) 95 C. C. A. 628, 170 Fed. 542.

⁴² To come within the terms of the acts, not only must the carrier be engaged in interstate commerce, but the particular car must, at the time, be in the condition of being hauled or used in moving interstate traffic. *Siegel v. New York C. & H. R. R. Co.* (1910) 178 Fed. 873; *Norman v. Southern R. Co.* (1907) 119 Tenn. 401, 104 S. W. 1088; *Felt v. Denver & R. G. R. Co.* (1910) 48 Colo. 249, 110 Pac. 215, 1136, 21 Ann. Cas. 379.

The act has been held to apply to cars being made up in a train for interstate traffic. *Mobile, J. & K. C. R. Co. v. Bromberg* (1904) 141 Ala. 258, 37 So. 395.

To a car which had been actually engaged in moving interstate traffic, and which was held in the yards to be sent on an interstate trip, and not segregated from the class of cars used in such traffic. *Felt v. Denver & R. G. R. Co. supra.*

To a locomotive and tender used in moving freight cars from one place to another in defendant's yard. *Patten v. Faithorn* (1910) 152 Ill. App. 426.

To a freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to

d. Brakes and brake power.—The provisions of the Federal safety-appliance act with reference to power brakes do not, it seems, prohibit the use of hand brakes where the train is equipped with

await repairs. *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617, reversing judgment (1908) 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233.

To a dining car regularly engaged in interstate traffic while waiting for the train to make the next trip. *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, reversing (1902) 54 C. C. A. 508, 117 Fed. 462.

To an empty car brought into a station in an interstate train, left in the switch yards over night, and the next day taken out in another interstate train. *Erie R. Co. v. Russell* (1910) 106 C. C. A. 160, 183 Fed. 722. The fact that the accident occurred during switching operations, and not during the regular eastern or western movement of the freight train, does not affect the application of the statute.

To an interstate traffic car received from another company by defendant, while being hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state. *United States v. Pittsburgh, C. C. & St. L. R. Co.* (1905) 143 Fed. 360.

To a foreign freight car, moved by one railroad company from one state into another, loaded, and delivered to defendant company, and by defendant to the consignee, and after being unloaded, placed by defendant on a switch track, and afterwards redelivered to the original company, again loaded by it, and returned into the state whence it came. *Johnson v. Great Northern R. Co.* (1910) 102 C. C. A. 89, 178 Fed. 643.

To a freight train scheduled to run regularly between points in different states. *United States v. Chicago Great Western R. Co.* (1908) 162 Fed. 775.

To a defective car or engine used in moving a box car from one switch track to another in defendant's yards, to be loaded with merchandise for shipment into another state. *Breske v. Minneapolis & St. L. R. Co.* (1911) 115 Minn. 386, 132 N. W. 337.

To a car loaded with coal, to be de-

livered to a consignee in another state. *United States v. Southern R. Co.* (1905) 135 Fed. 122.

To a car regularly used in interstate traffic, but, at the time when the defect is known to exist, is itself not being used for carrying interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce. *United States v. Wheeling & L. E. R. Co.* (1908) 167 Fed. 198.

To a car loaded with interstate freight until its use in moving the shipment is ended, notwithstanding the transit may be temporarily, but not indefinitely, suspended; and this, whether the ultimate destination of the shipment be near to or remote from the point of suspension. *Chicago, M. & St. P. R. Co. v. Voelker* (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; *United States v. Western & A. R. Co.* (1910) 184 Fed. 336; *Chicago, M. & St. P. R. Co. v. United States* (1908) 20 L.R.A. (N.S.) 473, 91 C. C. A. 373, 165 Fed. 423.

To a defective car, hauled in a train that contains cars that are being used in moving interstate commerce. *Breske v. Minneapolis & St. L. R. Co.* (1911) 115 Minn. 386, 132 N. W. 337; *United States v. Western & A. R. Co.* (1910) 184 Fed. 336; *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456; *Erie R. Co. v. Russell* (1910) 106 C. C. A. 160, 183 Fed. 722.

To a car containing only domestic commerce, but hauled in a train with other cars containing interstate commerce. *Norfolk & W. R. Co. v. United States* (1910) 101 C. C. A. 249, 177 Fed. 623.

To a train composed of cars, some of which are and some of which are not, engaged in interstate traffic. *United States v. Erie R. Co.* (1909) 166 Fed. 352.

To all cars regularly used on any railroad engaged in interstate commerce, not only while actually in use in such commerce, but at all times when in use on such road, and even when being moved between different points in the same state. *United States v. Great Northern R. Co.* (1906) 145 Fed. 438;

United States v. Colorado & N. W. R. Co. (1907) 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 Ann. Cas. 893; *United States v. International G. N. R. Co.* (1909) 98 C. C. A. 392, 174 Fed. 638; *Pacific Coast R. Co. v. United States* (1909) 98 C. C. A. 31, 173 Fed. 448; *United States v. Southern R. Co.* (1908) 164 Fed. 347; *Southern R. Co. v. United States* (1911) 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2; *Wabash R. Co. v. United States* (1909) 93 C. C. A. 393, 168 Fed. 1; *Lukens v. Lake Shore & M. S. R. Co.* (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82.

To a belt line railroad physically connected with other railroads so as to form a continuous highway across state lines on which interstate traffic, loaded on interstate cars, is moved from origin to destination without change of cars. *Belt R. Co. v. United States* (1909) 22 L.R.A.(N.S.) 582, 93 C. C. A. 666, 168 Fed. 542.

To a terminal company which received cars of coal coming from another state, and delivered them within its yards to the engines of a railway company. *United States v. Northern P. Terminal Co.* (1906) 144 Fed. 861.

To a car generally used in moving interstate traffic, although not actually so engaged at the time when the offense is charged as being committed. *United States v. Chicago & N. W. R. Co.* (1907) 157 Fed. 616.

To the cars of an interstate railroad, which are generally used interchangeably and indiscriminately in both interstate and intrastate traffic, while employed commercially and in such indiscriminate and interchangeable use. *Southern R. Co. v. Snyder* (1911) 109 C. C. A. 344, 187 Fed. 492.

Empty cars being moved to repair shops for the purpose of having them placed in condition to comply with the safety-appliance acts, in order not to be subject to the acts, must be wholly excluded from commercial use themselves, and from connection with other vehicles which are commercially employed. *Ibid.*

The act has been held not to apply to the necessary movement of a defective car for the purpose alone of repair. *United States v. Rio Grande Western R. Co.* (1909) 98 C. C. A. 293, 174 Fed. 399.

To cars being hauled to a place of

repair in a purely intrastate train, composed only of such cars, or while on a repair track, out of all connection with vehicles in commercial use. *Southern R. Co. v. Snyder* (1911) 109 C. C. A. 344, 187 Fed. 492.

To a car just in from an interstate trip, and being placed in the yards of a manufacturer. *Campbell v. Chicago, R. I. & P. R. Co.* (1909) 149 Ill. App. 120, judgment affirmed in (1910) 243 Ill. 620, 90 N. E. 1106.

To cars standing on the tracks of railroads engaged in interstate commerce, but not being used in such commerce. *Breske v. Minneapolis & St. L. R. Co.* (1911) 115 Minn. 386, 132 N. W. 337.

To cars colliding in a railroad yard, where there is no proof that the engine and cars in collision were used in interstate commerce. *Rosney v. Erie R. Co.* (1905) 68 C. C. A. 155, 135 Fed. 311.

To cars loaded with rails shipped from one state to another, and held at points on the road until the rails were needed as the work progressed. *Coley v. Kansas City Southern R. Co.* (1906) 43 Tex. Civ. App. 488, 95 S. W. 96.

To a car with defective brakes, merely because there was in the train a car containing an interstate shipment. *United States v. Illinois C. R. Co.* (1908) 166 Fed. 997.

To a car not shown to have been ever used or to be intended for use in interstate commerce. *United States v. Erie R. Co.* (1909) 166 Fed. 352.

To cars of an interstate railroad while actually devoted to intrastate use, even though not set apart solely and specifically for such use. *Southern R. Co. v. Snyder* (1911) 109 C. C. A. 344, 187 Fed. 492.

To a narrow gauge railroad, wholly in one state, receiving freight from another road without through bills of lading. *United States v. Geddes* (1904) 65 C. C. A. 320, 131 Fed. 452.

Where the evidence is conflicting as to whether the given car was engaged in interstate commerce, evidence merely of a defect in couplers of an automatic description will not support an averment of a violation of the act. *Kansas City, M. & B. R. Co. v. Flippo* (1903) 138 Ala. 487, 35 So. 457.

It has been held that a car loaded with intrastate traffic, hauled on an interstate track, is not exclusively controlled by the Federal act, but is also

the required percentage of power brakes;⁴³ nor does it forbid the use of train-brake cars with their air "cut out" when associated with the required percentage of power brake cars in working order.⁴⁴ In order to recover against a railroad company for failure to have a train equipped with air brakes as required by the Federal statute, such failure must have been the proximate cause of the injury.⁴⁵ The Illinois statute requiring brakes upon "any train of cars for the transportation of merchandise or other freight" does not apply to the making up of trains in a yard.⁴⁶ In South Carolina eight-wheeled gondola or flat cars are not excepted from the statute requiring brakes to be placed on every freight car other than four-wheeled freight cars.⁴⁷

It has been held that no liability existed under the Canadian act requiring continuous brakes on passenger trains, where the train causing the injury was not a passenger train, and the accident was caused by reason of the engineer's failure to see and act on the conductor's signal.⁴⁸

e. Automatic couplers.—Couplers, to come within the provisions of the Federal act, must be so constructed as to be manipulated without the necessity of a man placing his body in a position of danger,⁴⁹ and the statute applies to both coupling and uncoupling.⁵⁰ It requires each end of a car to be equipped with proper couplers.⁵¹ Loco-

within the Ohio statute requiring automatic couplers. *Detroit, T. & I. R. Co. v. State* (1909) 31 Ohio C. C. 20.

⁴³ *United States v. Baltimore & O. R. Co.* (1910) 176 Fed. 114. Proof of the mere fact that hand brakes were used on a particular grade would not be evidence that the trains were not properly equipped with the requisite number of power-brake cars.

⁴⁴ *Ibid.*

⁴⁵ *Lyon v. Charleston & W. C. R. Co.* (1906) — S. C. —, 56 S. E. 18.

⁴⁶ *Chicago & E. I. R. Co. v. Maloney* (1898) 77 Ill. App. 191.

⁴⁷ *Mew v. Charleston & S. R. Co.* (1898) 55 S. C. 90, 32 S. E. 828.

⁴⁸ *Muma v. Canadian P. R. Co.* (1907) 14 Ont. L. Rep. 147.

⁴⁹ *United States v. Nevada County Narrow Gauge R. Co.* (1908) 167 Fed. 695; *United States v. Louisville & N. R. Co.* (D. C.; 1908) 162 Fed. 185, affirmed in (1909) 98 C. C. A. 664, 174 Fed. 1021.

⁵⁰ The words, "without the necessity

of men going between the ends of the cars," which are the test of compliance with § 2 of the safety-appliance act, apply to both coupling and uncoupling; and if read as it should be, with a comma after the word "uncoupled," this becomes entirely clear. *United States v. Lacher* (1890) 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. *Chicago, M. & St. P. R. Co. v. Voelker* (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

⁵¹ *United States v. Central of Georgia R. Co.* (1907) 157 Fed. 893; *United States v. Atchison, T. & S. F. R. Co.* (1908) 167 Fed. 696; *United States v. Southern P. Co.* (1908) 167 Fed. 699; *United States v. Baltimore & O. R. Co.* (1909) 170 Fed. 456.

motives must be equipped with automatic couplers, within the meaning of the Federal act,⁵² but not under the Iowa statute.⁵³ Locomotives under the former statute need not, however, have automatic couplers at both ends.⁵⁴ The use of a switch engine without uncoupling levers has been held not a violation of the Federal statute, especially where it can be uncoupled without the necessity of going between it and the car to be coupled.⁵⁵ The Federal act is not limited to injuries to the person, but applies as well where death results from such injuries.⁵⁶ The statutes does not require the drawbars of fully loaded cars to be of a uniform height.⁵⁷ And it has been held that an electric railway need not maintain drawbars, heavy base framework, or buffers on the front end of its motors or cars, unless it intends to couple or uncouple cars to that end.⁵⁸ A logging train containing a car the height of the coupling of which exceeded 25 inches from the rails has been declared not within the exception to the Federal statute applying to logging cars.⁵⁹ And the statute,

⁵² *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The fact that locomotives are elsewhere in the act required in specific terms to be equipped with power driving-wheel brakes does not show that locomotives were intended to be excluded from the provision requiring automatic couplers. *Ibid.*

⁵³ *Bryce v. Burlington, C. R. & N. R. Co.* (1903) 119 Iowa, 274, 93 N. W. 275, holding that §§ 2079-2082 of the Iowa Code do not require engines to be equipped with automatic couplers. Section 2083 does not take away the defense of assumption of risk where the injury was caused by the absence of such couplers from the engine.

⁵⁴ *Wabash R. Co. v. United States* (1909) 97 C. C. A. 284, 172 Fed. 864.

⁵⁵ *United States v. Montpelier & W. R. R. Co.* (1910) 175 Fed. 874.

⁵⁶ *Mobile, J. & K. C. R. Co. v. Bromberg* (1904) 141 Ala. 258, 37 So. 395.

⁵⁷ In *St. Louis, I. M. & S. R. Co. v. Taylor* (1908) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, the court said: "We think that it requires that the center of the drawbars of freight cars used on standard gauge railroads shall be, when the cars are empty, 34½ inches above the level of the tops of the rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to ex-

ceed 3 inches; that it does not require that the variation shall be in proportion to the load, nor that a fully loaded car shall exhaust the full 3 inches of the maximum permissible variation, and bring its drawbars down to the height of 31½ inches above the rails. If a car, when unloaded, has its drawbars 34½ inches above the rails, and, in any stage of loading, does not lower its drawbars more than 3 inches, it complies with the requirements of the law. If, when unloaded, its drawbars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law."

The act of Congress does not require that the draft line of cars used in interstate commerce should be even, but requires that the centers of the drawbars should be of the standard and uniform height mentioned in the act. The act says nothing about draft line, but requires that the center of the drawbars should be of uniform height, with the exception that a variation is permitted between loaded and unloaded cars. *Neal v. St. Louis, I. M. & S. R. Co.* (1903) 71 Ark. 445, 78 S. W. 220.

⁵⁸ *Campbell v. Spokane & I. E. R. Co.* (1911) 188 Fed. 516.

⁵⁹ *Butterly v. Boyne City, G. & A. R.*

it has been asserted, does not apply to injuries received as the result of a collision.⁶⁰ The substitution of a short or "stub pilot" for a long pilot, in order to equip an engine with an automatic coupler, has been held not to constitute actionable negligence of an interstate railroad, although the engine happens to be employed for a time in "open range country" where cattle roam at will, and the change is the cause of overturning the engine by collision with cattle, which results in the killing of the fireman.⁶¹ Failure to equip with automatic couplers must have been the proximate cause of the injury, to entitle the plaintiff to recover.⁶² And whether such failure is the proximate cause may be a question for the jury.⁶³

In Nebraska a railroad company might use cars not equipped with automatic couplers prior to January 1, 1895, provided such cars were not first sent out for use in the state after the taking effect of Sess. Laws 1891, chap. 19, making it unlawful to put into use in the state any new cars, or cars sent into the shop for general repairs, not equipped with such couplers.⁶⁴

f. Grab irons.—The Federal safety-appliance act, requiring grab irons or hand holds on cars, has been held to apply to passenger cars.⁶⁵ The act requires hand holds to be provided both at the ends and sides of cars, and it has been held violated, although a brake lever which was provided might serve as a hand hold.⁶⁶

But, on the contrary, it has been declared that if, in the absence of a grab iron, a ladder or a brake lever affords equal protection, the statute is satisfied.⁶⁷

Co. (1909) 158 Mich. 385, 122 N. W. 635.

⁶⁰ *Campbell v. Spokane & I. E. R. Co.* (1911) 188 Fed. 576.

⁶¹ *Briggs v. Chicago & N. W. R. Co.* (1903) 60 C. C. A. 513, 125 Fed. 745.

The court said: "As locomotive engines are liable to be used on any portion of a railroad, and as they may be needed at any moment to handle interstate traffic, we think that an interstate carrier like the defendant company is entitled to have all of its engines so equipped that they may at any time be used in such service without violation of the act of Congress, and that it cannot be found guilty of negligence in so doing."

⁶² *York v. St. Louis, I. M. & S. R. Co.* (1909) 86 Ark. 244, 110 S. W. 803; *Voelker v. Chicago, M. & St. P. R. Co.* (1902) 116 Fed. 867.

⁶³ *Donegan v. Baltimore & N. Y. R. Co.* (1908) 91 C. C. A. 555, 165 Fed. 869.

⁶⁴ *Thompson v. Missouri P. R. Co.* (1897) 51 Neb. 527, 71 N. W. 61.

⁶⁵ *Norfolk & W. R. Co. v. United States* (1910) 101 C. C. A. 249, 177 Fed. 623; *United States v. Norfolk & W. R. Co.* (1910) 184 Fed. 99.

⁶⁶ The act is violated by failure to provide hand holds at the sides and near the rear end of a tender, although the tender is equipped with a running board and an uncoupling lever bar which might serve as a hand hold. *United States v. Baltimore & O. R. Co.* (1910) 184 Fed. 94.

⁶⁷ *United States v. Boston & M. R. Co.* (1909) 168 Fed. 148.

The effect of the amendment to the safety-appliance act, it is said, was to define the use of cars upon which grab irons were to be placed in similar language to that used in §§ 1 and 2 of the original safety-appliance act. It left no room for a distinction between the hauling of a car actually engaged in interstate commerce and the hauling of a car which is generally used in moving interstate commerce, although not actually so engaged at the time when the offense is charged as being committed.⁶⁸ But a car not equipped with grab irons has been held not used "in connection" with a car used in interstate traffic, within the meaning of the act, where they were used in different parts of the train, and not in position to be coupled or uncoupled.⁶⁹

In Illinois the proper use of a grab iron has been held not limited to the very act of coupling cars under the safety-appliance act of that state.⁷⁰

1879. Competency of employees.—In many of the jurisdictions enactments have been passed in respect to the competency of railroad employees. The majority of these, as will be seen, have reference to the habits of the employee in respect to temperance.¹

The intoxication of an engineer has been held a defense to an action by him against the company for injuries, under the statutes

⁶⁸ *United States v. Chicago & N. W. R. Co.* (1907) 157 Fed. 616.

⁶⁹ *United States v. Illinois C. R. Co.* (1908) 166 Fed. 997.

⁷⁰ The fact that a switchman uses a grab iron while opening the knuckle of the coupling device when the cars are several hundred feet apart will not relieve the company from liability from a resulting injury, on the theory that this was an improper use of the grab iron. *Campbell v. Chicago, R. I. & P. R. Co.* (1910) 243 Ill. 620, 90 N. E. 1106.

¹ *Alabama*.—Civ. Code 1907, § 5481 (3448). An applicant for employment as train despatcher, engineer, conductor, fireman, flagman, brakeman, trackman, or switchman is to be subjected to examination respecting his capacity, moral character, etc., and respecting his ability to distinguish objects and color. (Laws 1887, chap. 47; Laws 1887, chap. 59; Laws 1893, chap. 241.)

Colorado.—Laws 1891, p. 280. Railway companies not to employ a telegraph operator under eighteen years of age, nor one who has not had one year's experience.

Georgia.—Laws 1890, chap. 148. No

railway company is to employ a telegraph operator under eighteen years of age, nor one who has not had one year's experience.

Maine.—Rev. Stat. 1903, chap. 52, § 74. Any person in charge of a locomotive engine, or acting as conductor, brakeman, motorman, or switchman, who is intoxicated while employed on a railroad, is subject to a fine.

Massachusetts.—Rev. Laws 1902, chap. 111, § 221. A railroad corporation shall not employ any person or keep him in its employ in a position which requires the employee to distinguish form or color signals, unless he has been examined for color blindness or other defect of sight by a competent person employed by the corporation, and has received a certificate that he is not disqualified for such position by color blindness or other defect of sight.

Michigan.—Comp. Laws, § 6284. No person to be employed in any of the operating departments who uses intoxicating drinks as a beverage.

New York.—Railroad law, § 42. Men over twenty-one years of age, not addicted to intoxicating liquors, may be employed as car drivers, motormen, or

of North Carolina, making it a misdemeanor for an engineer to be in charge of a locomotive while intoxicated.²

As to the master's duty at common law to employ competent servants, see chapter XLVI., *ante*.

1880. System.—*a. Generally.*—Some miscellaneous provisions regulating the system of operation of railroads have been enacted.

England.—Railway act, 51, Vict. chap. 29, § 13. It is provided that when a train is run reversed in a city, a town, or village, the company shall station on the last car a person who shall notify persons standing on the crossing or track of the approach of the train.

Maine.—Rev. Stat. 1903, chap. 52, § 71. No car disconnected from a train shall be left or permitted to remain standing on the main track of a railroad unless accompanied by danger signals which are to be constantly attended by employees.

Michigan.—Comp. Laws 1897, § 6286. Copies of rules and regulations shall be furnished to employees. This provision merely prescribes a duty which exists at common law. See §§ 1119, 1132, *ante*.

Ontario.—Rev. Stat. Can. 1906, chap. 37. Railroad companies required to have lights on cars moving backward in cities, towns, or villages, or to station lookouts to warn people of the approach of the car.

gripmen, or in any other capacity, if fit and competent therefor. Applicants for positions to be examined and tested.

Laws 1896, chap. 112, § 41. Misdemeanor for any person or association engaged in the carriage of passengers or property to employ person addicted to intoxicating liquors.

North Carolina.—Laws of 1907, chap. 330; Pell's Revisal 1908, § 3758. Any train despatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or any employee of any steam, street, suburban, or interurban railway company who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting engine, street or electric car, shall be guilty of a misdemeanor.

Ohio.—Gen. Code. 1910 § 9005. Engineers who are in the habit of becoming intoxicated not to be employed.

Sec. 12,548 (Bates's Anno. Stat. 3365-9). Similar to Massachusetts provision forbidding employment of color-blind persons.

Sec. 12,551. Flagmen, hostlers, or assistant hostlers must be able to read, write, and speak the English language.

Laws 1891, p. 320. Railway companies not to employ as conductor a man who has not had two years' ex-

perience as trainman, nor as an engineer a man who has not had three as fireman.

Vermont.—Pub. Stat. 1906, § 4406. Man using intoxicating liquors not to be employed as conductor, engineer, brakeman, switchman, semaphore or other signalman, train despatcher, telegraph operator who receives train orders, motorman or operator of an electric car.

Washington.—Rem. & Ball. Codes & Stat. § 9071 (Laws 1901, p. 215, § 1. Cf. Laws 1897, p. 17, § 1). Hereafter street railway or street-car companies, or street-car corporations, shall employ none but competent men to operate or assist as conductors, motormen, or gripmen upon any street railway or street-car line in this state.

Sec. 8682 (Laws 1899, p. 49, § 1; Laws 1907, p. 265, § 1). Flagmen must be able to read, write, and speak the English language.

²This is true although the engineer was injured before his attempt to get upon the engine and to take charge of it had proceeded far enough to render him amenable to prosecution under the statute. *Seaboard Air-Line R. Co. v. Chapman* (1908) 4 Ga. App. 706, 62 S. E. 488.

The Canadian statute requiring lights on the rear end of a backing train in a city, town, or village, or a lookout to warn persons of its approach, have been held to be for the benefit of employees of the road as well as the public.¹

b. "*Full-crew*" statutes.—In the following jurisdictions provisions regulating the number of men forming train crews have been passed:

Arkansas.—Acts of 1909, p. 899. It is provided that all railroads whose line or lines are over 100 miles in length, engaged in hauling passenger trains consisting of three or more cars, must equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, a porter, and a flagman or brakeman.

Acts of 1907. All railroads over 50 miles in length, engaged in hauling freight trains consisting of twenty-five cars or more, are required to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakeman.

Indiana.—Burns's Anno. Stat. 1909, § 5296 (Acts 1907, p. 18). Passenger trains of five or more cars must have a crew consisting of one engineer, one fireman, one conductor, one brakeman, and one flagman, and the latter two employees shall not be required to perform the duties of baggage masters or express messengers.

Sec. 5295 (Laws 1907, p. 18). Railroad companies must provide a crew consisting of one conductor, one engineer, one fireman, two brakemen, and one flagman on every freight train of more than 50 cars, exclusive of the caboose and engine; on trains of less than 50 cars, the same crew with one less brakeman.

Maine.—Rev. Stat. 1903, chap. 52, § 70. No train of passenger cars moved by steam shall be run without one trusty and skilful brakeman to every two cars.

Nebraska.—Comp. Stat. 1911, § 4690s1. It shall be unlawful for any railroad company to operate outside of the yard limits, any passenger, mail, or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and one flagman.

Sec. 4690s2. It shall be unlawful for any railroad company to operate outside of yard limits any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor, and two brakemen.

New York.—A statute of this character was passed by the legislature in the session of 1913.

North Dakota.—Rev. Code 1905, § 4307. It shall be the duty of every corporation operating a railway which has not complete air equipments in good order on all rolling stock in use on said road to furnish at least two brakemen to each freight train consisting of forty-five cars; and it shall be the duty of said company to furnish an extra brakeman on said freight train for every ten cars or fraction thereof in excess of said forty-five cars; provided, that this section shall not apply to any train which has therein, equipped with air brakes, a sufficient number of cars to render hand brakes unnecessary in the ordinary stoppage of trains. [1895, chap. 94, § 1; R. C. 1899, § 2987.]

¹ *Lamond v. Grand Trunk R. Co.* (1908) 16 Ont. L. Rep. 365.

Ohio.—Gen. Code 1910, § 12,553. Passenger trains of not over five cars must have a crew of one engineer, one fireman, one conductor, and one brakeman; if the train consists of more than five cars, there shall be one additional brakeman.

South Carolina.—Code 1912, § 3217. Every railroad corporation shall cause to be stationed on every passenger train trusty and skilled brakemen equal in number at least to one for every two cars in the train, except on passenger trains, where power brakes are used, and one such brakeman on the last car of every freight train, which must always be equipped with a good and sufficient brake.

Texas.—Acts 1907, p. 92, § 1. Passenger trains to have crew consisting of at least one engineer, one fireman, one conductor, and one brakeman.

§ 2. Freight trains to have crew consisting of at least one engineer, one fireman, one conductor, and two brakemen.

§ 3. Outside of yards, a light engine shall have crew consisting of one engineer, one fireman, and one conductor.

The Indiana "full crew" act has been held to apply to all trains operated within the state, although starting in another state, and passing through Indiana to a point beyond.²

1881. Health of employees.—The statutes having to do with the health of employees may be divided into the following classes:

(1) Those requiring the company to provide shelter for the employees engaged in construction or repair work.¹

Under the Arkansas act it has been held that the phrase, "where such work is permanently done," means where constantly done, and the phrase "permanently employed" means regularly employed, and the act applies to repair tracks where the "running repairs" were made, consisting of the substitution of new for broken parts on cars, and supplying missing parts, so as to keep the cars in transit.²

(2) Those requiring the vestibules of street cars to be inclosed in winter to protect the motorman or other employees from the weather; in a few of these it is also required that the vestibule be heated.³

² *Pittsburgh, C. C. & St. L. R. Co. v. State* (1909) 172 Ind. 147, 87 N. E. 1034.

¹ *Arkansas.*—Act of 1905. It is provided that it shall be unlawful for any railroad company or corporation, or any other person owning, controlling, or operating any railroad within the state to build, construct, or repair railroad equipment without first erecting and maintaining at any division point where such work is permanently done, a building or shed over the repair tracks, so as to provide that all men permanently employed in the construction and repair shall be under shelter during inclement weather.

Kansas.—Gen. Stat. 1909, § 7127;

Laws of 1907, chap. 283, § 1. Similar in terms to the Arkansas act.

Oklahoma.—Comp. Laws 1909, § 4063a (act of March 27, 1909). Railroad companies required to erect and maintain a building or shed over repair tracks where equipment is being built, constructed, or repaired.

Texas.—Acts 1910 (31st Leg. 4th Called Session, S. B. 4), chap. 6. Railroad companies to provide and maintain building or sheds for protection of workmen engaged in constructing or repairing railroad tracks or other equipment.

² *St. Louis, I. M. & S. R. Co. v. State* (1908) 86 Ark. 518, 112 S. W. 150.

³ *Colorado.*—Rev. Stat. 1908, §§ 5439,

A conductor hurt by a fall from a car cannot recover damages for his injuries on the theory that the company failed to provide a car

5440. Employees on street cars to be protected by vestibules, etc.

Connecticut.—Act June 11, 1897, chap. 241. Railway commissioners may direct that platforms of cars be inclosed by gates or vestibules.

Illinois.—Hurd's Rev. Stat. 1908, p. 2120 (Laws 1903, p. 289). All street cars shall be provided during the months of November and March, inclusive, with screens or vestibules to protect the employees.

Indiana.—Burns's Anno. Stat. 1908, § 5705 (act June 28, 1895). Every electric street car, other than trail cars which are attached to motor cars, shall, during the months of November, December, January, February, and March of each year, be provided, at the forward end thereof, with a screen constructed of glass or other materials, which shall fully and completely protect the driver, or motorman, or gripman, or other person stationed on such forward end, and driving, guiding, or directing the motive power by which such cars are propelled, from wind and storm.

Iowa.—Code 1897, § 768. From November 1st of each year to April 1st following, all street cars, except trailers, used for the transportation of passengers, to be provided with vestibules inclosing the front platform on at least three sides, for the protection of employees operating such cars.

Kansas.—Gen. Stat. 1909, § 7150. All street or interurban cars during the months of November, December, January, February, and March to be provided with an inclosed vestibule for the benefit of the motorman or other employee used to operate the propelling power on said car; the vestibule to be heated in the same manner as the interior of said car at all times.

Massachusetts.—Rev. Laws 1902, chap. 112, § 56. All street cars in use for the transportation of passengers in December, January, February, and March, in each year, shall have their platforms inclosed in such manner as to protect the motorman, conductors, or other employees who operate such cars from exposure to wind and weather, in such manner as the board shall approve.

(Laws 1900, chap. 414, amending Laws 1897, chap. 452.)

Michigan.—Comp. Laws, § 5522. Street car platforms to be inclosed from November 1st to April 1st of each year, to protect the employees from exposure to the weather.

Minnesota.—Rev. Laws 1905, § 5185. Laws of 1893, chap. 63, § 1. It is provided (under penalty), that street railway companies operating electric, cable, or steam cars, requiring the constant service of persons on any of the cars except the rear platform, provide each car with an inclosure, constructed of wood, iron, and glass, or similar suitable material, sufficient to protect such employees from exposure to the inclemency of the weather, but not so as to obstruct the vision of the person operating the car, at all times between November 1st and April 1st in each year. "Trailing cars" are excluded from this requirement.

Pronounced constitutional in *State v. Smith* (1894) 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545.

Missouri.—Rev. Stat. 1909, § 4889. Similar to the Minnesota act, *supra*.

Montana.—Rev. Code 1907, § 1727. In same terms as the Michigan act.

Nebraska.—Comp. Stats. 1907, §§ 10,682, 10,683. Similar to the Minnesota statute, *supra*.

New Hampshire.—Pub. Stats. 1901, p. 531; act March 10, 1899, chap. 69. Platforms of street cars to be inclosed during certain months.

New Jersey.—Act May 11, 1897, chap. 190. Platforms of electric street railways to be inclosed for protection in winter.

New York.—Railroad law 1909, §§ 111, 111a. Street surface cars, except in portions of New York city, propelled by electricity, cable, or compressed air, to have front and rear platforms inclosed.

North Carolina.—Laws 1901, chap. 743; Pell's Revisal 1908, § 2615. All street cars to have vestibule fronts during the last half of November, and during December, January, February, and March.

Ohio.—Gen. Stat. 1910, § 12,788; act of April 20, 1893, 90 Laws, 220, § 1, amended by 98 Laws 5. It is provided

with a vestibuled front, as required by the North Carolina statute, where there is no causal relation between the lack of a vestibule and the accident.⁴

So it has been held that the Texas act requiring the forward end of electric cars to be screened during certain months is a penal statute which will not be extended beyond the plain import of its terms.⁵

(3) Those requiring seats to be provided for employees on street cars.⁶

(under penalty) that every electric street car other than trail cars, which are attached to motor cars, shall be provided during the months of November, December, January, February, and March of each year, at the forward end, with a screen constructed of glass or other material, which shall fully and completely protect the driver or motorman or gripman, or other person stationed on the forward end, guiding and directing the motor power by which they are propelled, from wind and storm; and that the space provided on such car for such persons shall, during the said months, be provided with a sufficient heating device to maintain a temperature at all times not below 60° Fahrenheit.

Pronounced constitutional in *State v. Nelson* (1894) 52 Ohio St. 88, 26 L. R. A. 317, 39 N. E. 22.

Oregon.—Lord's Gen. Laws 1910 § 7012. All street cars to be provided with vestibules or weather guards during November, December, January, February, and March. (Laws 1901, p. 122, § 1; B. & C. § 2101.)

South Carolina.—Code 1912, § 3949. Electric railway companies shall affix to their cars or coaches inclosed vestibules for the protection of motormen and passengers during the months of December, January, February, and March.

Sec. 3952. Interurban railroad companies shall affix to their cars or coaches inclosed vestibules for the protection of motormen and passengers during the months of November, December, January, February, and March.

Tennessee.—Laws 1903, chap. 480. Street cars to be equipped with front vestibules except from March 15 to November 1 of each year.

Texas.—Laws 1903, p. 178, 1. Electric cars to be equipped with vestibules from November 15 to March 15 of each year.

Utah.—Comp. Laws 1907, § 4487x7 (Laws 1901, p. 44) Street cars to be inclosed for protection of employees from November 1 to April 1 of each year.

Virginia.—Act 1898, Feb. 1, chap. 181. Street railways required to vestibule fronts of cars from December to March, inclusive.

Washington.—Rem. & Bal. Codes & Stat. § 9076 (Laws 1895, p. 360, § 1). All persons owning, managing, or operating any street railway shall provide, during the rainy or winter season, all cars with good, substantial, and sufficient vestibules, or weather guards, for the protection of the employees.

West Virginia.—Code 1906, § 441; Acts 1901, chap. 8. The platforms of street cars shall be inclosed for the protection of the employees.

Wisconsin.—Acts 1895, chap. 279. Enactment substantially similar to that of Minnesota.

⁴ *Rich v. Asheville Electric Co.* (1910) 152 N. C. 689, 30 L.R.A.(N.S.) 428, 68 S. E. 232.

See note to *Rich v. Asheville Electric Co.* 30 L.R.A.(N.S.) 428.

⁵ *Beaumont Traction Co. v. State* (1909) 57 Tex. Civ. App. 605, 122 S. W. 615.

⁶ *Kansas*.—Gen. Stat. 1909, § 7150. Seats to be provided for motormen, to be used when it will not interfere with the proper performance of their duty.

Oregon.—Lord's Gen. Laws 1910 § 7010. Electric cars to be provided with seats for motormen (Laws 1909, chap. 59, § 1).

New Jersey.—Laws 1882, p. 44 (Comp. Stat. 1910, p. 4990). Seats to be provided for the drivers of horse cars.

(4) Those requiring toilet facilities to be provided for employees.⁷

⁷ *Kansas*.—Gen. Stat. 1909, § 7151. maintain proper toilet facilities on said
Every such street or interurban car interurban cars, or at convenient places.
company, or other person, association, along its right of way, for the use of its
or corporation, which owns, controls or employees and passengers, and to which
operates any street or interurban car such employees and passengers shall
system in whole or in part within the have access.
state of Kansas, shall provide and

CHAPTER LXXX.

STATUTES RELATIVE TO THE HEALTH AND SAFETY OF EMPLOYEES IN MINES.

- 1882. Generally; constitutional provisions.
 - a. In general.
 - b. General construction of these provisions; nature of duty imposed.
 - c. "Wilful violation" of the statute.
 - d. Constitutional provisions.
- 1883. Governmental control.
- 1884. Underground workings. Method of construction.
- 1885. Underground workings. Maintenance of safe conditions in place of work.
- 1886. Mechanical appliances.
- 1887. Competency of employees.
- 1888. System of operation.
- 1889. Health of employees.
- 1890. Medical aid.
- 1891. Places within purview of mining acts.

1882. Generally; constitutional provisions.—a. *In general.*—In every jurisdiction in which mining is carried on to any considerable extent, statutes affecting the duties of the owners or operators of mines have been enacted. These statutes vary greatly in point of comprehensiveness and particularity. Some of them cover only a very small portion of the available field of legislation. Others, such as those which have been passed in England, Pennsylvania, and several of the British Colonies, are extremely elaborate, and, so far as regards the specific matters dealt with, would seem to admit of very little further expansion. But in view of the general trend of labor legislation at the present day, it is by no means unlikely that some legislatures may be led to supplement them by the introduction of provisions operating so as to subject employers to a more stringent liability in respect of the consequences of a failure to perform their obligations which are specified.

It has been deemed best to review the cases dealing with these enactments in connection with the particular provision which they construe, although a few of the more general questions of construction will be noted in the following subsections.

b. General construction of these provisions; nature of duty imposed.—It has been held the provision in the Illinois Constitution relative to the safety of mines (see note 22, *infra*) should be liberally construed.¹

In general it may be said that the courts are inclined to construe the statutes relative to the safety and health of employees in mines liberally, so as to afford the servant the benefits intended by the legislature.² But there is some authority to the contrary;³ and even in those jurisdictions in which the liberal construction view has been taken, it has been held that the servant, in order to secure the benefits of the statute, must bring himself clearly within the statute.⁴

The duty imposed upon the master by the statutes is generally held to be an imperative and absolute duty,⁵ which is continuous,⁶ and the measure of the duty is to be determined by the terms of the statute, and not by the principles of ordinary care.⁷

¹ *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90.

² *Beard v. Skeldon* (1885) 113 Ill. 584 (see § 1886, note 3, *post*); *Princeton Coal Min. Co. v. Lawrence* (1911) — Ind. —, 95 N. E. 423, rehearing denied in 96 N. E. 387 (see § 1885, note 2, *post*); *Stearns Coal Co. v. Evans* (1908) 33 Ky. L. Rep. 755, 111 S. W. 308 (see § 1885, note 43, *post*); *Welch v. Kansas City Midland Coal & Min. Co.* (1910) 151 Mo. App. 438, 132 S. W. 49 (see § 1886, note 3, *post*).

³ *Green v. Bessemer Coal, Iron & Land Co.* (1909) 162 Ala. 609, 50 So. 289 (see § 1886, note 4, *post*).

⁴ *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378 (see § 1885, note 9, *post*).

⁵ *Deserant v. Cerillos Coal R. Co.* (1909) 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573 (see § 1885, note 45, *post*); *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54 (see § 1885, note 44, *post*); *Wesley City Coal Co. v. Healer* (1876) 84 Ill. 126, 1 Mor. Min. Rep. 68 (see § 1884, note 5, *post*); *Layzell v. J. H. Somers Coal Co.* (1909) 156 Mich. 268, 117 N. W. 179, 120 N. W. 996 (see § 1887, note 5, *post*); *Kleinfelt v. J. H. Somers*

Coal Co. (1909) 156 Mich. 473, 132 Am. St. Rep. 532, 121 N. W. 118 (see § 1887, note 6, *post*); *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679 (see § 1885, note 11, *post*); *Com. v. Reynolds*, 1 Kulp, 218 (see § 1885, note 45, *post*); *Gulla v. Lehigh Valley Coal Co.* (1905) 28 Pa. Super. Ct. 11 (see § 1885, note 70, *post*).

⁶ *Wilson v. Wishaw Coal Co.* (1883) 10 Sc. Sess. Cas. 4th series, 1021, 20 Scot. L. R. 680 (see § 1884, note 7, *post*); *Layzell v. J. H. Somers Coal Co.* (1909) 156 Mich. 268, 117 N. W. 179, 120 N. W. 996 (see § 1887, note 5, *post*); *Monson v. La France Copper Co.* (1909) 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243 (see § 1886, note 6, *post*); *Nalewaja v. Northwestern Improv. Co.* (1911) 63 Wash. 391, 115 Pac. 847 (see § 1885, note 45, *post*).

⁷ *Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579 (see § 1888, note 2, *post*); *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122 (see § 1888, note 50, *post*); *Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768 (see § 1885, note 11, *post*); *Edwards v. Lam* (1909) 132 Ky. 32, 116 S. W. 283, rehearing denied in (1909) 132 Ky. 42, 119 S. W. 175 (see

So also the statutory duty is generally deemed to be nondelegable,⁸ although in a few decisions it is said that they do not impose upon the mine owner the absolute duty of carrying out personally all the mere details of the work.⁹

By a court of inferior jurisdiction in Pennsylvania it has been laid down that a mine owner is bound to comply with the statutory requirements, even though the precautions which they prescribe may be unnecessary in his mine.^{9a}

c. "Wilful violation" of the statute.—In some of the statutes relative to the safety and health of employees in mines, notably the Illinois act, the mine owner is declared to be liable for any "wilful" violation of the statute. Some of the general principles governing the construction of this phrase may be noted.

It has been frequently held that in the construction of the Illinois statute the words "wilfully" and "knowingly" are to be considered as synonymous.¹⁰ So too it has been held that if a mine examiner could,

§ 1885, note 45, post); *Nicholson Coal Min. Co. v. Moulden* (1911) 143 Ky. 348, 136 S. W. 620 (see § 1885, note 45, post); *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679 (see § 1885, note 11, post).

⁸ *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54 (see § 1885, note 44, post); *Joseph Taylor Coal Co. v. Dawes* (1906) 220 Ill. 145, 77 N. E. 131 (see § 1888, note 40, post); *Wilmington & S. Coal Co. v. Sloan* (1907) 225 Ill. 467, 80 N. E. 265 (see § 1885, note 44, post); *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214 (see § 1885, note 10, post); *Poli v. Numa Block Coal Co.* (1910) 149 Iowa, 104, 33 L.R.A.(N.S.) 646, 127 N. W. 1105 (see § 1886, note 5, post); *Curvin v. Grimes* (1909) 132 Ky. 555, 116 S. W. 725 (see § 1885, note 44, post); *Interstate Coal Co. v. Bazavenie* (1911) 144 Ky. 172, 137 S. W. 859 (see § 1885, note 44, post); *Gulla v. Lehigh Valley Coal Co.* (1905) 28 Pa. Super. Ct. 11 (see § 1885, note 70, post).

⁹ *Dickinson v. Fletcher* (1873) L. R. 9 C. P. 1, 43 L. J. Mag. Cas. N. S. 25, 29 L. T. N. S. 540 (see § 1885, note 63, post); *Sinnerton v. Merry* (1886) 3 Sc. Sess. Cas. 4th series, 1012, 23 Scot. L. R. 725 (see § 1885, note 72, post); *Watkins v. Naval Colliery Co.* [1911] 2 K. B. 162, 80 L. J. K. B. N. S. 746, 104 L. T. N. S. 439, 55 Sol. Jo. 347 (see § 1886,

note 7, post); *Manning v. App. Consol. Gold Min. Co.* (1906) 149 Cal. 35, 84 Pac. 657 (see § 1888, note 41, post); *Squillache v. Tidewater Coal & Coke Co.* (1908) 64 W. Va. 337, 62 S. E. 446 (see § 1885, note 48, post).

^{9a} *Com. ex rel. Williams v. Kingston Coal Co.* (1891) 6 Kulp, 241.

¹⁰ *Marquette Third Vein Coal Co. v. Diehl* (1904) 208 Ill. 116, 70 N. E. 17; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Olson v. Kelly Coal Co.* (1908) 236 Ill. 502, 86 N. E. 88; *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 166; *Riverton Coal Co. v. Shepherd* (1903) 111 Ill. App. 294.

In *Carterville Coal Co. v. Abbott* (1899) 181 Ill. 495, 55 N. E. 131, the court said: "Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he wilfully disregards its provisions, and wilfully disregards the safety of miners employed therein."

An act consciously omitted is wilfully omitted, within the meaning of the word "wilful," as used in these enactments of the legislature relative to the duty of mine owners. *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192.

Wilful violation is predicated where the owner is affected with notice that the requirements have not been complied

by the exercise of reasonable care, have known of the dangerous conditions, his failure to discover them is a wilful violation of the statute.¹¹

In determining the question of the mine owner's "wilful" violation of the statute, the question of the exercise of ordinary care on his part is not involved.¹² The conscious failure to observe and comply with the provisions of the act, even with no evil intent, renders him liable.¹³ The questions of the existence or nonexistence of good faith, or the presence or absence of an intention to comply with the statute, on the part of the operator, are not involved.¹⁴ Even if a mine manager

with, and fails to remedy the defective conditions. *Bartlett Coal & Min. Co. v. Roach* (1873) 68 Ill. 174, 10 Mor. Min. Rep. 682; *Jupiter Coal Min. Co. v. Mercer* (1899) 84 Ill. App. 96; *Girard Coal Co. v. Wiggins* (1893) 52 Ill. App. 69.

It is not error to instruct the jury that by a wilful violation of the law is meant a violation of its provisions, knowingly and deliberately committed. *Catlett v. Young* (1892) 143 Ill. 74, 32 N. E. 447.

The inference that a mine owner possessed that knowledge of the failure to comply with the statute which warrants the conclusion that he had wilfully violated it may properly be drawn where he was operating a coal mine, the original shaft of which was 200 feet in depth, and had failed to construct an additional or escapement shaft, in the manner required by 2 Starr & C. Anno. Stat. chap. 93, § 3, within a year after coal was mined for sale or use. *Carterville Coal Co. v. Abbott* (1898) 81 Ill. App. 279.

¹¹ *Gallez v. Kelly Coal Co.* (1909) 151 Ill. App. 178.

¹² *Hamilton v. Spring Valley Coal Co.* (1909) 149 Ill. App. 10.

¹³ *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Missouri Malleable Iron Co. v. Dillon* (1903) 206 Ill. 145, 69 N. E. 12; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Athens Min. Co. v. Carnduff* (1906) 221 Ill. 354, 77 N. E. 571.

It is not necessary that a mine examiner should have had any evil intent, in order to make his failure to comply with the statute a wilful violation thereof, but a wilful violation signifies a conscious violation. *Mertens v. South-*

ern Coal & Min. Co. (1908) 235 Ill. 540, 85 N. E. 743.

¹⁴ *Emerling v. Spring Valley Coal Co.* (1909) 149 Ill. App. 97; *Eldorado Coal & Coke Co. v. Swan* (1907) 227 Ill. 586, 81 N. E. 691. In the last case, the court said: "Appellant's most serious contention is that, even if it be conceded that the light was not fully up to the legal requirements in respect to the amount of light, still when the evidence all shows that appellant had made an honest effort to comply with the statute, and had partially failed, it cannot be adjudged guilty of a wilful violation of the law, even if its partial failure arises from negligence on its part in the selection of the means or the method of their application, with the view of complying with the statute. This argument is more ingenious than sound. The fallacy of the argument results from the assumed meaning of the word 'wilful,' as it is used in the miners act. If it were necessary to show an evil intent, or any blameable conduct, to establish the wilfulness contemplated by this statute, then there would be more force in this contention. But no such construction of this statute has even been recognized by this court. On the contrary, it has often been held that an act consciously done—that is, proceeding from the free and voluntary will,—is wilful, within the statute."

"It is insisted that there was no wilful violation of the statute because the plaintiff in error in good faith believed the doorway was not a principal doorway. The plaintiff in error was, however, acquainted with all the facts. It was charged with knowledge that the door was necessary for the ventilation of a portion of the face of the coal where miners were at work. It cannot

honestly believed that timbers are not necessary, his failure to furnish timbers when demanded by a miner is nevertheless a wilful violation of the statute.¹⁵

The failure of the mine manager for many days to clean or sprinkle a roadway, with knowledge that such cleaning or sprinkling was necessary, is a conscious omission of duty, and consequently a wilful violation of the statute.¹⁶

Evidence of other failures to comply with the statute is admissible to prove a wilful violation of the statute.¹⁷

On the other hand, it has been held that mere negligence is not sufficient to show a wilful violation of the statute.¹⁸ Although a mine owner will not be relieved from liability because other owners have also failed to comply with the statutory duty, yet if he has made an attempt to comply with the statute, and the conditions are such as

be heard to say that it was mistaken as to the law, and its failure to provide a trapper under such circumstances must be regarded as wilful." *Karkowski v. LaSalle County Carbon Coal Co.* (1911) 248 Ill. 195, 199, 93 N. E. 780.

In a case where a declaration alleged that plaintiff's intestate came to his death by defendant's wilful omission to comply with two sections of the act, it was held proper to refuse to allow officers of defendant to testify that they intended to comply with the statute in good faith, since the word "wilful," as employed in the declaration, did not charge wrongful intent, but only that the omissions were conscious acts of the mind, and did not result from mere inadvertence. *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, affirming (1899) 84 Ill. App. 190.

¹⁵ *Springfield Coal Min. Co. v. Gedutis* (1907) 227 Ill. 9, 81 N. E. 9.

¹⁶ *Davis v. Illinois Collieries Co.* (1908) 232 Ill. 284, 83 N. E. 836, affirming (1907) 137 Ill. App. 15, and indirectly *Illinois Collieries Co. v. Haveron* (1908) 137 Ill. App. 22 (same facts as in the *Davis Case*).

¹⁷ In an action for injuries to a coal miner, due to the failure of the operator to light a landing, evidence that the operator had on former occasions failed to properly light the bottom of the shaft is admissible. *Robertson v. Donk Bros. Coal & Coke Co.* (1909) 238 Ill. 344, 87 N. E. 373.

¹⁸ In an action to recover for the wilful violation of the mines act, it is error to submit the cause to the jury as one of negligence. *Swinosynski v. Kelly Coal Co.* (1908) 146 Ill. App. 120.

In an action under the Illinois mines act, charging wilful violation, an instruction upon the subject of negligence simply is erroneous. *Moore v. Centralia Coal Co.* (1908) 140 Ill. App. 291.

Under the mining act of this state the liability of the owner is conditioned upon proof that he has "wilfully violated" the statutory requirements. *Consolidated Coal Co. v. Carson* (1896) 66 Ill. App. 434. Mere noncompliance with these requirements does not constitute a "wilful violation" thereof. *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, affirming (1899) 84 Ill. App. 190; *Springside Coal Min. Co. v. Grogan* (1892) 53 Ill. App. 60 (instruction based on opposite theory held erroneous).

Instructions are defective unless they are such as to keep permanently before the jury the question whether the breach of the statutory requirement complained of was wilful. *Hawley v. Dailey* (1883) 13 Ill. App. 391.

Negligence so gross as to amount to recklessness and indicate a willingness to subject others to a known and avoidable risk will support a charge of wilful wrong; but such a charge is not sustained by proof of a want merely of ordinary care. *Girard Coal Co. v. Wiggins* (1893) 52 Ill. App. 69.

prudent men consider safe, then it cannot be said that he has wilfully violated the statute.¹⁹

Whether or not the mine owner has been guilty of a wilful violation of the statute is ordinarily a question for the jury.²⁰

d. Constitutional provisions.—The constitutions of several of the American states contain provisions requiring the enactment of laws for the protection of miners. Some of these provisions are expressed in general terms.²¹ By others it is ordained in greater detail that the legislature shall pass such laws as may be necessary for the protection of miners, by providing for ventilation where it may be required, and the construction of escapement shafts, or such other appliances as may be necessary to provide safety in all mines.²² It has been held that such a provision embraces only such reasonably necessary mechanical appliances as will secure the end in view, and does not include other kinds of health regulations.²³ But it has also been held that the provision in the Illinois Constitution (art. 4, § 29) that the legislature shall pass such laws as are necessary for the pro-

¹⁹ "Defendant was permitted to show that this trap door was constructed and its sill maintained in the method usually adopted in other like mines, and the jury were instructed that if said sill was constructed in the manner in which such doors with sills used for that purpose in coal mines are usually and ordinarily constructed in coal mines by men of ordinary care and caution, then such sill did not constitute a dangerous condition under the law. A distinction, we think, should be drawn between cases where the mine owner has failed to do some specific thing required by statute, and where the alleged dangerous condition is in a matter not specifically prescribed by statute. Where the statute has directed a fence to be built around the top of the mine, or a light to be displayed at the bottom of the mine, on the roadways to be sprinkled when the air in the mine is charged with dust, the operator is not permitted to say, in defense to an action for an injury caused by a failure to comply with such requirements, that he did some other thing which he thought was a sufficient protection of the men in his employ. But the statute contains no directions as to how the sill or the trap door shall be built, or how the roadway shall be fitted for travel, except that the operator must guard against

dangerous conditions. If, therefore, in such a matter, the mine examiner has made an examination as required by statute, and has honestly decided that the conditions are safe, and has so reported, and if the mine manager so believes, and if the conditions are those which prudent mine managers consider safe in their mines, then, though the jury might decide that they were mistaken and that the conditions were in fact dangerous, it is difficult to see how they could decide that the operator had wilfully permitted dangerous conditions to exist. It is a wilful violation of the statute that is charged in this declaration. A wilful violation of the statute is a conscious violation." *Hamilton v. Spring Valley Coal Co.* (1909) 149 Ill. App. 10, 20.

²⁰ Whether there has been a wilful failure must be determined by the jury upon a consideration of all the facts and circumstances of the case. *Odin Coal Co. v. Denman* (1899) 84 Ill. App. 190; *Muddy Valley Min. & Mfg. Co. v. Phillips* (1890) 39 Ill. App. 376.

²¹ There is a clause of this tenor in Ark. Const. 19, 18.

²² Such is the effect of Ill. Const. art. 4, § 29, and Colo. Const. art. 16, § 2.

²³ *Re Morgan* (1899) 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

tection of miners by providing for ventilation, for the construction of escapement shafts, or such "other appliances" as may secure safety, includes all the physical conditions in the mine.²⁴

1883. Governmental control.—The enactments under this head are dividible into the following classes:

(1) Provisions which relate to the appointment, powers, and duties of official inspectors.¹

In some jurisdictions the inspector is invested with a general authority to give notice to the owner or operator concerning any causes of danger not specifically provided in the statute, and to require the

²⁴ *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90.

¹ *England.*—Coal mines regulation act 1887, §§ 39 *et seq.*

Metalliferous mines regulation act 1872, §§ 15 *et seq.*

Alabama.—Code 1907, §§ 999–1005 (Laws 1897, chap. 486, § 1).

Arkansas.—Dig. 1904, §§ 5345–5349.

Colorado.—Rev. Stat. 1908, §§ 651–655 (coal mines); §§ 4264–4270 (metalliferous mines).

Idaho.—Rev. Codes, § 199 (act of March 6, 1893, p. 152; act of March 11, 1895, p. 130).

Illinois.—Hurd's Rev. Stat. 1908, pp. 142 *et seq.* (Laws of 1899, p. 300). For the earlier provision see Starr & C. Anno. Stat. p. 2725 (act of June 15, 1895, p. 254, § 11a).

Indiana.—Burns's Anno. Stat. 1908, §§ 8590, 8611, 8612.

Iowa.—Code 1897, §§ 2478 *et seq.*

Kansas.—Gen. Stat. 1899, §§ 3970 *et seq.*

Kentucky.—Stat. 1909, §§ 2722 *et seq.*

Michigan.—Laws of 1897, chap. 123; Laws 1899, No. 57, §§ 1, 9.

Minnesota.—Rev. Laws 1909, §§ 1824–7 *et seq.*

Missouri.—Rev. Stat. 1909, § 8464.

Montana.—Rev. Code 1907, §§ 1711 *et seq.*; §§ 1679 *et seq.* (coal mines).

New Jersey.—Laws 1892, chap. 24; Laws 1894, chap. 54.

New York.—Labor law 1909, § 120 (duties of commissioner of labor in regard to inspection).

North Carolina.—Pell's Revisal 1908, §§ 4943 *et seq.*; Laws 1897, chap. 251, §§ 1 *et seq.*

§ 3910. Duties and powers of labor commissioner prescribed.

Ohio.—Gen. Code 1910, §§ 898 *et seq.* (Laws 1892, chap. 314).

Oklahoma.—Comp. Laws 1909, §§ 4347 *et seq.*

Pennsylvania.—Act of May 3, 1909, P. L. 422, §§ 1 *et seq.*; for earlier enactment, see act of June 1, 1901, P. L. 540, § 1, and act of June 2, 1891, art. 4, § 1 *et seq.*

Act of May 15, 1893, art. 10, §§ 1 *et seq.*, art. 11, § 1 (bituminous coal mines).

South Dakota.—Political Code 1908, §§ 136 *et seq.* (Comp. Laws 1910, §§ 136 *et seq.*).

Tennessee.—Laws of 1907, chap. 540.

Texas.—Acts 1907, p. 331, §§ 14 *et seq.*

Utah.—Comp. Laws 1907, §§ 1507–1511, 1519.

Washington.—Rem. & Bal. Code 1910, §§ 7372 (3158*), 7391 (3175), 7392 (3176).

West Virginia.—Code 1906, §§ 400 *et seq.* (Acts 1905, chap. 46) (earlier enactment Laws 1897, chap. 59).

Wyoming.—Comp. Stat. 1910, §§ 3483–3485 (metalliferous mines); §§ 3518, 3536–3548 (coal mines).

Ontario.—Mines act 1906, §§ 49, 50.

Nova Scotia.—Rev. Stat. 1900, chap. 18, §§ 4–7 (general mines act); chap. 20, § 15 (1) (metalliferous mines); chap. 19, § 39 (coal mines).

British Columbia.—Rev. Stat. 1897, chap. 138, §§ 63 *et seq.* (coal mines).

New South Wales.—Coal mines regulation act 1896, §§ 16–24.

Victoria.—Miners act 1890, § 367 (earlier act, regulation of mines, 1883).

New Zealand.—Mining acts, compilation act 1905, § 270

defective conditions to be remedied.² Such a provision does not apply to a case where the source of the danger to which attention is directed is beyond the control of the mine owner, and consequently cannot be remedied by him.³

A few American enactments require mine owners to pay the fees charged by an inspector for examining his mine. It has been held that such a requirement is constitutional.⁴

(2) Provisions which impose upon the owner or operator of every mine the duty of making a plan of the workings.

In England and in some of the British Possessions it is enacted that this plan shall be kept in the office of the mine, and produced at any time on the request of an inspector.⁵

The American statutes ordinarily provide for its being deposited at some specified public office.⁶

² *England*.—Coal mines regulation act 1887, § 42.

New South Wales.—Coal mines regulation act 1896, § 20.

New Zealand.—Mining acts, compilation act 1905, § 260.

³ *Reg. ex rel. Baker v. Spon Lane Colliery Co.* (1878) L. R. 3 Q. B. Div. 673, 48 L. J. Mag. Cas. N. S. 25, 39 L. T. N. S. 13, 27 Week. Rep. 46. There the danger arose from a dangerous accumulation of water in the shaft of an adjoining colliery. It was held that the only available remedy under the circumstances was to proceed against the owner under the section (51, rule 6; in the act of 1887, § 49, rule 7) which required him to withdraw his workmen from a part of a mine found to be dangerous.

⁴ *Chicago, W. & V. Coal Co. v. People* (1899) 181 Ill. 270, 48 L.R.A. 554, 54 N. E. 961.

⁵ *England*.—Coal mines regulation act 1887, § 34; metalliferous mines regulation act 1872, § 19.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 40 (coal mines); chap. 20, § 17 (metalliferous mines).

New South Wales.—Coal mines regulation act 1896, § 28.

New Zealand.—Mining acts compilation act 1905, § 256.

⁶ *Alabama*.—Code 1907, § 1025.

California.—Stat. 1873-74, p. 726, § 1 (Gen. Laws act 2223).

Colorado.—Rev. Stat. 1908, § 638 (coal mines) (Stat. Anno. 1911, § 638).

Illinois.—Hurd's Rev. Stat. 1908, p. 1424, § 1 (Laws of 1899, p. 300). For the earlier provision, see Starr & S. Anno. Stat. p. 2717 (Laws 1879, p. 204, § 1).

Indiana.—Burns's Anno. Stat. 1908, § 8570 (Laws 1905, chap. 50, § 6).

Iowa.—Code 1897, § 2485.

Kansas.—Gen. Stat. 1899, § 3959.

Kentucky.—Stat. 2727 (Laws 1893, chap. 142, § 8).

Missouri.—Rev. Laws 1909, §§ 8441, 8442.

Montana.—Rev. Codes 1907, § 1692 (Laws 1891, p. 282, § 1).

New Mexico.—Comp. Laws 1897, §§ 2339, 2340.

Ohio.—Gen. Code 1910, §§ 911, 913 (map of abandoned mine).

Oklahoma.—Comp. Laws 1909, §§ 4354 et seq.

Pennsylvania.—Act of June 2, 1891, art. 3 (P. L. 177) § 1 (anthracite coal mines); act of May 15, 1893, P. L. 52, art. 1, § 1 (bituminous coal mines).

Tennessee.—Laws 1903, chap. 237, §§ 10 et seq.

Utah.—Comp. Laws 1910, § 1512.

Washington.—Rem. & Bal. Code & Stat. 1910, §§ 7376 (3160*), 7377 (3161*).

West Virginia.—Code 1907, § 404.

Wyoming.—Comp. Stat. 1910, § 3505 (map to be kept at mine).

This is also the effect of some of the statutes in Ontario and Victoria.⁷

An American provision to the effect that, in the event of the failure of the owner or operator to perform his duty, the map may be made at his expense, has been pronounced constitutional.⁸

(3) Those which provide for an official investigation into the causes of accidents and the circumstances under which they occurred.⁹

With reference to the Illinois enactment it has been held that the person whose duty it is to report accidents to the mine inspector is the person who has immediate personal charge of the mine or colliery. The owner and operator of the mine, or his agent, is not within the penalty imposed for a breach of the duty, unless he has personal charge of the mine.¹⁰

By 18 & 19 Vict. chap. 1908, the mine owner is required to send notice of loss of life, or of serious injury due to explosion, within twenty-four hours. But he cannot be convicted for failing to send notice of a serious injury not causing death or due to explosion.¹¹

1884. Underground workings. Method of construction.—The obligations which are imposed upon mine owners in respect of permanent conditions in the underground workings are as follows:

(1) To see that every shaft is cased, lined, or otherwise made secure, where the natural strata are not safe.¹

⁷ *Ontario*.—Mines act 1906, chap. 11, § 202 (2).

Victoria.—Mines act 1890, § 363.

⁸ *Daniels v. Hilgard* (1875) 77 Ill. 640, 15 Mor. Min. Rep. 280.

⁹ *England*.—Coal mines regulation act 1887, §§ 44–46, 48; metalliferous mines act 1872, § 22.

Notice of accidents act 1906, § 2, as to mines.

Alabama.—Political Code 1907, § 1032 (2930).

Arkansas.—Dig. 1904, § 5345.

Colorado.—Rev. Stat. 1908, § 645.

Idaho.—Rev. Codes, § 207.

Illinois.—Starr & C. Anno. Stat. p. 2723 (Laws 1879, p. 204, § 9); earlier enactment, Rev. Stat. 1874, chap. 93, § 9, amended by act May 11, 1877.

Indiana.—Burns's Anno. Stat. 1908, § 8580; Act March 6, 1897, chap. 111. All accidents causing twenty-four hours delay shall be investigated by mine inspector.

Kansas.—Gen. Stat. 1909, § 5014.

Minnesota.—Rev. Laws 1909, §§ 1824–14.

Missouri.—Rev. Stat. 1909, § 8462.

Montana.—1 Rev. Codes 1907, § 1717.

New York.—Labor law 1909, § 126.

North Carolina.—Pell's Revisal 1908,

§ 4940 (Laws 1897, chap. 251, § 6).

Ohio.—Gen. Code 1910, §§ 926, 927.

Pennsylvania.—Act of June 2, 1891,

art. 1, §§ 1 *et seq.* (anthracite coal mines); act of May 15, 1893, art. 12,

§§ 1 *et seq.* (bituminous coal mines).

South Dakota.—Political Code 1908,

§ 143.

Tennessee.—Laws 1903, chap. 237,

§§ 25a *et seq.*

Utah.—Comp. Laws 1907, § 1521.

Washington.—Rem. & Bal. Code 1910,

§ 7390 (3174).

West Virginia.—Code 1906, § 414

(Laws 1887, chap. 50).

Wyoming.—Comp. Stat. 1910, § 3519

(coal mines); § 3487 (coal mines).

Ontario.—Mines act 1906, §§ 49, 50.

Victoria.—Mines act 1890, § 370.

¹⁰ *Sholl v. People* (1879) 93 Ill. 129.

¹¹ *Underhill v. Longridge* (1859) 29

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221.

¹ *England*.—Coal mines regulation act

(2) To see that every shaft which is used both for the ascent or descent of persons and for the hoisting of materials shall be divided into two compartments by a secure partition.²

(3) To see that there are two shafts or outlets affording separate means of ingress and egress for the persons working in every mine.³

With reference to one of the provisions by which the duty to pro-

1887, § 49 (20); metalliferous mines regulation act 1822, 23 (8).

Coal mines regulation act 1887, § 49 (25); metalliferous mines act 1872, § 23 (10). Shafts over 50 yards in depth to be provided with girder.

Kansas.—Gen. Stat. 1909, § 5007.

Pennsylvania.—Act of June 2, 1891, P. L. 177, art. 4, § 21.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (15) (coal mines); chap. 20, § 19 (11) (metalliferous mines).

New South Wales.—Coal mines regulation act 1896, § 47 (21).

New Zealand.—Mining acts compilation act 1906, § 255 (9).

Victoria.—Mines act 1890, § 357 (8).

² *England*.—Metalliferous mines regulation act 1872, § 23 (9).

Colorado.—Rev. Stat. 1908, § 4290 (metalliferous mines).

South Dakota.—Political Code 1908, p. 643 (Laws 1903, chap. 179).

Ontario.—Mines act 1906, chap. 11, § 205 (22).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (27) (coal mines); chap. 20, § 19 (22) (metalliferous mines).

New South Wales.—Coal mines regulation act 1896, § 43.

Victoria.—Mines act 1890, § 357 (12).

New Zealand.—Mining acts compilation act 1906, § 255 (11).

³ *England*.—Coal mines regulation act 1887, §§ 16–18.

Alabama.—Code 1907, §§ 1023, 1024 (coal mines).

Arkansas.—Dig. 1904, § 5339.

California.—Stat. 1871–72, p. 413 (Gen. Laws, act 2222) (quartz mining claims).

Stat. 1873–74, p. 726, § 3 (Gen. Laws, act 2223) (coal mines).

Colorado.—Rev. Stat. 1908, § 639 (coal mines).

Illinois.—Hurd's Rev. Stat. 1908, p. 1426, § 3 (Laws of 1899, p. 300). For the earlier enactments, see Starr & C. Anno. Stat. p. 2718 (act of May 28, 1879, § 3; acts 1889, p. 202) (coal mines).

It has been held that § 3 of the act of 1877, was kept in force by the proviso in § 3 of the act of 1879, which repealed all the earlier acts except those parts which were covered by the proviso. *Hamilton v. State* (1882) 102 Ill. 367.

Indiana.—Burns's Anno. Stat. 1908, § 8571 (Laws 1905, chap. 50, § 3) (coal mines).

Sec. 8607 (Acts 1907, p. 347). At all coal mines where any escape way or manway is hereafter constructed, the same shall be provided with a good and sufficient stairway, according to the specifications for mine stairways now provided by law, and of suitable design and strength to accomplish the purpose for which it is intended.

Iowa.—Code 1897, § 2486 (Laws 1890, chap. 46) (coal mines).

Kansas.—Gen. Stat. 1909, §§ 4984, 5028, 5029. Earlier enactment, Laws 1899, chap. 165.

Kentucky.—Gen. Stat. § 2468 (Stat. § 2730, Laws 1893, chap. 142, § 9) (coal mines).

Michigan.—Laws 1899, No. 57, § 2 (coal mines).

Missouri.—Rev. Laws 1909, § 8443; Laws 1897, p. 199 (coal mines).

Montana.—Rev. Codes 1907, §§ 1696, 1697 (Laws 1891, p. 282, §§ 3, 4) (coal mines); §§ 8541, 8542 (Laws 1897, p. 66, § 1) (quartz mining claims).

New Mexico.—Comp. Laws 1897, § 2341 (coal mines).

New York.—Labor law 1909, § 121. Second outlet to be provided in coal mines, if, in the opinion of the commissioner of labor, it is necessary for safety of employees.

North Carolina.—Pell's Revisal 1908, § 4934 (coal mines). Earlier enactment, Laws 1897, chap. 251, § 4.

Ohio.—Gen. Code 1910, §§ 914, 915, 917 (coal mines).

Oklahoma.—Comp. Laws 1909, §§ 4359 *et seq.*

Pennsylvania.—Act of June 2, 1891, P. L. 177, art. 4, §§ 1–3 (anthracite coal mines); Act of May 15, 1893, P. L.

vide escape ways has been imposed, the doctrine has been laid down that it is not intended for the benefit of the owners of mines, but is designed to protect the health and ensure the safety of the persons employed in the mines, and consequently that a court has no power under it to direct a mine owner to leave open the passages between his own mine and an adjoining one, so that an escapement constructed by him may serve for both mines.⁴

It has also been held that the liability for a breach of the provision as to escape ways attaches, although the conditions which prevailed on the occasion when the need of the second outlet was experienced were accidental and implied no fault in the mine owner.⁵ Other provisions of this type would doubtless be construed on the same footing.

It has been held that the Alabama statute (Code 1896, § 2921) requiring "two available openings to the surface of each seam" is not satisfied by merely dividing the shaft with a wooden partition.⁶

52, art. 2, §§ 1-6 (bituminous coal mines).

South Dakota.—Comp. Laws 1910, p. 643; Laws 1903, chap. 179, § 1.

Tennessee.—Laws 1903, chap. 237, §§ 27 et seq.

Texas.—Sayre's Supp. 1897-1904, p. 355; Laws 1903, p. 103, § 1.

Utah.—Comp. Laws 1907, § 1513 (Laws 1901, p. 84; Laws 1905, p. 223) (coal mines).

Washington.—Rem. & Bal. Codes & Stat. 1910, § 7378 (3162), § 7379 (3162) (coal mines).

West Virginia.—Code 1907, § 405 (coal mines).

Wyoming.—Comp. Stat. 1910, § 3506 (coal mines).

Ontario.—Mines act 1906, § 205 (32).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 31 (coal mines).

British Columbia.—Rev. Stat. 1897, chap. 134, § 25 (19) (metalliferous mines).

New South Wales.—Coal mines regulation act 1896, §§ 43-45.

⁴ *Loose v. People* (1882) 11 Ill. App. 445.

⁵ *Wesley City Coal Co. v. Healer* (1876) 84 Ill. 126, 1 Mor. Min. Rep. 68 (fire broke out).

⁶ *Howells Min. Co. v. Grey* (1906) 148 Ala. 535, 42 So. 448. The court said: "The statute is intended for the preservation and protection of human life, and should be construed so that the ends for which it was intended may

be accomplished. What is meant by 'two available openings,' as used in the statute? Does the statute mean that one ground opening, divided up by a plank partition into two compartments, the mouths of which are separated only by a thin wooden partition, is sufficient as 'two available openings,' one of which is to be known as a manway or escape way? We think not. It is the spirit and intent of the statute that there shall be two separate and distinct openings, one of which is to be used as an escape way, and so located as to not be necessarily obstructed or cut off by any fire or other disaster which might befall the hoisting shaft or other opening,—*ex vi termini*, two holes in the ground; not one hole, divided by a plank partition into two compartments. . . .

The case of *Whatley v. Zenida Coal Co.* (1898) 122 Ala. 118, 26 So. 124, is not in conflict with the foregoing views. The court simply said, through McClellan, Ch. J.: "It cannot, as a matter of law, be said to be the duty of the person operating coal mines to cut a manway, different and separate from the slope through which coal is brought to the surface, for ingress and egress of their employees." We reaffirm what was said in the *Whatley Case*, *supra*, and repeat that 'it cannot be said, as a matter of law, that there must be a manway separate and distinct from the slope,' unless such an opening be required by the chief mine inspector. The

The duty to keep the traveling ways open is continuous.⁷

Whether a mine owner was in default is a question of fact to be determined by a consideration of the phraseology of the given enactment.⁸

The question whether a way constructed in pursuance of this requirement was sufficient is primarily a question for the jury.⁹

(4) To see that a traveling way is constructed around every hoist-

law does not require at all times and under all conditions two available openings, but simply authorized the mine inspector to require two available openings in all mines working over twenty men. In the case at bar the mine inspector required two openings, and there is nothing to indicate that such was done in the *Whatley Case*, *supra*; and, in the absence of such a requirement, it is not, as matter of law, the duty of a mine owner to maintain a manway, separate and distinct from the opening for the hoisting shaft."

⁷In *Wilson v. Wishaw Coal Co.* (1883) 10 Sc. Sess. Cas. 4th series, 1021, 20 Scot. L. R. 680, manholes had been constructed along the sides of an underground plane in a coal mine, along which the loaded and empty wagons were drawn in opposite directions on different sets of rails. Between the two tracks was a wall which had originally been erected as a means of ventilation, but was not used for that purpose at the time of the accident in question, and which had fallen down in several places. A miner, knowing the conditions in the plane, started to descend along the rails over which the loaded wagons were drawn, although he was aware that a train was then on the point of being despatched, and that some minutes would be required to reach the bottom. Being met by the train and unable to reach a manhole or a hole in the wall, he was struck and injured. Held, that he had been guilty of contributory negligence which precluded him from recovering. The opinion was expressed that a certain number of manholes, which might otherwise have been sufficient to satisfy the statute, was rendered insufficient by the fact that parts of an old wall, originally constructed for ventilation, were still standing between the two tracks in the plane along which the loaded and unloaded wagons were drawn. This in-

creased the danger of using the incline, as a miner in seeking to cross from one side to the other might encounter pieces of the wall.

⁸In an action to enforce the penalty provided by the section of the act of March 3, 1870 (corresponding to the act of June 2, 1891), prohibiting the working of mines not having two shafts for every seam of coal worked, with a proviso that this shall not apply to opening a new mine or making communications between shafts, so long as not more than twenty persons are employed in such new mine, the operating of the first and third seams in a certain mine simultaneously with the opening of the fifth, which had but one outlet was held not to be unlawful, as the fifth seam was simply in preparation for working. *Haddock v. Com.* (1883) 103 Pa. 243.

In a case where an old mine had the statutory outlets, and was then worked further several hundred feet along the seams, it was held to have become a new mine, in such a sense as to render obligatory the construction of an outlet for ventilation and escape was required by the act of 1870. *Com. ex rel. Williams v. Wilkesbarre Coal Co.* (1872) 29 Phila. Leg. Int. 213, 15 Mor. Min. Rep. 31.

⁹*Cambria Iron Co. v. Shaffer* (1887) 5 Sadler (Pa.) 105, 8 Atl. 204.

Upon the question what is a "passageway communicating with the escapeway shaft," and an "exit from main hauling ways to the escapement shaft," which by statute are required to be of a certain height and width, evidence that the passage where a mule driver in a mine was injured was the shortest road to the escapement shaft, although there was another longer road, is sufficient to go to the jury. *Spring Valley Coal Co. v. Rowatt* (1902) 196 Ill. 156, 63 N. E. 649, affirming (1901) 96 Ill. App. 248.

ing shaft, so as to enable men to cross from one side to the other without passing under or over the cages.¹⁰

In one case it was held that a miner would be supposed to know of the existence of such a traveling way around the shaft and could not recover for injuries caused by his failure to use it.¹¹

That a mine is in the early stages of development is no defense to an action under the Illinois statute, based upon the failure to have a traveling way around a shaft, where such a way had been constructed, but had been permitted to remain blocked by a cave-in for a period of six weeks, when it could have been opened in two or three days.¹²

(5) To see that the roof and sides of every traveling road and working place are made secure.¹³

The general provisions of this tenor are confined to England and the British Colonies. Those which relate to the duty of mine owners

¹⁰ *Colorado*.—Rev. Stat. 1908, § 644.

Illinois.—Hurd's Rev. Stat. 1908 (Laws 1899, p. 300). For an earlier provision, see Starr & C. Anno. Stat. p. 2723 (Laws 1879, p. 204, § 8).

Indiana.—Burns's Anno. Stat. 1908, § 8581 (Laws 1905, chap. 50, § 13). Earlier enactment, Rev. Stat. 1881, § 5467.

Kansas.—Gen. Stat. 1909, § 4988; Laws 1883, chap. 117, § 8, as amended by Laws 1885, chap. 143, § 3. There shall be cut in the side of every mining shaft, at the bottom thereof, a traveling way sufficient to enable persons to pass around the shaft in going from one side of the mine to the other.

Missouri.—Rev. Laws 1909, § 8450.

Montana.—Rev. Codes 1907, § 170 (Laws 1891, p. 282, § 8).

New York.—Labor law 1909, § 128.

Ohio.—Gen. Code 1910, § 919.

Pennsylvania.—Act of May 15, 1893, art. 2, §§ 1, 3 (bituminous coal mines).

Texas.—Acts 1907, p. 331, § 1 (b).

Wyoming.—Comp. Stat. 1910, § 3517.

¹¹ *Rush v. Coal Bluff Min. Co.* (1891) 131 Ind. 135, 30 N. E. 904.

¹² *Chicago-Coulterville Coal Co. v. Fidelity & C. Co.* (1904) 130 Fed. 957. The court said: "The learned counsel for plaintiff sought in argument to evade the application of this statute to this instance by contending that this was a new mine, in the early stage of development, and that it ought not to be exacted or expected of a mine owner, in his relation of responsibility to his employee, to have the passageway in the

prescribed condition during such experimental development. The evidence in this case shows that long prior to this accident, when the shaft was sunk and the levels started therefrom, the plaintiff complied with the statute by making a passageway 14 feet in width, and that in the fore part of September, 1902, the obstruction occurred from the cave-in, and that for six weeks the plaintiff left it in this condition, although it was prosecuting the work of development by hauling tons of coal from the extensions each day for merchandise. It was then engaged in operating a mine. The spirit as well as the letter of the statute made it imperative upon the plaintiff, as soon as it began to extend its lateral levels and to dig, haul, and dump the coal into the elevator crates, to provide this safe and commodious passageway for the cager and his mule."

¹³ *England*.—Coal mines regulation act 1887, § 49 (21).

Ontario.—Mines act 1906, § 205 (16), (20).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (16) (coal mines); chap. 20, § 19 (12) (metalliferous mines).

British Columbia.—Rev. Stat. 1897, chap. 138 (coal mines), § 82 (17), (20); chap. 134 (metalliferous mines), § 25 (20).

New South Wales.—Coal mines regulation act 1896, § 47 (22).

Victoria.—Mines act 1890, § 351 (10).

New Zealand.—Mining acts, compilation act 1906, § 255 (10).

in respect of furnishing timber to be used by the miners in propping the place of work are noticed in § 1885, *post*.

(6) To see that underground planes and roads which are used both for the passage of persons and the conveyance of materials in cars operated by mechanical power or (under the terms of some statutes) by animals shall be provided at certain intervals with manholes or places of refuge.¹⁴

In one case it was held that where the distance from the outer edge of the car to the side of the entry was less than 3 feet, and there were no places of refuge, and some cross cuts which had been made were filled with rubbish, there was a wilful violation of the statute.¹⁵ In another it was held that "places of refuge," to be kept clear of obstructions, include not only the "cut in the sidewall," but where conditions are such that a cut is not required, that is, where "there is a clear space of 2½ feet," such space must be regarded as a place of refuge, and a failure to keep the same clear of obstructions would violate the statute.¹⁶ The requirement of the Pennsylvania statute as to passageway alongside of hauling ways is not satisfied where a passageway, although otherwise sufficient, alongside tracks for coal cars in a mine, is used for drainage of the mine, and is covered with several inches of water.¹⁷

¹⁴ *England*.—Coal mines regulation act 1887, § 49 (14), (15); metalliferous mines regulation act 1872, § 23 (3)—(5).

Arkansas.—Kirby's Dig. 1904, § 5344.

Colorado.—Rev. Stat. 1908, § 644.

Illinois.—Hurd's Rev. Stat. 1908, p. 1438 (Laws 1907, p. 397).

Indiana.—Burns's Anno. Stat. 1908, § 8581 (Laws 1905, chap. 50, § 13); § 8582.

Kansas.—Gen. Stat. 1909, § 5008 (Laws 1897, chap. 159, § 6); § 4987 (Laws 1883, chap. 117, § 3).

Missouri.—Rev. Stat. 1909, § 8461.

Montana.—Rev. Codes 1907, § 1704 (Laws 1891, p. 282, § 8).

Ohio.—Gen. Code 1910, § 919.

Oklahoma.—Comp. Laws 1909, § 4384.

Pennsylvania.—Act of June 2, 1891, art. 12, rule 180 (anthracite coal mines); act of May 15, 1893 (P. L. 52), art. 6, § 4 (bituminous coal mines).

Texas.—Acts 1907, p. 331, § 1. Places of refuge.

Utah.—Comp. Laws 1910, § 1518 (16).

Washington.—Rem. & Bal. Codes & Stat. 1910, § 7389 (3173).

West Virginia.—Code 1907, §§ 408, 410.

Ontario.—Mines act 1906 (chap. 11), § 205 (13).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (10) (11) (coal mines); chap. 20, § 19 (5) (7) (8) (metalliferous mines).

British Columbia.—Rev. Stat. chap. 38, § 82 (11)–(13).

New South Wales.—Coal mines regulation act 1896, § 47 (14), (15), (16).

Victoria.—Mines act 1890, § 357 (3)–(5).

New Zealand.—Mining acts, compilation act 1906, § 255 (3), (4).

¹⁵ *Brookside Coal Min. Co. v. Hajnal* (1901) 101 Ill. App. 175.

¹⁶ *Moore v. Centralia Coal Co.* (1908) 140 Ill. App. 291 (plaintiff was prevented by obstruction along track from stepping off of runaway car).

¹⁷ *Reeder v. Lehigh Valley Coal Co.* (1911) 231 Pa. 563, 80 Atl. 1121.

Hurd's Rev. Stat. 1908, chap. 93, § 21, requiring certain space between walls and cars where miners are required to work, does not prevent a track being laid within 6 inches of a wall at a place where men were not required to work, where there was a clear space on the other side of the track where the men were required to work.¹⁸ Under a similar statute, it has been held that the master is not under obligations to construct places of refuge at any particular place, but only at intervals not more than 20 yards apart.¹⁹ In a Scotch case it was laid down by one member of the court of session that cross roads which led off the main level of a mine, and were within the statutory distance from each other, were to be considered as "manholes" within the meaning of a rule of this tenor.²⁰ The position thus taken seems to be perfectly reasonable. But the other judges preferred to reserve their opinion upon the point.

The Illinois statute requiring places of refuge along hauling ways upon which employees "must travel on foot" to and from their work has no application where the mine owner had furnished a separate passageway for the men to travel on, had forbidden the miners to use the hauling way, and had posted signs at frequent intervals along the hauling way, indicating the direction of the manway.²¹

1885. Underground workings. Maintenance of safe conditions in place of work.—The statutory enactment relative to the maintenance of safe conditions in underground workings imposes upon the mine owner the following duties:

(1) To sprinkle the entries, roads, etc., wherever the dust accumulates to a dangerous degree.¹

¹⁸ *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90.

¹⁹ *Schlapp v. McLean County Coal Co.* (1908) 235 Ill. 630, 85 N. E. 916.

²⁰ *Hughes v. Clyde Coal Co.* (1891) 19 Sc. Sess. Cas. 4th series, 343, 29 Scot. L. R. 387.

²¹ *Guthrie v. Empire Coal Co.* (1908) 142 Ill. App. 332. The court said: "We are of opinion that if appellant furnished a reasonably safe and sufficient manway parallel with the hauling way, and had ordered and directed or warned its men working in the mine to walk to and from their work in the manway, and not walk upon the hauling way, then it was not required under the statute to build places of refuge in the hauling way. If our interpretation of the statute as applied to the evidence in this case is correct, it follows that

the court erred in excluding this evidence. The evidence so excluded was not competent for the purpose of showing negligence on the part of appellee, as in actions under this statute for its wilful violation the negligence of the party injured is not a defense, but this excluded evidence tended to show that the hauling way was not the way in which the miners traveled in going to and from their work, and that they were excluded therefrom, and for this purpose it was competent."

¹ *Illinois*.—Hurd's Rev. Stat. 1908, p. 1435 (Laws 1899, p. 300). In dusty mines, hauling roads must be sprinkled. See also p. 1438.

Indiana.—Burns's Anno. Stat. 1908, § 8579; Acts 1905, p. 65, chap. 50. In case the roadways or entries of any mine are so dry that the air becomes

The Indiana statute relative to sprinkling mines is remedial as well as penal, and should not be so strictly construed as to destroy the object of its enactment;² and the provisions of this act, though a part of the same section in which provision is made for ventilating mines, are applicable irrespective of the subject of ventilation.³ It gives a right of action for injuries occasioned by any violation or wilful failure to sprinkle roadways and entries when so dry as to cause dust; even a mere negligent failure to sprinkle gives a right of action.⁴

A complaint based upon the failure to sprinkle a mine is sufficient where it is expressly averred in the first paragraph "that, if said defendant company had performed its duty in regularly and thoroughly sprinkling said dust on and before the date of the explosion, the accident and injuries herein complained of would not and could not have occurred, and that the same did occur solely and proximately by

charged with dust, such roadways or entries shall be regularly and thoroughly sprinkled, and it shall be the duty of the inspector to see that this provision is carried out.

Sec. 8613 (Acts 1907, p. 347). The inspector of mines shall have power in his discretion to order the sprinkling of any coal mine, or part of mine, by notice in writing to the operator thereof, or person in charge of the same; and after receiving such notice it shall be unlawful for any person to act in violation thereof and to omit such sprinkling. Copies of any notices given hereunder shall be posted at the mine entrance by the inspector of mines.

The act of 1907 (Anno. Stat. § 8613) does not repeal the act of 1905 (Anno. Stat. § 8579) so as to make the duty of sprinkling dependent upon the action of the inspector. *Princeton Coal Min. Co. v. Lawrence* (1911) — Ind. —, 95 N. E. 423, rehearing denied (1911) 96 N. E. 387.

Kansas.—Gen. Stat. 1909, § 5012. Mine boss. § 39. It shall be the duty of the mine boss or agent in charge of any mine where coal dust or any other inflammable ingredients may accumulate, to cause the same to be properly sprinkled or saturated at least once a day.

Ohio.—Gen. Code 1910, § 935. Mines sprinkled wherever air is dry so as to be charged with dust; explosive materials not to be allowed to accumulate. (98 v. 169, §§ 1, 2.)

Oklahoma.—Comp. Laws 1909, § 4380. Entries, airways, or rooms to be thoroughly sprinkled whenever the air is clogged with dust.

Utah.—Comp. Laws 1907, § 1516 (Laws 1901, p. 86; Laws 1905, p. 225). Water to be provided for sprinkling whenever necessary.

Tennessee.—Laws 1903, chap. 237, § 30.

² *Princeton Coal Min. Co. v. Lawrence* (1911) — Ind. —, 95 N. E. 423, rehearing denied (1911) 96 N. E. 387.

³ *Vandalia Coal Co. v. Yemm* (1910) 175 Ind. 524, 92 N. E. 49 (miner injured by explosion). The court said: "As we read the clause, however, it is a distinct statutory duty, disconnected from the subject of ventilation proper, and the more is this true under a complaint which alleges that such a condition is in itself dangerous. We must assume that the legislature so viewed it, and had a purpose in view in enacting the statute, and that the purpose was to provide against this particular element of danger. Certainly it is as specifically enjoined to be done as any other thing embraced in the statute. It is required, irrespective of the subject of ventilation, and this being so, it was manifestly enacted for the benefit of appellee and others employed in the mine. That is the test."

⁴ *Princeton Coal Min. Co. v. Lawrence* (1911) — Ind. —, 95 N. E. 423, rehearing denied in (1911) 96 N. E. 387.

reason of its neglect in that behalf.”⁵ Evidence showing that the mine examiner had had his attention called to dust in the entry several weeks before the explosion, and that he had failed to have the entry sprinkled, shows a wilful failure to obey the statute.⁶

The statute relating to sprinkling roadways and entries enures to the benefit of a shot-firer who, in accordance with the terms of a statute, was employed for the sole purpose of firing shots, and who was paid by the miners themselves,—especially where the statute does not provide that the miners shall themselves select the shot-firer.⁷

(2) To furnish and keep at the miners’ disposal a sufficient supply of props and timbers. In many statutes of this character, there are provisions requiring the miner himself to put the props in place and to keep the place of work securely propped; some going to the extent of making it a misdemeanor for the miner to fail so to do.⁸

⁵ *Vandalia Coal Co. v. Yemm* (1910) 175 Ind. 524, 92 N. E. 49.

⁶ *Illinois Collieries Co. v. Davis* (1907) 137 Ill. App. 15, affirmed in (1908) 232 Ill. 284, 83 N. E. 836; *Illinois Collieries Co. v. Haveron* (1907) 137 Ill. App. 22.

⁷ *Princeton Coal Min. Co. v. Lawrence* (1911) — Ind. —, 95 N. E. 423, rehearing denied (1911) 96 N. E. 387.

⁸ *England*.—Coal mines regulations act 1887, § 49 (21). The roof and sides of every traveling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such traveling road or working place which is not made secure.

Sec. 49 (22). Where the timbering in the working places is done by the workmen, suitable timber shall be provided at a place convenient to them.

Alabama.—Code 1907, § 1021. Mine owner to keep sufficient supply of props, and afford miners proper facilities for delivery of props to working places.

Arkansas.—Kirby’s Dig. 1904, § 5352. The owner, agent, or operator of any mine shall keep a sufficient amount of timber when required to be used as props, so that the workmen can at all times be able to properly secure the said workings from caving in; and it shall be the duty of the owner, agent, or operator to send down all such props when required, and deliver said props to the place where cars are delivered.

Colorado.—Laws 1885, p. 138, § 4. Mine owners required to make traveling

ways secure against loose coal, slate, and rock falling in, and to furnish timbers for all places where they are to be used and placed in the working places of the mines.

Illinois.—Hurd’s Rev. Stat. 1908, p. 1434 (Laws 1899, p. 300). Mine owner to furnish props; miner to properly prop and secure his place of work. Earlier provisions, see Starr & C. Anno. Stat. p. 2730; Rev. Stat. chap. 93, § 16 (Laws 1879, p. 204, § 16, as amended by Laws 1887, p. 235).

Indiana.—Burns’s Anno. Stat. 1908, § 8585 (Laws 1905, chap. 50, § 15). Mine owner to furnish sufficient supply of timber for employees to secure working place; miner to notify mine owner of need of timber.

The earlier enactment (Burns’s Rev. Stat. 1894, § 7447, 7472; Horner’s Rev. Stat. 1901, § 5472a, 5480m) was pronounced constitutional in *D. H. Davis Coal Co. v. Polland* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492.

Iowa.—Code 1897, § 2489. Mine owner to furnish sufficient supply of props and deliver them, when required, to places where needed.

Kansas.—Gen. Stat. 1909, § 4987. Mine owner to furnish sufficient props.

Kentucky.—Stat. 1908, § 2739b (7); Act of March 3, 1908. Each owner, lessee, or operator of every mine to which the mining laws of the state apply, shall provide and furnish to the miners employed in said mine a sufficient number of caps and props, said props to be sawed square at each end,

A complaint in a statutory action must bring the case within the requirements of the statute, and any omission cannot be supplied by intendment; thus a complaint based on the statute must allege that more than ten men were employed.⁹

The duty to secure properly the roof of the mine cannot be delegated by the mine owner, even to a statutory mine boss.¹⁰ So the requirement of the statute (Rev. Stat. 1899, § 8822), that the mining companies are to furnish and send down into the mine a sufficient supply of timber so that workmen at all times may be able properly to secure the workings from caving in, has been held to be an imperative requirement, and not a question of reasonable diligence.¹¹ And a failure to comply with the requirement cannot be excused because

to be used by said miners in securing the roof in their rooms, and at such other working places where, by laws or custom of those usually engaged in such employment, it is the duty of said miners to keep the roof propped, after the miner has selected and worked the same.

Sec. 2732 (Russell's Stat. 1909, § 3319). Misdemeanor wilfully and intentionally to neglect to prop mine under his control.

Michigan.—Laws 1899, No. 57, § 7.

Minnesota.—Rev. Laws 1909, § 1824-15. Duty of mine owner to furnish sufficient supply of props.

Missouri.—Rev. Stat. 1909, § 8473. Duty of mine owner to furnish sufficient supply of props, and deliver them when required.

New York.—Labor law 1909, § 122. Mine owner to properly timber mine.

North Carolina.—Pell's Revisal 1908, § 4932 (coal mines). Mine owner to furnish sufficient supply of props.

Ohio.—Gen. Code 1910, § 921. Mine operator to keep supply of props on hand. Duty of miner to prop working place securely. Earlier enactments, Rev. Stat. § 6871; McClain's Code, §§ 2463, 2465.

Oklahoma.—Comp. Laws 1909, § 4382. Mine owner to furnish sufficient supply of props.

Pennsylvania.—Act of June 2, 1891, P. L. 177, art. 11, §§ 1-3 (anthracite coal mines); act of May 15, 1893 (P. L. 52) art. 6, § 1; art. 7, § 1 (bituminous coal mines). Mine owner to furnish sufficient supply of props; miner to notify foreman of need of props; misdemeanor for owner to fail to comply with provisions.

Act of May 15, 1893, art. 6, § 2. Workmen to notify mine foreman as to need of timber.

Tennessee.—Laws 1881, chap. 170, § 19. Miner having charge of a working place, who neglects or refuses to keep the roof properly timbered, is guilty of a misdemeanor.

Texas.—Acts 1907, p. 331, § 1. Props and timbers.

Utah.—Comp. Laws 1907, § 1517 (Laws 1901, p. 87; Laws 1905, p. 225). Mine owner to furnish sufficient supply of props. For the earlier enactment, see Laws 1892, chap. 41; Rev. Stat. 1898, § 1519.

Washington.—Rem. & Bal. Codes & Stats. 1910, § 7394 (3178). Mine owner to furnish sufficient supply of props.

West Virginia.—Code 1906, § 410. Mine owner to furnish sufficient supply of props.

Wyoming.—Comp. Stat. 1910, § 3511. Mine owner to furnish sufficient supply of props upon order of miner.

New South Wales.—Coal mines regulation act 1896, § 47 (23). Timbering by workmen. Supply.

⁹ *Zeller, McC. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378; *Dickason Coal Co. v. Unverferth* (1902) 30 Ind. App. 546, 66 N. E. 759.

¹⁰ *Linton Coal & Min. Co. v. Persons* (1894) 11 Ind. App. 264, 39 N. E. 214.

¹¹ *McDaniels v. Royle Min. Co.* (1905) 110 Mo. App. 706, 85 S. W. 679. The court said: "When the desired amount of timbers are furnished in the mine to properly secure the workings, the mine owner has performed his duty, and it is then left to the miners to use them for their own security. But they must be

the presence of props might render machine mining impracticable.¹² So the statutory duty of a mine owner to take down all loose slate, coal, etc., or carefully to secure it, and to withdraw all employees therefrom until it is safe, except those who are engaged in the very work of making it safe, is absolute, and does not authorize a mine boss or operator to exercise any discretion as to the practicability of making the mine safe without undue interference with the working of the mine.¹³ In a Federal decision it was held that as the Ohio act does not define the degree of care required of the mine owner in providing timber, such care must be determined by the principles of the common law.¹⁴ Such a view is decidedly against the weight of authority, not only of the decisions upon this provision, but also upon the various other provisions of the different mines acts.

While it is the duty of the "mining boss" to see that sufficient timber of suitable lengths and sizes is placed in the working places of the mine, the duty of securely propping the roof of the mine, by actually setting such timbers thereunder, is generally placed upon any miner, workman, or other person having the control of any working place in the mine.¹⁵ And the duty to securely prop the mines, imposed upon the miners, by statute (Rev. Stat. § 6871), cannot be shifted

furnished with all the timbers necessary for that purpose, and the mine owner cannot excuse himself by furnishing what may be deemed ordinarily sufficient. This is not a question of reasonable diligence, but an imperative requirement of the statute for the preservation of the workmen engaged in hazardous labor. The condition of the roof showed that extraordinary means were required for safety, and enough timbers should have been furnished to meet the requirement of the situation."

Gen. Stat. 1909, § 4987, imposing on mine owners the duty to keep careful watch to see that as the miners advance their excavations all loose coal, slate, and rock overhead are carefully secured against falling, requires more than ordinary diligence to furnish a safe place to work, and was not intended merely to declare the common-law duty already imposed. *Little v. Norton Coal Co.* (1910) 83 Kan. 232, 109 Pac. 768. The court said: "The defendant cannot escape liability for its failure to perform the duty, on the ground that it did not know that the rock was likely to fall." See also *Barrett v. Dessy* (1908) 78 Kan. 642, 97 Pac. 786.

¹² *Morris Coal Co. v. Donley* (1906) 73 Ohio St. 298, 76 N. E. 945.

¹³ *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122.

A contrary view was expressed in *Zeller, M. & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378, in which a case construing the provisions of the factory act requiring the guarding of machinery was cited as authority. The analogy does not seem close, and the better view seems to be that taken later by the same court in the *Howell Case*, *supra*.

¹⁴ *Cecil v. American Sheet Steel Co.* (1904) 64 C. C. A. 72, 129 Fed. 542.

¹⁵ *Victor Coal Co. v. Muir* (1894) 20 Colo. 333, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 382; *Lammey v. Center Coal Min. Co.* (1909) 144 Iowa, 640, 123 N. W. 356.

The implication from this provision is that, when no timberman is employed, it is the duty of the miners, as a part of their employment, to observe carefully the roof under which they are working from day to day, and set props wherever they seem to be needed. *Consolidated Coal Co. v. Scheller* (1891) 42 Ill. App. 619.

onto the mine owner by a custom which imposes that duty upon another servant.¹⁶ But the provision requiring the workmen to prop their working places does not require them to prop or look after the safety of entries. That duty rests on the master.¹⁷

And the provision in statutes of this character, that it is the duty of the miner to keep the roof securely propped, will not defeat a recovery for injuries caused by the failure to prop, where the injured employee had no duty in respect thereto.¹⁸ Assuming that the contention that the statute as to props had altered the common law as to providing a reasonably safe place to work, and thrown that duty onto the miners, was true, it has been held, nevertheless, that, as the owner had employed a timberman whose special duty it was to prop the roof, and thus had taken upon himself the duty of furnishing a safe

¹⁶ *Coal & Min. Co. v. Clay (Consolidated Coal & Min. Co. v. Floyd)* (1894) 51 Ohio St. 542, 25 L.R.A. 848, 38 N. E. 610.

¹⁷ *Sloss-Sheffield Steel & I. Co. v. Green* (1909) 159 Ala. 178, 49 So. 301.

¹⁸ McClain's Code, § 2463, making it a misdemeanor for any miner to neglect or refuse to securely prop or support the roofs and entries under his control in the mine where he is working, has no application where the evidence showed that he had no control over the roof, and was directed not to remove any slate therefrom. *Taylor v. Star Coal Co.* (1899) 110 Iowa, 40, 81 N. W. 249.

And this provision does not apply in the case of an injury to any employee injured in a sloping entry of a coal mine through which coal is brought to the surface, where such employee is not in control of the entry. This is not a case where the keeping of the place of work in repair is incidental to the labor which is to be performed. The duties of the laborer have no connection with the preparation of the entry, which is a completed piece of work as far as he is concerned. *Corson v. Coal Hill Coal Co.* (1897) 101 Iowa, 224, 70 N. W. 185.

Although ordinarily it is not the mine owner's duty to prop the roof of the mine, and he has performed his full duty where he has furnished a sufficient supply of suitable timber, yet he is responsible for the death of an employee caused by a fall of slate from the roof, where the latter had no duty to per-

form in connection with the timbering. *Jackson v. Richardson Coal Co.* (1908) 33 Ky. L. Rep. 289, 109 S. W. 902.

By Ky. Stat. § 2732 it is declared to be a misdemeanor for any person employed in a mine to intentionally or wilfully neglect or refuse to securely prop the roof of a working place under his control, and providing that any employee who neglects or refuses to obey an order by the superintendent of the mine in relation to the security of the bank where he is at work shall be liable to a fine. It has been held that this provision refers to persons actually engaged as miners in taking out coal and thereby removing the natural props of the roof, and has no application to an employee employed as track layer along the roadways of the mine, which are no more under his control than that of any other general employee; and his failure to prop the roof of such roadways is not such contributory negligence as will prevent a recovery for his death. *Ashland Coal & I. R. Co. v. Wallace* (1897) 101 Ky. 626, 43 S. W. 207, denying rehearing in (1897) 101 Ky. 644, 42 S. W. 744.

A coal-mine driller is not barred from recovery because of the statute providing that any person employed in a mine who wilfully neglects to prop the roof of any working place under his control shall be liable to a fine, since such statute was not applicable to him, because he was not charged with the duty to prop. *Williams Coal Co. v. Cooper* (1910) 138 Ky. 287, 127 S. W. 1000.

place, he was liable for injuries caused by the timberman's failure so to do.¹⁹

Only those having use for the props and the right to demand them may complain of a wilful violation on the part of the mine manager to comply with such demand.²⁰ Nor can a miner recover while engaged in putting in the necessary props.²¹ But it has been held that the statute enures to the benefit of a person who was assisting a miner who received a specified sum per bushel,²² and also of a miner who was working under a very high and dangerous roof, and was receiving extra pay for so doing.²³

¹⁹ *Consolidated Coal Co. v. Scheiber* (1897) 167 Ill. 539, 47 N. E. 1052, affirming (1896) 65 Ill. App. 304.

²⁰ *Southern Coal & Min. Co. v. Hopp* (1907) 133 Ill. App. 239. In holding that the statute was not designed for the protection of a shot-firer the court said: "In thus construing the statute, evidence of the legislative intent, if that were needed, may be found in the change in the law made by the act of 1899, the present statute, which is a revision and amendment of the statute of 1879. By the earlier statute, the act of 1879, the operator was required to supply the props and cap-pieces, 'so that the workmen may at all times be able to properly secure said workings for their own safety.' 'Workmen' is a comprehensive term, and unless limited by construction made necessary by other provisions of the statute, might fairly have been said to include all the employees in the mine, whatever their particular service or occupation. No duty is imposed by the earlier statute upon the miners or workmen to use or place the props. By the present statute, the revision, the purpose is stated to be 'for the securing the roof by the miners,' and the duty is imposed upon the miner to 'prop and secure his place.' Whatever uncertainty there may have been as to the purpose of the legislature under the old law, it is removed by clear and definite statement in the revision. It is the duty of shot-firers, under the shot-firers act of 1905, among other things, 'to inspect and do all the firing of all blasts prepared, in a practical, workmanlike manner,' and they are not permitted 'to do any blasting, exploding of blasts, or to do any firing whatever, until each and every miner and employee is out of the mine except the shot-firers.' By

this act the legislature has made it necessary for the mine operator to further classify his employees, and for the service heretofore required of the miner, that of shot-firer, it is now the duty of the operator to employ 'a sufficient number of practical experienced men' whose duties are as above stated. The shot-firers are thus made a distinct class, experts it may be said, and no more to be classed as miners, within the meaning of § 16 (a), then are all underground workmen and employees. Certainly they are not in contemplation when the statute requiring props to be supplied was enacted, and we are unable to so construe that statute as to bring shot-firers within its purpose and protection."

²¹ *Gallatin Coal & Coke Co. v. Andrezewski* (1907) 137 Ill. App. 1.

The Colorado statute requiring the roof and walls of traveling ways to be secured does not require the mine owner to timber the place where excavating is going on, although such place is, when completed, to be used as a traveling way. *Baldi v. Cedar Hill Coal & Coke Co.* (1909) 97 C. C. A. 505, 173 Fed. 781.

²² Failure of a mine owner to keep a sufficient supply of timber to be used as props, and send down the props when required, as provided by statute, renders such owner liable for an injury to a servant employed by one who had contracted with the owner to take out the coal at a specified sum per bushel, since the only way in which the owner can relieve himself of the duty is to transfer the control and occupancy of the mine by lease or other contract. *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308.

²³ *Mt. Olive & S. Coal Co. v. Herbeck*

In one case the supreme court of Missouri said, *obiter*, that the word "required" as used in the statute (Rev. Stat. 1899, § 8822) means "requested," so that the master is not liable for a failure to furnish timber in the absence of a request for it from the miner.²⁴ And this decision was followed by a subsequent decision in the court of appeals,²⁵ although there had been several earlier decisions of the latter court to the contrary.²⁶ But the contrary view has been taken by an English court,²⁷ and also in Ohio.²⁸

Under the Illinois act the miner is the judge of the kind of timbers needed, and not the mine examiner; consequently a failure to supply the kind demanded by the miner is a wilful violation of the statute.²⁹ But if the miner does not specify the number, size, or dimensions of props, caps, or timbers that he requires, the mine man-

(1901) 190 Ill. 39, 60 N. E. 105, affirming (1900) 92 Ill. App. 441.

²⁴ *Wojtylak v. Kansas & T. Coal Co.* (1905) 188 Mo. 260, 87 S. W. 506, approving upon this point the holding of *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486. The supreme court said: "We think § 8822, Revised Statutes 1899, means that the mining company shall keep on hand a sufficient supply of props so that, when a miner requests them, it shall send them to him without unnecessary delay, to enable him to prop his room."

²⁵ *McKinnon v. Western Coal & Min. Co.* (1906) 120 Mo. App. 148, 96 S. W. 485.

²⁶ *Bowerman v. Lackawanna Min. Co.* (1902) 98 Mo. App. 308, 71 S. W. 1062; *Weston v. Lackawanna Min. Co.* (1904) 105 Mo. App. 702, 710, 78 S. W. 1044; *Bruce v. Wolfe* (1903) 102 Mo. App. 385, 76 S. W. 723.

²⁷ Rule 22 of § 49 of the coal mines regulation act 1887, providing for the use of sprags or holing props in mines to support the top coal whilst the bottom coal is being worked, "where they are required," means where they are "necessary," and not where the workmen think them necessary; and whether they be necessary or not is a question of fact, to be decided by the justices in each case. *Gibbon v. Phillips* (1894) 64 L. J. Mag. Cas. N. S. 42.

²⁸ By Rev. Stat. § 6871 (which is substantially copied from the act of April, 1872), it is made a criminal offense for a person employed in a mine to neglect

or refuse to prop securely the roof and entries under his control. It is also provided that the owner, etc., shall keep a supply of timber constantly on hand, and deliver the same to the working place of the miner; and it is declared that no miner shall be liable for accidents which occur in mines where this provision has not been complied with. All that is necessary to establish negligence under this section is to show that the timber was not delivered. The miner is not required to ask for it, or give notice to anyone. *Pittsburgh & W. Coal Co. v. Estievenard* (1895) 53 Ohio St. 43, 40 N. E. 725.

²⁹ *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335; *Kellyville Coal Co. v. Strine* (1905) 217 Ill. 516, 75 N. E. 375; *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, affirming (1909) 149 Ill. App. 661.

"We are of the opinion that under this statute, when the miner makes a reasonable and timely demand for timbers of a particular and specified kind, to be used in propping the roof of his working place, the operator should furnish him such timbers as are called for. The practical miner who is at work in a given room, and whose life is at stake, is quite as likely to call for the proper timbers as the mine manager would be to furnish suitable props if the selection was left to his choice or convenience." *Springfield Coal Min. Co. v. Gedutis* (1907) 227 Ill. 9, 81 N. E. 9.

ager may supply what in his best judgment will suffice for the purpose.³⁰

A provision that the props which the mine owner is required to furnish upon the demand of workmen shall be suitably prepared is not satisfied where the owner merely furnishes the props and requires the men to cut them according to the lengths they need.³¹ So evidence which merely shows that there were props somewhere in the mine is not sufficient to prove that there was a substantial compliance with the statute; particularly where it appears that the miner in question knew nothing about them.³² And the fact that there was a sufficient supply of props and cap-pieces of suitable dimensions at or near the place where the plaintiff was working does not defeat a recovery, unless such props and cap-pieces were supplied for the plaintiff's use.³³

The duty of the mine boss "to see that the miner's working place is supplied with proper timbers" is nowise dependent upon the condition that he receive notice of the need of timbers in the miner's working place, through the medium of the register on the blackboard, if the mine boss or the operator has actual knowledge of the need of timber.³⁴ So a mine operator is liable, under § 18 of the mines and miners act, not only when the existence of the alleged dangerous condition has been discovered by him, but also when, by the exercise of the care required by the provisions of the act, he could have discovered such dangerous condition.³⁵

A demand made in conformity with a custom or mode adopted and in general use in the mine constitutes a sufficient demand upon the mine manager.³⁶

³⁰ *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257, affirming (1909) 149 Ill. App. 661.

A miner cannot complain that the props supplied were not of the precise length that he wanted, unless he informed the defendant what lengths were required. *Sugar Creek Min. Co. v. Peterson* (1898) 177 Ill. 324, 52 N. E. 475, reversing (1897) 75 Ill. App. 631.

³¹ *Com. v. Richmond*, 2 Pa. C. P. 189.

The miner himself is the one to determine the length and dimensions of the props and cap pieces necessary to properly secure his safety, and if he orders props and cap pieces of one dimension and length, it is not a compliance with the statute for the owner to furnish him props which must be spliced or sawed before they can be used. *Western Anthracite Coal & Coke Co. v. Beaver*

(1901) 192 Ill. 333, 61 N. E. 335, affirming (1900) 95 Ill. App. 95.

³² *Donk Bros. Coal & Coke Co. v. Stroff* (1902) 100 Ill. App. 576, affirmed in (1903) 200 Ill. 483, 66 N. E. 29.

³³ *Donk Bros. Coal & Coke Co. v. Lucis* (1907) 226 Ill. 23, 80 N. E. 560.

³⁴ *Muren Coal & Ice Co. v. Copeland* (1910) 46 Ind. App. 230, 90 N. E. 489, rehearing denied in (1910) 46 Ind. App. 237, 91 N. E. 508.

³⁵ *Peebles v. O'Gara Coal Co.* (1909) 239 Ill. 370, 88 N. E. 166.

³⁶ *Donk Bros. Coal & Coke Co. v. Lucis* (1907) 226 Ill. 23, 80 N. E. 560, affirming (1906) 127 Ill. App. 61 (demand made upon driver); *Pana Coal Co. v. Becker* (1906) 130 Ill. App. 40 (similar facts); *Vindas v. Dering Coal Co.* (1908) 145 Ill. App. 528 (order

In the note below are set out a number of cases in which the master's liability or nonliability is determined by the particular facts of the individual case.³⁷

A complaint showing that more than ten men are employed in the mines, that the mine owner failed to keep on hand a supply of props, caps, and timbers, that the mining boss failed to inspect the rooms at

signed by miner and put in box provided for that purpose). See also *Chicago, W. & V. Coal Co. v. Peterson* (1891) 39 Ill. App. 114.

Where the custom established by defendant was for miners to write on a blackboard placed near the mouth of the shaft for the purpose, the number of props and caps desired, whenever wanted, and when furnished they were sent down and delivered at the miners' room, and there was evidence that the plaintiff had for three successive days before his injury placed his order on the board, and the props and caps were not furnished to him, a trial judge was justified in instructing the jury that plaintiff had made a demand for such props and caps. *Donk Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330, affirming (1900) 95 Ill. App. 193.

³⁷ It is proper to refuse to direct a verdict for the defendant, where it appears that plaintiff's intestate had informed the "pit boss" that a rock was liable to fall and was dangerous, and that he ordered props for it, which the boss promised to send, but failed to send, and the rock fell on plaintiff's intestate. *Western Anthracite Coal & Coke Co. v. Beaver* (1901) 192 Ill. 333, 61 N. E. 335, affirming (1900) 95 Ill. App. 95.

The falling of a "nigger-head" or boulder in a coal mine is a "caving in" within the statute requiring mine owners to furnish sufficient timbers to protect employees from "caving in" of the mine. *Pachko v. Wilkeson Coal & Coke Co.* (1907) 46 Wash. 422, 90 Pac. 436.

A mine owner is liable where the general manager of the mine fails to prop the roof of an entry, if he knows that it is dangerous. *Coal Valley Min. Co. v. Haywood* (1902) 98 Ill. App. 258.

By Laws 1890, chap. 394, §§ 9, 10, and Laws 1897, chap. 415, § 122, it is provided that the owners and operators of mines shall cause their mines to be properly timbered, and the roof and sides of each working place thereof to

be properly secured, and that no person be permitted to work in an unsafe place and under dangerous material except to make it secure. In an action under this provision, a verdict for the plaintiff was held to be warranted by evidence that his intestate was killed by the fall of a pillar of talc while engaged in defendant's mine; that defendant's managing agent had notice of the dangerous position of the pillar, and of its liability to fall, previous to the accident; that timbers had been procured for protecting it, which had not been used; and that water had accumulated on the upper side of the pillar, and, by dripping down between the crevices of the layers of talc, softened the greasy material, causing it to slide. *Tetherton v. United States Talc Co.* (1901) 165 N. Y. 665, 59 N. E. 1131, affirming (1899) 41 App. Div. 613, 58 N. Y. Supp. 55.

In an action for negligently causing decedent's death by failing to furnish the timber, after several witnesses have testified that when timber was on hand it was kept at the bottom of the shaft, the question asked witnesses, whether there were props on hand at the bottom of the shaft at the time, is not erroneous though the statute does not require them to be kept in any particular place. *Mt. Olive & S. Coal Co. v. Rademacher* (1901) 190 Ill. 538, 60 N. E. 888, affirming (1900) 92 Ill. App. 442.

Under the Tennessee statute (Acts 1881, chap. 170) it has been held that, irrespective of whether a miner was charged with keeping the roof of an entry room or neck propped, there can be no liability where the overseer had examined the roof before the accident, and afterwards the miner worked under it for ten or fourteen hours, undermining the support of it, without calling the overseer, as he was entitled to do. *Heald v. Wallace* (1902) 109 Tenn. 346, 71 S. W. 80.

A declaration averring a failure to furnish props and prop the roof so that it should not fall does not show a viola-

least every alternate day, and that a blackboard on which the miners could register their orders for timber was not provided,—states a cause of action under Acts 1891, p. 57, § 13.³⁸

Whether or not the master furnished the props as requested by the miner is for the jury where the evidence is conflicting.³⁹

For the purpose of showing a wilful violation by a mine owner of the Illinois act, where a general demand for props and caps was made by a miner, and less caps than props were furnished, evidence of complaints on previous occasions that the mine owner had not furnished enough caps is inadmissible.⁴⁰

An instruction as to the duties of a mine owner to his employees, substantially in the language of Hurd's Rev. Stat. 1899, p. 1169, § 18, imposing them, is a sufficient statement of such duties.⁴¹

(3) To see that the mines and all parts thereof are properly ventilated.⁴²

tion of this provision. *Consolidated Coal Co. v. Yung* (1887) 24 Ill. App. 255.

A servant cannot recover under the provision requiring the furnishing of props, where there is no evidence that he called for any props which were not furnished. *Oleson v. Maple Grove Coal & Min. Co.* (1901) 115 Iowa, 74, 87 N. W. 736.

Under the Pennsylvania statute the master is not in default unless it appears that a request for props has been refused, or that the superintendent has failed to keep on hand the necessary supplies. *Bisko v. Braznell Gas Coal Co.* (1909) 223 Pa. 186, 72 Atl. 504.

A mine owner, being by § 14 liable only for wilful violations of the statute, cannot be sued for a breach of § 16, respecting the supply of timber for props, unless he knew that the props were necessary. *Leslie v. Rich Hill Coal Min. Co.* (1892) 110 Mo. 31, 19 S. W. 308. Compare decisions on Illinois mining acts.

³⁸ *Collins Coal Co. v. Hadley* (1906) 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

³⁹ *Druglis v. Northwestern Improv. Co.* (1905) 41 Wash. 398, 83 Pac. 101.

⁴⁰ *Hackart v. Decatur Coal Co.* (1909) 243 Ill. 49, 90 N. E. 257.

⁴¹ *Donk Bros. Coal & Coke Co. v. Peton* (1901) 192 Ill. 41, 61 N. E. 330.

⁴² *England*.—Coal mines regulation act 1887, § 49 (1)–(3). An adequate amount of ventilation shall be constant-

ly produced to dilute and render harmless noxious gases to such an extent that the underground workings and traveling roads shall be in a fit state for working and passing therein. For earlier enactments see 23 & 24 Vict. chap. 151, § 10; 18 & 19 Vict. chap. 108, § 4.

United States.—Act of Congress March 3, 1891, chap. 564 (26 Stat. at L. 1104, chap. 564); Act of Congress July 1, 1902, chap. 1356 (32 Stat. at L. 631). The owners or managers of every coal mine to provide an adequate amount of ventilation, and to force a certain amount of pure air per second, by proper appliances, through such mine, to the face of every working place, so as to expel therefrom poisonous gas.

Alabama.—Code 1907, §§ 1016–1018, 1027.

Arkansas.—Kirby's Dig. 1904, § 5340. *California*.—Stat. 1873–74, p. 726, § 4 (Gen. Laws, act 2223).

Colorado.—Rev. Stat. 1908, § 641.

Illinois.—Hurd's Rev. Stat. 1908, p. 1436, § 19 (Laws 1899, p. 300). Various provisions required to keep air pure for miners. Earlier enactment, Act of June 7, 1897, p. 269, amending mining acts of 1879, 1885, and 1891.

Indiana.—Burns's Anno. Stat. 1908, § 8579; Laws 1905, chap. 50, § 11.

Iowa.—Code Supp. 1907, § 2488 (22 G. A. chap. 56, § 3; 20 G. A. chap. 21, § 10; 27 G. A. chap. 59, § 1). Ventilation; amount of air for each man and for each animal prescribed.

The provision as to the ventilation of coal mines, and all other provisions intended for the protection of miners, "should be rigidly enforced, and the mine owners held to the strictest accountability in the performance of the statutory duties."⁴³

The statutory duty to ventilate the mine is a positive duty, which cannot be delegated to a servant so as to exempt the master from liability for injuries caused to another servant by its omission.⁴⁴ And

Kansas.—Gen. Stat. 1909, § 4986; Laws 1883, chap. 117, § 5. Ventilation. Amount of air space prescribed.

Secs. 5003, 5004; Laws 1897, chap. 159, §§ 1, 2. Method of work by room and pillar plan prescribed; break-throughs regulated.

Sec. 5005. Air space to be split; abandoned portions blocked off.

Sec. 5009. Air ways prescribed.

Sec. 5013. Air gates to be provided and kept closed.

Kentucky.—Stat. 1909 (Laws 1893, chap. 142, § 10).

Michigan.—Laws 1899, No. 57, § 8.

Missouri.—Rev. Laws 1909, §§ 8445, 8446, 8447, 8449. Ventilation. Powers of inspector in reference to.

Sec. 8474. Method of working the post and pillar plan.

Montana.—Rev. Codes 1907, § 1698 (Laws 1891, p. 282, § 5).

New Mexico.—Comp. Laws 1897, §§ 2342, 2343.

New York.—Labor law 1909, § 122.

North Carolina.—Pell's Revisal 1908, § 4936; Laws 1897, chap. 251, § 5.

Ohio.—Gen. Code 1910, §§ 922-924.

Oklahoma.—Comp. Laws 1909, §§ 4370 *et seq.* Various provisions designed to keep the air pure for the miners.

Pennsylvania.—Act of May 15, 1893, P. L. 52, art. 4, §§ 1-3. Ventilation of bituminous coal mines.

Art. 5, § 3. Duty of mine foreman as to cut-throughs.

Art. 2, § 2. Furnace ventilation not to be used, when there is only one opening into the mine.

Act of June 2, 1891, P. L. 177, art. 10, §§ 1-18. Ventilation in anthracite mines.

Art. 12 (17). Measures to be adopted for removal of dust from coal breakers, when it is so dense as to be injurious.

Act April 20, 1899, chap. 58. Self-acting doors may, if approved by inspector, be used in anthracite coal mines. Amending 1891, chap. 177, art. 10, § 10.

South Dakota.—Comp. Laws 1910, § 2583. Exhaust fans to be provided in smelters and dry crushing reduction works.

Tennessee.—Laws 1903, chap. 237, §§ 20a *et seq.* Break-throughs; ventilation.

Sec. 33. Explosion doors.

Texas.—Acts 1907, p. 331, § 1. Worked-out portions blocked off.

Secs. 2, 6. Ventilation.

Washington.—Rem. & Bal. Codes & Stats. 1910, §§ 7381-7384 (Ballinger's Anno. Codes & Stat. § 3165). Requiring mine owners to provide a good and sufficient amount of ventilation. Earlier provision, see act March 5, 1891, chap. 81.

West Virginia.—Code 1907, § 409.

Wyoming.—Comp. Stat. 1910, §§ 3508, 3510, 3513. Ventilation; safety lamps to be used; control of fire damp.

§ 3511. Duty of mining boss to see that ventilation is efficient.

Sec. 8530. Cross-cuts to be shut off.

Ontario.—Mines act 1906, chap. 11, § 205 (1); Rev. Stat. 1897, chap. 36, § 69 (1).

Nova Scotia.—Rev. Stat. chap. 19, § 44 (1). Adequate ventilation; coal mines.

Chap. 20, § 19 (1). Adequate ventilation; metalliferous mines.

British Columbia.—Mines (metalliferous) inspection act, Rev. Stat. chap. 134, § 25 (1).

Mines (coal), regulation of. Rev. Stat. chap. 38, § 82 (1).

New South Wales.—Coal mines regulation act 1896, § 47 (1).

Victoria.—Mines act 1890, § 357 (1).

New Zealand.—Mining acts, compilation act 1906, § 255 (1).

⁴³ *Sterns Coal Co. v. Evans* (1908) 33 Ky. L. Rep. 755, 111 S. W. 308.

⁴⁴ *Sommer v. Carbon Hill Coal Co.* (1898) 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54; *Wilmington & S. Coal Co. v. Sloan* (1907) 225 Ill. 467, 80 N. E. 265, affirming (1906) 127 Ill. App.

this duty is absolute, and is not determinable by reference to the principles of due care.⁴⁵ So the certified manager of a colliery cannot escape liability for failure properly to ventilate the mine by showing that it would cost £200 to do so.⁴⁶ That the negligence of a fellow servant concurred to cause the injury does not relieve a mine owner for failure to ventilate the mine as required by statute.⁴⁷ In one case it has been held that the statutory duty of the mine owner in respect to ventilation is not continuous, but that he has performed his full duty when he has complied with the statute in the first instance.⁴⁸

218. And the duty imposed by the Kentucky statute cannot be avoided by resorting to a contract whereby a third person is to operate the mine. *Interstate Coal Co. v. Baravene* (1911) 144 Ky. 172, 137 S. W. 859.

The operator of a mine in which an accident occurred cannot escape the duty imposed by the statute to see that the mine was ventilated by saying that he had contracted with another person to attend to the necessary bratticing, and that the latter had failed in his duty in regard to it. *Curvin v. Grimes* (1909) 132 Ky. 555, 116 S. W. 725.

⁴⁵ Instructions as to the duty of a mine owner with respect to the ventilation of a mine and keeping it clear from standing gas are erroneous when they make his duty relative, instead of absolute, as required by the act of Congress of March 3, 1891, and make the test what a reasonable person would do, instead of the command of the statute. *Deserant v. Cerillos Coal R. Co.* (1900) 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573, reversing (1897) 9 N. M. 49, 49 Pac. 807.

The jury should be instructed in the terms of the statute as to the quantity of air to be supplied in a mine, instead of being told that it is the owner's duty to, at all times, keep all working places in the mine supplied with pure air. *Nicholson Coal Min. Co. v. Moulden* (1911) 143 Ky. 348, 136 S. W. 620.

Under the Kentucky statute (Stat. 1909, § 2731) which requires a certain amount of air per minute for the mines, an instruction which leaves the jury to determine what is a sufficient supply of air is erroneous. *Edwards v. Lam* (1909) 132 Ky. 32, 116 S. W. 283, rehearing denied in (1909) 132 Ky. 42, 119 S. W. 175, 131 S. W. 795.

Under the act of 1870, requiring the mining boss to have main doors attended and guarded to prevent their being left open, he has no discretion. *Com. v. Reynolds*, 1 Kulp, 218.

All that is necessary for the plaintiff to make out his prima facie case is to show that the injury was caused by an explosion, and that the defendant did not comply with the statute. *Godfrey v. Beattyville Coal Co.* (1897) 101 Ky. 339, 41 S. W. 10.

The duty of the operator of a coal mine under Rem. & Bal. Codes & Stats. § 7381, to ventilate the mine, is a continuing and imperative one. *Nalewaja v. Northwestern Improv. Co.* (1911) 63 Wash. 391, 115 Pac. 847.

"The statute defines the amount and measure of the ventilation, and requires that so much air 'shall be circulated to the face of every working place throughout the mine, so that said mines shall be free from standing gas of whatever kind.' Kirby's Dig. § 5340. This means that the air shall be carried to the extremest point where the pick falls, and that the entire mine shall be free of gas." *Western Coal & Min. Co. v. Jones* (1905) 75 Ark. 76, 87 S. W. 440.

⁴⁶ *Hall v. Hopwood* (1879) 49 L. J. Mag. Cas. N. S. 17, 41 L. T. N. S. 797, 15 Mor. Min. Rep. 42.

⁴⁷ *Russell v. Dayton Coal & I. Co.* (1902) 109 Tenn. 43, 70 S. W. 1; *Czarnecki v. Seattle & S. F. R. & Nav. Co.* (1902) 30 Wash. 288, 70 Pac. 750 (duty as to ventilation absolute and nondel-egable).

⁴⁸ A safe plant, or a reasonably safe place to work, required of the master, with respect at least to the ventilation of the mine, means in the eye of the statute that it shall be so in the first instance, it was not intended that he should be made liable if it should after-

This decision, which is against the decided weight of authority, is explainable by reference to the doctrine which prevails in West Virginia, Pennsylvania, and possibly a few other states, that a mine boss or other employee who is appointed in pursuance of statute is not a vice principal, or even an employee, of the mine owner. See §§ 1435a, 1435b, *ante*.

It has been held that the Pennsylvania statute of March 3, 1870, providing for the ventilation of mines, does not become applicable to an air shaft in the course of construction, until a communication is formed between it and the mine; and until then employees of an independent contractor engaged in sinking the shaft have no right of action against the general owners of the mine for a personal injury sustained in the work.⁴⁹ But in a Kentucky case it has been held that the statute as to ventilation will not be restricted in its application to those mines only in which the miners are actually engaged in mining coal which is being marketed.⁵⁰

Under Hurd's Rev. Stat. 1908, chap. 93, providing that cross-cuts shall be made not more than 60 feet apart, and no room shall be opened in advance of the last open cross-cut, entries in a mine may not be extended to an indefinite distance without the opening up of new cross-cuts, provided no room was turned off at the entry, since such a construction would subvert to a considerable extent the purpose of the statute.⁵¹ The provision in the act of 1881, chap. 170, § 7, that in no case shall a furnace be used inside a mine, where the coal breaker and chute buildings are directly over and cover the top of the shaft, for the purpose of producing a hot up-cast of air, is only applicable where the coal is taken out by a shaft, and not where it is removed by a horizontal entry.⁵²

The minimum of ventilation required to be "constantly" produced by coal mines regulation act 1902, § 47, gen. rule 1, is not 100 cubic feet of pure air per minute for each man, boy, and horse ordinarily employed in the mine, but so much per minute for each man, boy, and horse actually at work in the mine at the time, or for the time being.⁵³ Under 18 & 19 Vict. chap. 108, § 4, requiring ventilation constant-

wards be rendered unsafe by the negligent manner in which the boss or foreman directed the work. *Squilache v. Tidewater Coal & Coke Co.* (1908) 64 W. Va. 337, 62 S. E. 446.

⁴⁹ *Welsh v. Lehigh & W. Coal Co.* (1886) 2 Sadler (Pa.) 319, 5 Atl. 48.

⁵⁰ *Interstate Coal Co. v. Baxawenie* (1911) 144 Ky. 172, 137 S. W. 859.

⁵¹ *Smith v. Moffat Coal Co.* (1909) 151 Ill. App. 362.

⁵² *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387 (suffocation of miner caused by the burning of the buildings at the entrance of the in-take).

⁵³ *Broughall v. Watson* (1906) 3 Austr. Comm. L. R. 750, reversing

ly if a colliery "be worked," the suspension of actual work from Saturday to Monday will not suspend the requirements as to ventilation during that time.⁵⁴

The statutes relative to ventilation have been held not to enure to the benefit of miners injured otherwise than by lack of ventilation, although the statute was violated by the mine owner.⁵⁵ But a contrary view has been taken by the court in Illinois.⁵⁶

(1905) New So. Wales L. R. 550 (artificial ventilation stopped at night when only a few horses were left in mine).

⁵⁴ *Knowles v. Dickinson* (1860) 2 El. & El. 705, 29 L. J. Mag. Cas. N. S. 135, 6 Jur. N. S. 678, 8 Week. Rep. 411.

⁵⁵ The requirement of act of April 20, 1899, P. L. 65, that all main doors shall have an attendant, "whose constant duty it shall be to open them for transportation and travel, and prevent them from standing open longer than is necessary for persons or cars to pass through," has reference solely to ventilation, and not to the safety of persons using the gangways. *Allen v. Kingston Coal Co.* (1905) 212 Pa. 54, 56, 61 Atl. 572.

The statute requiring a coal mine operator to provide a person to open and close a door in a coal mine is designed solely to prevent interference with the circulation of the air, and not to protect drivers from injury in opening the doors. *Indiana & C. Coal Co. v. Neal* (1906) 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424.

The purpose of the statute requiring cross-cuts between the parallel entries in coal mines is for the circulation of air in the mines, and not for passways or places of rest, and a mine owner is not required to make them safe for this latter purpose. *Lenk v. Kansas & T. Coal Co.* (1899) 80 Mo. App. 374.

Section 19 of the statute pertains to the subject of ventilation, and has reference solely to the sanitary condition of the mine, the health and safety of the men as affected by the supply and circulation of air, and has no relation to conditions in reference to light, and does not afford a cause of action to a servant injured because he cannot see defects in the roof on account of the smoke. *Pittenger & D. Min. & Mfg. Co. v. Gettleman* (1906) 126 Ill. App. 549.

See also *Rosan v. Big Muddy Coal & I. Co.* (1906) 128 Ill. App. 128.

⁵⁶ Liability for failure to comply with the statute requiring permanent doors used in directing ventilating currents to be so hung as to close automatically is not limited to injuries caused by improper ventilation. *Madison Coal Co. v. Hayes* (1905) 215 Ill. 625, 74 N. E. 755 (driver caught between car and door); *Himrod Coal Co. v. Stevens* (1903) 203 Ill. 115, 67 N. E. 389 (driver injured in collision).

"We have held that while the principal purpose of § 19 is to provide for the ventilation of the mine, the requirement of an attendant at all principal doorways is not designed solely for protection against injuries arising from improper ventilation, but also to secure the safety of drivers from dangers resulting from the existence of the doors." *Karkowski v. LaSalle County Carbon Coal Co.* (1911) 248 Ill. 195, 197, 93 N. E. 780.

In *Layman v. Pennell Min. Co.* (1908) 142 Ill. App. 580, the court said: "Undoubtedly the primary purpose of the legislature in enacting §§ 16 and 19 of the act in question was to provide a proper sanitary condition of a mine by a system of ventilation, whereby there might be forced throughout the mine currents of fresh air sufficient for the health and safety of men and animals employed therein, and the withdrawal therefrom of noxious gases, but we are not disposed to hold that the requirements of those sections of the statute are directed solely to the maintenance of proper sanitary conditions, and that a mine operator may not be held liable for an injury to a miner proximately caused by wilful violation of those provisions, even though such injury is not directly attributable to the sanitary condition of the mine. In other words, if through the wilful failure of a mine operator to comply with the provisions of said §§ 16 and 19, noxious gases, deleterious air, and standing

Whether the doorway at which an injury from collision occurred was a principal or subordinate doorway is a question of fact, upon which the judgment of the appellate court is conclusive.⁵⁷

Under § 8802, Rev. Stat. 1899, the court cannot take judicial notice that all coal mines generate gas, and it is necessary for the plaintiff to allege and prove that the mine in question generated gas.⁵⁸

The burden is upon the operator of showing that an extension, more than 60 feet from the gangway, of a room in a coal mine, is with written permission, without which it is prohibited by Rem. & Bal. Codes & Stats. § 7382.⁵⁹

If the miners violate the rules of proper mining, so that the means provided under the statute for sufficient ventilation in proper mining are ineffectual, it is not the purpose of the legislature to make the mine owner criminally and civilly liable for that fact.⁶⁰

In the note below will be found a number of cases in which the liability or nonliability of the mine owner is determined by the particular facts of the individual case.⁶¹

powder smoke are present in the mine in such quantities, and are of such character as to obscure a miner's vision, and he suffers an injury by reason of the obscuration of his vision caused by the presence of such gases, air, and smoke, the mine operator should not be permitted to escape liability for such injury upon the ground that such injury was not approximately caused by conditions affecting the sanitation of the mine." In this case, however, a recovery was allowed upon the ground that the miner had actual knowledge of the conditions. No mention is made of *Pittenger & D. Min. & Mfg. Co. v. Gettleman*, *supra*.

⁵⁷ *Madison Coal Co. v. Hayes* (1905) 215 Ill. 625, 74 N. E. 755; *Himrod Coal Co. v. Stevens* (1903) 203 Ill. 115, 67 N. E. 389; *Karkowski v. LaSalle County Carbon Coal Co.* (1911) 248 Ill. 195, 93 N. E. 780.

⁵⁸ *Timson v. Manufacturers' Coal & Coke Co.* (1909) 220 Mo. 580, 119 S. W. 565, overruling *Poor v. Watson* (1902) 92 Mo. App. 89, in which it was held that the statute relating to mines and mining showed of itself that coal mines are meant to be included in the expression, "all mines generating gas," used in § 8802, Rev. Stat. 1899.

⁵⁹ *Delaski v. Northwestern Improv. Co.* (1910) 61 Wash. 255, 112 Pac. 341.

⁶⁰ *Edwards v. Lam* (1909) 132 Ky. 42, 119 S. W. 175, 131 S. W. 795.

⁶¹ Where the evidence tended to show the presence of explosive gas in the mine in dangerous quantities for at least four days prior to the accident, in a room within about 30 feet of the entry, where naked or open lights were used by the miners without objection by the superintendent; and that a person who was not a certified fire boss had been employed with the knowledge of the superintendent, a recovery was upheld. *Kless v. Youghiogheny Min. Co.* (1902) 18 Pa. Super. Ct. 551.

A jury is justified in finding that a mine owner was guilty of an actionable breach of the provision (§ 2488) of the Code respecting the ventilation of mines, where the evidence tends to show that the room where the plaintiff worked was filled with poisonous gases to such an extent that to breathe it was dangerous to the health. *Mosgrove v. Zimbleman Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227.

A mining company wilfully neglecting to prevent accumulation of gas, as required by the act of July 1, 1887, is liable for injuries to an employee caused thereby. *Muddy Valley Min. & Mfg. Co. v. Phillips* (1890) 39 Ill. App. 376.

Under 23 & 24 Viet., chap. 151--an

(4) To see that the mines are properly illuminated, and that the lamps and oils used are such as are not likely to cause explosions.⁶²

act for the regulation and inspection of mines,—so much of the mine must be kept ventilated as to render the working places safe. *Brough v. Homfray* (1868) 15 Mining Rep. 6, L. R. 3 Q. B. 771, 37 L. J. Mag. Cas. N. S. 177, 16 Week. Rep. 1123, 9 Best. & S. 492.

As to the question whether the effect of the act of 23 & 24 Vict. chap. 151, § 10, with regard to the ventilation of coal mines, is or is not to make the operator of the mine absolutely responsible for failure to provide such ventilation, and thus exclude *pro tanto* the defense of coservice, see § 1495, *ante*.

There can be no recovery where the plaintiff himself testified that he had no reason to complain of the ventilation of the other parts of the mine on the night of the accident, and there was no evidence in the case that would warrant a jury in finding that the means of ventilation were either inadequate or insufficient. *Bisko v. Braznell Gas Coal Co.* (1909) 223 Pa. 189, 195, 72 Atl. 504.

The Federal statute is sufficiently complied with where air is forced through to working places in a mine, and the places not fit for working places on account of the accumulation of gas are properly dead-lined, signals being there placed, warning employees not to enter such places. *Central Coal & Coke Co. v. Gregory* (1906) 78 Ark. 43, 93 S. W. 56.

⁶² *England*.—Coal mines regulation act 1887, § 49 (8)–11. No light other than a locked safety lamp to be used in any place where likely to be danger from an accumulation of inflammable gas.

Alabama.—Code 1907, § 1022. Safety lamps to be furnished by operators.

Colorado.—Rev. Stat. 1908, § 643. Safety lamps to be the property of the owner of the mine and under the charge of his agent (coal mines).

Illinois.—Hurd's Rev. Stat. 1908, p. 1441 (Laws 1899, p. 300). Sufficient lights on landings. For earlier provisions see Starr & C. Anno. Stat. p. 2721, Laws 1879, p. 204, § 6, Hurd's Rev. Stat. 1899, chap. 93, § 6.

P. 1441 (Laws 1899, p. 300). In any mine where fire damp is being generated so as to require the use of a

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safety lamp, such lamps shall be immediately provided by the operator; and a mine manager or other competent person shall keep such lamps in proper condition, and furnish them to the men upon entering the mine, but the miners shall be responsible for the condition of the lamps while in their possession.

P. 1443 (Act of April 30, 1895, p. 256). Prescribing kinds of oil which may be used. Tests. Penalties. Inspection.

Indiana.—Burns's Anno. Stat. 1908, § 8575; Laws 1905, chap. 50, § 7. Illumination of shafts; safety lamps.

Sec. 8588; Laws 1905, chap. 50, § 18. Establishing standards and tests for miner's oil.

Iowa.—Code Supp. 1902, § 2495 (a), (b). Kind and quality of oil to be used prescribed. Earlier enactments, Laws 1896, chaps. 92, 93; Laws 1898, chap. 60.

Kansas.—Gen. Stat. 1909, § 4987. Safety lamps.

Sec. 5015. Lard oil only to be used for lighting purposes, except when repairing downcast or upcast shafts.

Kentucky.—Stat. § 2739a, (5)–(8) (act of Dec. 3, 1892). Quality of illuminating oil.

Missouri.—Rev. Law 1909, § 8452; act April 9, 1895, p. 225. Illumination of coal mines. Prescribing kinds of oil which may be used.

Montana.—Rev. Codes, 1907, § 1703, Laws 1891, p. 282, § 7. Illumination of shaft at underground entrance.

North Carolina.—Pell's Revisal 1908, § 4937; Laws 1897, chap. 251, § 6. Safety lamps to be property of operator of mine.

Ohio.—Gen. Code 1910, §§ 937–940. Safety lamps; quality of oils for illuminating mines. Act April 19, 1894, chap. 153.

Oklahoma.—Comp. Laws 1909, §§ 4373 *et seq.* No accumulation of explosive gas shall be allowed to exist; safety lamps to be furnished.

Sec. 4389. Only pure oils to be used for illumination; no explosive oils to be taken into the mine.

Pennsylvania.—Act of May 15, 1893, art. 5, §§ 5–7. Locked safety lamps only to be used in places through which fire

A mine owner is not liable for the act of a competent person employed by him to take charge of the safety lamps in a mine, in delivering to miners unlocked lamps in violation of mines regulation act, 23 & 24 Vict. chap. 151, §§ 10, 22.⁶³

The provision of the act of May 15, 1893 (P. L. 52), requiring the use of safety lamps in bituminous coal mines, applies only to mines where inflammable gases are found, or a sudden inflow of gas is likely to be encountered; and the requirements as to bore holes is necessary only when the entry is being driven towards, or in dangerous proximity to, an abandoned mine or a part "suspected" to contain inflammable gases, or which may be inundated with water.⁶⁴

The word "landing" in Hurd's Rev. Stat. 1908, c. 93, § 28, par. "b," providing that there must be maintained at the "landing" at which miners take or leave the cage sufficient light to show the "landing" and surrounding objects, is broad enough to cover the place at the bottom or at the top of the shaft where miners enter or leave the cage; and the mine operator is required to keep each of those places lighted.⁶⁵

damp may be caused in dangerous quantities.

Art. 8, § 4. Explosive oil not to be used for lighting purposes in bituminous coal mine.

Act April 28, 1899, chap. 74. Explosive oil may be used in bituminous coal mines in approved safety lamps. Amending 1893, chap. 48, art. 8, § 4.

Act of June 2, 1891, P. L. 177, art. 12, § 146. Locked safety lamps to be used in workings where there is danger from explosive gases in anthracite mines.

Tennessee.—Laws 1903, chap. 237, §§ 21d et seq. Safety lamps to be used. Laws 1901, chap. 92. Pure oil to be used.

Texas.—Acts 1907, p. 331, §§ 7, 12. Safety lamps; oil.

Utah.—Comp. Laws 1910, § 1519 (3). Use of explosive oils for lighting is forbidden, except in safety lamps.

Sec. 1518 (4). No light except locked safety lamps to be used in any working place approaching any place where there is likely to be an accumulation of explosive gases.

Washington.—Rem. & Bal. Codes & Stats. 1910, § 7400. Only safety lamps to be used in mines where there is likely to be an accumulation of explosive gases.

West Virginia.—Code 1907, § 409a3.

Only locked safety lamps to be used where explosive gas is generated in dangerous quantities.

Sec. 420. Pure oil to be used in torches and open lamps.

Wyoming.—Comp. Stat. 1910, § 3513. Safety lamps.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (7). Use of safety lamps prescribed in approaching places where there is likely to be an accumulation of explosive gas.

British Columbia.—Rev. Stat. chap. 38, § 82 (8). Regulation of coal mines; safety lamps and lights.

New South Wales.—Coal mines regulation act 1896, § 47 (8)–10. Use of locked safety lamps.

Victoria.—Mines act 1890, § 357 (11). Illumination.

⁶³ *Dickenson v. Fletcher* (1873) L. R. 9 C. P. 1, 43 L. J. Mag. Cas. N. S. 25, 29 L. T. N. S. 540.

⁶⁴ *D'Jorko v. Berwind-White Coal Min. Co.* (1911) 231 Pa. 164, 80 Atl. 77 (no recovery for violation of act in respect to safety lamps in absence of all proof that the mine was gaseous).

⁶⁵ *Robertson v. Donk Bros. Coal & Coke Co.* (1909) 238 Ill. 344, 87 N. E. 373, affirming (1908) 143 Ill. App. 391.

Hurd's Rev. Stat. 1901, chap. 93, § 28, ¶ b, providing that a good and sufficient light be maintained at the bottom of the shaft, so that persons coming to the bottom may discern the cage and objects in the vicinity, applies only to the safety of men while entering and leaving the mine, and has no reference to the safety of persons traveling along the entries in the mine, engaged in their ordinary duties.⁶⁶ The phrase "persons coming to the bottom," in paragraph b of § 28 of the mines and miners act, providing for the maintenance of a good and sufficient light at the bottom of the shaft, was designed not only to protect those coming to the bottom from their working places to leave the mine, but also those coming to the bottom to go to their working places in the mine.⁶⁷

Whether or not the light maintained by the master is sufficient is a question for the jury.⁶⁸

(5) To see that all dangerous openings are guarded.⁶⁹

⁶⁶ *Lumaghi v. Voytilla* (1902) 101 Ill. App. 112.

⁶⁷ *Robertson v. Donk Bros. Coal & Coke Co.* (1909) 238 Ill. 344, 87 N. E. 373, affirming (1908) 143 Ill. App. 391.

⁶⁸ *Elderado Coal & Coke Co. v. Swan* (1907) 227 Ill. 586, 81 N. E. 691 (torch).

⁶⁹ *England*.—Coal mines regulation act 1887, § 37 (where mine is abandoned or working thereof discontinued, the top of the shaft and every side entrance from the surface is to be securely fenced); § 49 (6) (entrances to places not in use or in course of working are to be fenced); § 49 (18) (top of every shaft that is out of use or used only as an air shaft is to be fenced); § 49 (19) (top and all entrances between the top and bottom of every working, ventilating, and pumping shaft are to be properly fenced).

Metalliferous mines regulation act 1872, § 23 (6), (7). Similar to § 49 of the above statute.

Arkansas.—Kirby's Dig. § 5344. Landings on each level and shaft to be fenced.

California.—Gen. Laws 1909, act 2221, § 1. All abandoned mining shafts, pits, or other abandoned excavations dangerous to passersby or livestock shall be securely covered or fenced, and kept so.

Colorado.—Rev. Stat. 1908, § 655. Abandoned shafts, etc., to be fenced.

Sec. 4295. Metalliferous mines; guard rails to be provided at levels, etc.

Sec. 4294. Top of shaft to be protected in metalliferous mines.

Sec. 4297. Abandoned shafts to be guarded.

Florida.—Gen. Stat. 1906, § 3152. General provisions requiring pits and holes to be guarded, which do not apply to mines except those which have been abandoned.

Illinois.—Hurd's Rev. Stat. 1908, p. 1426, § 2 (Laws 1899, p. 300). Landings at top of shaft and openings of each seam to be kept securely guarded. (For earlier provisions, see Laws 1879, p. 207, § 8, Starr & C. Anno. Stat. p. 2723; act 1872, § 8).

Indiana.—Burns's Anno. Stat. 1908, § 8575; Laws 1905, chap. 50, § 7. Top of every shaft to be fenced.

Sec. 8576 (Acts 1905, p. 65). The entrance of an abandoned mine shall be securely fenced off, so that no injury can arise therefrom.

Kansas.—Gen. Stat. 1909, § 4988; Laws 1883, chap. 117, § 8, as amended by Laws 1885, chap. 143, § 3. The entrance of every abandoned shaft or slope, and the top of each shaft, and each landing of a mine, shall be properly fenced.

Missouri.—Rev. Stat. 1909, § 8461. Top of every shaft opening, every entrance to an intermediate vein, and every abandoned slope or other shaft, is to be fenced.

From the terms of some of these provisions it is evident that they are intended for the protection of the public as well as of the workmen themselves.

The duty to erect a guard rail around a platform in a mine as required by statute is absolute and nondelegable.⁷⁰

The inclosing of the opening or mouth of a shaft with a fence provided with gates which were constantly left open, and could not be closed on account of coal and other material that had accumulated and was allowed to remain about them, is not a compliance with Ky. Stat. 1903, § 2731, providing that a safety gate shall be provided at the top of every shaft.⁷¹ But the mere leaving of the gates open as a detail of the work will not render the owner liable.⁷²

The owners in fee of mines and minerals, who demised a lead mine for a term of years, subject to royalties to be paid upon the place where the ore should have been gotten or weighed and before it should be taken away, the lease reserving powers of distress and re-

New York.—Labor law 1909, § 132. Every underground working more than 40 feet deep to be equipped with proper head house and doors.

North Carolina.—Pell's Revisal 1908, § 4933. Unused mines to be fenced.

Pennsylvania.—Act of June 2, 1891, art. 4, §§ 6-8 (top of shafts, abandoned slopes, shafts, etc., and underground entrances in anthracite mines, to be fenced); § 16 (top of shaft to be covered).

Act of May 15, 1893, art. 3, § 1 (safety-gates to be provided to prevent persons from falling into shafts in bituminous coal mines).

Texas.—Acts 1907, p. 331, § 1 (c). Landings at top of shaft to be protected.

Washington.—Rem. & Bal. Codes & Stats. 1910, § 7408 (3186) (abandoned mines and shafts to be fenced).

Ontario.—Mines act 1906, chap. 11, § 205 (18). Top of every shaft to be securely fenced; also every pit or opening dangerous by reason of its depth.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (4), (13), (14). Provisions similar to the English ones respecting coal mines.

Rev. Stat. 1900, chap. 20, § 19 (9) (10). Provisions similar to the English ones respecting metalliferous mines.

British Columbia.—Rev. Stat. 1897, chap. 134 (metalliferous mines), § 25 (13). Top of shaft to be covered; each winze or well hole extending from one

level or drift to another is to be protected at the top.

Chap. 138 (coal mines), § 59. Abandoned or discontinued mines to be fenced; § 82 (5). Entrances to any place not in actual course of working to be fenced; § 82 (14). Shafts temporarily out of use to be fenced; § 82 (15).

New South Wales.—Coal mines regulation act 1896, § 47 (6) (18) (20). Provisions similar to the English ones respecting coal mines.

Victoria.—Mines act 1890, § 357 (6). Top of shafts and all entrances between the top and bottom of every working or pumping shaft to be securely fenced.

New Zealand.—Mining acts, compilation act 1906, § 255 (6). Top and all entrances between the top and bottom of every working or pumping shaft to be securely fenced.

⁷⁰ *Gulla v. Lehigh Valley Coal Co.* (1905) 28 Pa. Super. Ct. 11.

⁷¹ *Moseley v. Black Diamond Coal & Min. Co.* (1908) 33 Ky. L. Rep. 110, 109 S. W. 306.

⁷² It was conceded that, as the top had been properly fenced, fault could not be imputed to the coal masters on the ground of the gate's having been left open somewhat longer than usual as an incident of the work of the pit. *Sinnerton v. Merry* (1886) 13 Sc. Sess. Cas. 4th series, 1012, 23 Scot. L. R. 725.

entry if the royalties should be in arrear, are "persons interested in the minerals of the mine," within the meaning of the statute requiring abandoned mines to be fenced, although the lease was still in force and undetermined.⁷³

The statute relative to fencing abandoned mines applies to a mine abandoned or discontinued at any time before or after the time of the act's coming into operation.⁷⁴ The fact that the statute came into effect only a few days before the accident occurred is no excuse for a noncompliance with its provisions. If unable to carry out any of the statutory duties at once, the mine owner is bound to suspend operations until he has made the necessary preparation.⁷⁵

The purpose of the statute requiring the top of every shaft to be fenced is to guard the opening and prevent an involuntary entrance thereto, and not to prevent missiles from falling into the shaft.⁷⁶

British Columbia Rev. Stat. 1897, chap. 134, § 25 (13) requiring the top of shafts to be covered, does not require an opening at an intermediate level to be covered.⁷⁷ In one case the liability of the mine owner turned partly upon the question whether the "top of the shaft" which he was required to fence was applicable to the upper surface of a structure erected above the mouth of the shaft.⁷⁸

A wall enclosing a field in which the abandoned entrance is located, which is about 45 yards from it, is not a sufficient fencing.⁷⁹ A flat car, 8 feet long, 7 feet wide, and 30 inches high, and of sufficient size, when in place over the shaft, to completely cover it, there being an arrangement for keeping the car in its place, when not being moved

⁷³ *Evans v. Mostyn* (1877) L. R. 2 C. P. Div. 547, 47 L. J. Mag. Cas. N. S. 25, 36 L. T. N. S. 856.

⁷⁴ *Stott v. Dickinson* (1876) 19 L. T. N. S. 291.

⁷⁵ *Bartlett Coal & Min. Co. v. Roach* (1873) 68 Ill. 174, 10 Mor. Min. Rep. 682.

⁷⁶ "That such was not contemplated by the statute is made clear by the fact that the section under consideration makes the requirement in terms that the cages operated in a shaft shall be protected by a safety covering." *Jacobson v. Smith* (1904) 123 Iowa, 263, 98 N. W. 773.

⁷⁷ *Martin, J., in Stamer v. Hall Mines* (1899) 6 B. C. 579.

⁷⁸ Where a mine owner had erected above the opening of a shaft an unenclosed framework of timber, supporting a structure called a "tippie house," to

which the cage could be hoisted, and through which the day shift entered and left the shaft, but it was customary to let off the night shift at the surface of the ground, and plaintiff's intestate, being one of the night shift, and endeavoring to alight, fell into the shaft and was killed (it being dark at the surface, and there being then no fence there), it is proper to submit to the jury the questions whether the surface or the tippie house was the top of the shaft, within the meaning of § 8 of Hurd's Rev. Stat. 1899, chap. 93, requiring the top of every shaft to be securely fenced. *Odin Coal Co. v. Denman* (1900) 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192, affirming (1899) 84 Ill. App. 190.

⁷⁹ *Foster v. Owen* (1892) 67 L. T. N. S. 712, 62 L. J. Mag. Cas. N. S. 7, 5 Reports, 50, 41 Week. Rep. 240, 57 J. P. 87.

for the purpose of being dumped, by means of a movable block acting upon a pivot, is not a sufficient fencing within the statute, where the continual tendency of the car, when not blocked, was to go down the incline to the place of dumping, and thus expose the mouth of the shaft.⁸⁰ The failure of the owner of a coal mine to place a hand rail along the stairway in the escapement shaft, as required by statute renders him liable for an injury sustained by an employee and caused by such defect.⁸¹

A special rule framed under § 51 of the act provided that the "pitheadman shall see that no rails are laid up to the mouth of the shaft without some provision being made to prevent wagons from being pushed into the shaft." At the mouth of a pit which was being sunk to a greater depth there was no fencing, except that there was a moveable wooden block upon the rails leading to the pit mouth, which it was the duty of the pitheadman not to remove unless he was satisfied that the covering table was on the pit mouth. Held, that this arrangement was not in breach of statutory rules.⁸²

(6) To see that certain precautions are taken for the protection of employees against fire.⁸³

(7) To keep the mines free from water.⁸⁴

⁸⁰ *Catlett v. Young* (1892) 143 Ill. 74, 82, 32 N. E. 447.

⁸¹ *Carterville Coal Co. v. Abbott* (1899) 181 Ill. 495, 55 N. E. 131.

⁸² *M'Gill v. Bowman* (1890) 18 Sc. Sess. Cas. 4th series, 206, 28 Scot. L. R. 144.

⁸³ *Missouri*.—Rev. Stat. 1909, § 8445. If a furnace is used for ventilating purposes, it shall be built so as to prevent the communication of fire to any part of the works, by lining the upcast with incombustible material for a sufficient distance up from said furnace (Rev. Stat. 1899, § 8801).

Tennessee.—Act 1881, chap. 170, § 7. The use of furnaces for the purpose of producing a hot upcast of air in mines where the coal breakers and chute buildings are directly over and cover the top of the shaft is prohibited.

This provision is applicable only to a mine where the coal is taken out by a shaft. It does not comprehend mines in which the coal is removed by a horizontal entry. *Coal Creek Min. Co. v. Davis* (1891) 90 Tenn. 711, 18 S. W. 387 (miner suffocated by the burning of buildings at the entrance of the intake).

Utah.—Comp. Laws 1910, 1540x. Mines having but one outlet, and that covered with the building containing the mechanical plant, are to have certain fire protection.

British Columbia.—Rev. Stat. 1897, chap. 134, § 25 (7) (fire protection in metalliferous mines).

⁸⁴ *Arkansas*.—Kirby's Dig. 1904, § 5341.

Indiana.—Burns's Anno. Stat. 1908, § 8584 (Acts 1905, p. 65).

Kansas.—Gen. Stat. 1909, §§ 5007, 5010.

Missouri.—Rev. Stat. 1909, § 8455 (Rev. Stat. 1899, § 8810).

Oklahoma.—Comp. Laws 1909, § 4379. Provisions respecting accumulation of water.

Washington.—Rem. & Bal. Codes & Stats. § 7385 (Laws 1888, p. 36, § 5; Laws 1891, p. 160, § 14; 1 Hill's Codes, § 2224).

Wyoming.—Comp. Stat. 1910, § 3507. Water coming from the surface or out of the strata in a shaft used for the purpose of ingress and egress shall be so conducted as to be prevented from falling down the shaft or the stairs or on persons ascending or descending the

1886. Mechanical appliances.—The enactments under this head have reference to the following matters:

(1) The machinery used for lowering and raising employees to and from the underground workings. The most comprehensive of the statutes prescribe (a) that the cages used for the conveyance of employees shall have a sufficient cover overhead; (b) that there shall be attached to these cages safety catches which will prevent them from falling in cases where the rope breaks or the hoisting apparatus fails to work properly; (c) that the hoisting apparatus shall be provided with an adequate brake and an indicator showing to the person who works the apparatus the position of the cage in the shaft; (d) that the drum of the hoisting apparatus shall be provided with proper appliances to prevent the rope from slipping; (e) that the cage shall be provided with suitable hand holds for the use of the miners being carried. But from an examination of the enactments tabulated below, it appears that many of the legislatures have, for some reason not easily explained, omitted to provide for one or more of the precautions thus indicated.¹

stairway (Laws of 1890-91, chap. 80, § 3; Rev. Stat. 1899, § 2564).

¹*England.*—Coal mines regulation act 1887, § 49 (27), (29), (30). Appliances or drum to prevent rope from slipping; brakes; indicators.

Metalliferous mines regulation act 1872, § 23 (11), (13), (14). Similar provisions.

Alabama.—Code 1907, § 1028. Safety catches; brakes; indicators.

Arkansas.—Kirby's Dig. 1904, § 5342. Overhead covers of boiler iron, and safety catches on cages.

Colorado.—Rev. Stat. 1908, § 640 (Coal mines). Overhead covers; appliances to prevent rope from slipping; safety catches.

Sec. 4285 (metalliferous mines). Indicators.

Sec. 4294 (metalliferous mines). Safety catches.

Illinois.—Hurd's Rev. Stat. 1908, p. 1426 (Laws of 1889, p. 300). Covers; safety catches; hand holds; brakes; flanges on drum; indicator. For earlier enactments of similar tenor see Starr & C. Anno. Stat. 1896, p. 2721, ¶ 6 (Laws 1879, p. 204, as amended by Laws 1887, p. 230); Rev. Laws 1874, chap. 70, § 14.

Indiana.—Burns's Anno. Stat. 1908, §§ 8572, 8573, 8574. Overhead covers of boiler plate and safety catches on

cages; brakes, indicators (Laws 1905, chap. 50, §§ 4, 5, 6).

Iowa.—Code 1897, § 2489. Overhead covers and safety catches on cages; brakes; indicators.

Kansas.—Gen. Stat. 1909, § 4984. Safety catches; flanges on drum; brakes.

Kentucky.—Stats. 1909, § 2731. Overhead covers and safety catches on cage; brake; indicators (Laws 1893, chap. 142, § 10).

Michigan.—Laws 1899, No. 57, § 4. Overhead cover and safety catches on cage; brakes; hand holds.

Missouri.—Rev. Laws 1909, § 8456. Overhead covers and safety catches on cage; brakes.

Montana.—Rev. Codes 1907, §§ 1703, 1722, 8536. Overhead covers of boiler iron and safety catches on cages; brakes (Laws 1891, p. 282; Laws 1897, p. 245; Act of March 4, 1903).

New York.—Labor law 1909, § 124. Safety brakes.

Ohio.—Gen. Code 1910, § 918. Overhead covers and safety catches on cages; brakes.

Oklahoma.—Comp. Laws 1909, § 4366. Covers; safety catches; flanges on drum; brakes.

Pennsylvania.—Act of June 2, 1891, P. L. 177, Art. 4, § 10 (anthracite coal

In a few jurisdictions there are provisions that the mine owner must provide either safe stairways or safe and suitable hoisting machinery.²

The view taken generally is that these statutes are remedial, and are to be so construed that the miners receive the protection intended to be given to them;³ on the other hand it has been said that the court, although not inclined to give the statute a narrow construction, will not ignore the fact that the provisions are enforceable by penalty.⁴

The statutory duty in respect to cages used in mines has been held to be a nondelegable duty,⁵ and also continuous.⁶ A different view is taken by the English courts, where it is held that § 49, rule 30, of the coal mines regulation act 1887, requiring adequate brakes on machines used for lowering and raising men, does not impose upon the owners of a mine an absolute, unqualified obligation, for any breach of which, resulting in personal injury to a miner, they are liable in

mines). Overhead covers; handrails, and safety catches on cages; appliances to prevent rope from slipping; brakes; guides to prevent cage from swinging.

Act of May 15, 1893, art. 3, § 1 (bituminous coal mines). Overhead covers and safety catches on cages; appliances to prevent rope from slipping; brakes.

South Dakota.—Pol. Code, 1908, § 2581 (Laws 1897, chap. 92). Overhead covers of boiler iron and safety catches on cage.

Texas.—Acts 1907, p. 331, § 1 (d). Cages; covers; hand holds.

Utah.—Comp. Laws 1910, §§ 1513, 1540-1. Overhead covers of boiler iron and safety catches in cages.

Washington.—Rem. & Bal. Anno. Codes & Stats. 1910, §§ 7386 (3170), 7414 (3192). Overhead covers and safety catches in cages; brakes.

West Virginia.—Code 1907, § 407. Overhead covers and safety catches in cages; brakes.

Ontario.—Mines act 1906, § 205 (23), (25), (27), (28). Hoods, dogs, and other safety appliances on cages; indicators; brakes; appliances to prevent rope from slipping.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (18), (20), (21); chap. 20, § 19 (14), (16), (17). The provisions in both these chapters are similar to those in the English acts.

British Columbia.—Rev. Stat. 1897,

chap. 38, § 92 (21), (23), (24). Same provisions as in English acts.

New South Wales.—Coal mines regulation act 1896, § 47 (28), (29), (31). Same provisions as in the English act.

Victoria.—Mines act 1896, § 357 (17); (22), (23). Same provisions as in English acts.

New Zealand.—Mining acts, compilation act 1906, § 255 (17), (24), (25), (26). Same provisions as in English acts, except that the minimum thickness of the cage cover is specified, as in some of the American statutes.

²*Oklahoma*.—Comp. Laws 1909, § 4363. Mine over 75 feet in depth shall be provided with safe and suitable hoisting machinery, or with safe and convenient stairs.

Wyoming.—Comp. Stat. 1910, § 3507 (Laws 1890-91, chap. 80, § 3; Rev. Stat. 1899, § 2564).

³*Welch v. Kansas City Midland Coal & Min. Co.* (1910) 151 Mo. App. 438, 132 S. W. 49; *Beard v. Skeldon* (1885) 113 Ill. 584, affirming (1883) 13 Ill. App. 54.

⁴*Green v. Bessemer Coal, I. & Land Co.* (1909) 162 Ala. 609, 50 So. 289.

⁵*Poli v. Numa Block Coal Co.* (1910) 149 Iowa, 104, 33 L.R.A. (N.S.) 646, 127 N. W. 1105.

⁶*Monson v. La France Copper Co.* (1909) 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.

damages, but only an obligation to provide such machinery as their expert manager shall deem to be adequate.⁷

In some jurisdictions the expressed purpose of the provisions with regard to the overhead covers of cages is to secure the safety of "persons ascending and descending the shaft." But the duty of the mine owner in this regard has been held to enure to the benefit of persons besides those who, strictly speaking, come within this description.⁸

⁷ *Watkins v. Naval Colliery Co.* [1911] 2 K. B. 162. In this case the mine owner had installed a brake used for controlling the cage, which was adequate for lowering or raising twenty men at a time, but a manager subsequently employed directed that the number of men be increased to twenty-six, and a miner was killed, due to the inadequacy of the brake to control such a load. Farwell, J., said: "It is reasonably practicable for the owner to find the money to pay for the brake and the repairs, and for the manager to ascertain and direct the adequacy of such brake and the nature and mode of such repairs; but it is no more reasonably practicable for the owner to ascertain and direct such adequacy and repairs than it would be for the manager to find the money to pay for them, and that this latter is not to be expected of the manager appears from the judgment of Cockburn, Ch. J., in *Hall v. Hopwood* (1879) 49 L. J. Mag. Cas. N. S. 17, 41 L. T. N. S. 797, 15 Mor. Min. Rep. 42. . . . The reasonable construction of these rules is, in my opinion, that they are in direct enactment on the owner to provide such a brake and such machinery as the expert manager shall deem necessary, and on the manager to see that such brake and machinery are adequate, and to direct their use with reference to the extent of adequacy provided by him. The owner cannot reasonably be expected to do more than provide all that the expert whom he is compelled by the act to employ deems necessary; the responsibility for the correctness of the advice rests with the expert who gives it. Take, for instance, rule 6, which I have just read. It is impossible for the owner to direct the number who are to ascend or descend at the same time, and to interfere with the manager's discretion in altering such numbers from time to time. I cannot agree with Pickford, J.,

that the alteration of the numbers makes any difference; it is a question for an expert, in the first instance, for how many persons the brake will suffice, and it remains a question for him if and whenever any alteration is made from time to time. There is certainly nothing in *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 14 Times L. R. 493, 47 Week. Rep. 87, that conflicts with this, for the enactment there imposed a direct, absolute duty on one man only, the occupier of the factory; nor in *Britannic Merthyr Coal Co. v. David* [1910] A. C. 74, 79 L. J. K. B. N. S. 153, 101 L. T. N. S. 833, 26 Times L. R. 164, 54 Sol. Jo. 151, 47 Scot. L. R. 609, the net result of which is that § 49 does not impose a direct, absolute duty in all events on the owners; this is apparent from the summing up of Channell, J., approved by Lord Halsbury and the House of Lords, except as to the *onus* of proof; if this were not so, the House would have entered judgment, instead of ordering a new trial."

⁸ In one case it was held that a person employed as "cager" at the bottom of the shaft of a coal mine, who was injured in the performance of his duty by a lump of coal falling from the top of the shaft into an uncovered cage, was entitled to recover damages under the Missouri act, although he might not be strictly within the letter of the clause. *Durant v. Lexington Coal Min. Co.* (1888) 97 Mo. 62, 10 S. W. 484.

In another case, on the broad ground that the object of the Indiana act is to protect all persons working in coal mines, it was held that a miner employed at the bottom of a shaft to run cars into the cage could recover for an injury resulting from a violation of the statute although he was not ascending or descending. *Bodell v. Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856.

Whatever may be the form of the statute, a person who is upon a cage for the purpose of being raised or lowered is clearly entitled to recover, if he is injured by a falling object which would not have struck him if the cage had been sufficiently covered.⁹

Where the agreement under which an independent contractor is engaged to open a mine imposes upon the owner the obligation of furnishing the hoisting machinery, a workman in the employ of the contractor is entitled to maintain an action against the owner for an injury caused by his violation of a statutory duty to provide a cage with spring catches for hoisting and lowering the miners.¹⁰

A "pit boss" charged with the duty of seeing that the hoisting apparatus satisfied the requirements of the law cannot recover for injuries caused by his failure to perform this duty.¹¹ This doctrine is doubtless correct.

The provision in the Alabama statute relative to safety catches on elevators does not require safety catches on tram cars running on an inclined track.¹²

The failure of hoisting machinery to perform its proper function is a "giving out" within the meaning of a requirement that "every drum shall be provided with a sufficient brake to prevent accident in case of the giving out of machinery."¹³ A breach of a requirement that hoisting machinery which will keep miners safe "so far as possible" shall be provided is predicable where the mine owner or his agent knows that the valve of the engine is so defective that it allows the steam to escape through it and the engine automatically.¹⁴ Pumping gear, although it may serve the purpose of a brake, is not a "brake" in the statutory sense.¹⁵

A contention that defendant was negligent in not providing a cer-

⁹ *Litchfield Coal Co. v. Taylor* (1876) 81 Ill. 590, 10 Mor. Min. Rep. 684.

A bucket 3 feet in diameter, 3 feet deep, and capable of holding four men, with no protector overhead and without a guard, swinging from side to side, and striking the sides and timber of the shaft when being raised or lowered, does not comply with the act of June 2, 1891, § 3, requiring a cage with the necessary buntings and guides, in the second opening of a shaft, with hand rails and efficient safety catches, and a sufficient cover overhead. *Com. v. Elk Hill Coal & I. Co.* (1898) 4 Lack. Legal News, 80.

¹⁰ *Fell v. Rich Hill Coal Min. Co.* (1886) 23 Mo. App. 216.

¹¹ *Beaucoup Coal Co. v. Cooper* (1883) 12 Ill. App. 373.

¹² *Green v. Bessemer Coal, I. & Land Co.* (1909) 162 Ala. 609, 50 So. 289.

¹³ *Beard v. Skeldon* (1885) 113 Ill. 584 (instruction to this effect approved), affirming (1883) 13 Ill. App. 54 (miner killed by a cage which had fallen owing to the fact that there was no appliance to prevent it from doing so).

¹⁴ *Consolidated Coal Co. v. Maehl* (1888) 31 Ill. App. 252, affirmed in (1889) 130 Ill. 551, 22 N. E. 715 (but this point was not discussed).

¹⁵ *Nimmo v. Clark* (1872) 10 Sc. Sess. Cas. 3d series, 477.

tain cage with a covering is untenable where it appears that he was at work on top of the cage at the time of the accident.¹⁶

(2) The provision of safety appliances on cars used in hauling material on underground roads with a steep gradient.¹⁷

(3) The provision of safety valves and steam and water gauges for steam boilers.¹⁸

A pipe which conducts steam from a boiler above ground to a pumping engine in the underground workings of a mine is a "boiler" as that word is defined by the words, "closed vessel for generating steam," in the interpretation clause of the boiler explosions act 1882.¹⁹

On the ground that the statute in question renders any "owner, agent, or viewer" liable for failure to observe the rules formulated by it, it was held that an information would lie against a portion of the owners for nonobservance of the rule respecting steam gauges.²⁰

(4) The fencing of dangerous machinery.²¹

¹⁶ *Jacobson v. Smith* (1904) 123 Iowa, 263, 98 N. W. 773.

¹⁷ *Colorado*.—Rev. Stat. 1908, § 655.

¹⁸ *England*.—Coal mines regulation act 1887, § 49 (32).

Metalliferous mines regulation act 1872, § 23 (18).

Arkansas.—Kirby's Dig. § 5534. Every steam boiler to be provided with a proper gauge.

California.—Stat. 1873-74, p. 426, § 1 (Gen. Laws, act 2223). Steam boiler in coal mines to be kept in good order.

Colorado.—Rev. Stat. 1908, § 644.

Illinois.—Hurd's Rev. Stat. 1908, p. 1428, Laws 1899, p. 300. For earlier enactment see Starr & C. Anno. Stat. p. 2723 (Laws 1879, p. 204, § 8).

Kansas.—Gen. Stat. 1909, § 4985.

Missouri.—Rev. Stat. 1909, § 8461.

New York.—Labor law 1909, § 124.

Pennsylvania.—Act of June 2, 1891, P. L. 177, art 5, § 4 (anthracite coal mines).

Washington.—Rem. & Bal. Anno. Codes & Stats. 1910, § 7389 (3173).

Ontario.—Mines act 1906, § 205 (40).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (24) (coal mines).

Chap. 20, § 19 (19) (metalliferous mines).

British Columbia.—Rev. Stat. 1897, chap. 134, § 25 (metalliferous mines).

Chap. 138, § 82 (26) (coal mines).

New South Wales.—Coal mines regulation act 1896, § 47 (33).

Victoria.—Mines act 1890, § 357 (35).

New Zealand.—Mining acts, compilation act 1906, § 255 (36).

¹⁹ *Reg. v. Boiler Explosions Act Comrs.* [1891] 1 Q. B. 703, 60 L. J. Q. B. N. S. 544, 64 L. T. N. S. 674, 39 Week. Rep. 440.

²⁰ *Reg. v. Brown* (1857) 7 El. & Bl. 757, 26 L. J. Mag. Cas. N. S. 183, 3 Jur. N. S. 745, 5 Week. Rep. 625. In that case decided with reference to § 11 of 18 & 19 Vict. chap. 108, the English statutes superseded by the coal mines regulation act, a mandamus requiring a justice to hear the complaint was issued.

²¹ *England*.—Coal mines regulation act 1887, § 49 (31). Every fly wheel, and all exposed and dangerous parts of machinery used in and about the mines, are to be kept securely fenced.

Metalliferous mines regulation act 1872 § 23 (17). Similar provision.

Kansas.—Gen. Stat. 1909, § 4988; Laws 1883, chap. 117, § 8, as amended by Laws 1885, chap. 143, § 3. All machinery about mines shall be properly fenced off.

Oklahoma.—Comp. Laws 1909, § 4369. Sec. 4377. Mining machines where used shall be provided with a sufficient shield.

Act June 2, 1891 (P. L. 188) art. 5, § 5, requiring all dangerous machinery used in or about mines, such as engines, rollers, wheels, screens, shafting, and belting, to be protected by a covering or railing, does not include a trolley wire within the designated kinds of dangerous machinery.²²

(5) The protection of workmen from electricity.²³

1887. Competency of employees.—As to the liability of mine owners for the acts of supervising employees in mines appointed pursuant to statute, see §§ 1435a, 1435b, *ante*.

The enactments under this head may be divided into the following classes:

(1) Provisions relative to the qualifications of employees intrusted with functions of superintendence.¹

Pennsylvania.—Act of June 2, 1891, P. L. 177, act 5, § 5 (anthracite coal mines).

Act of May 15, 1893, P. L. 52, art. 3, § 4. Machinery from which any accident would be liable to occur must be fenced off, in bituminous coal mines.

Act of May 15, 1893 (bituminous coal mines).

Wyoming.—Comp. Stat. 1910, § 3517.

Ontario.—Mines act 1906, § 205 (39).

Nova Scotia.—Rev. Stat. chap. 19, § 44 (23) (coal mines).

Chap. 20, § 19 (18) (metalliferous mines).

British Columbia.—Rev. Stat. 1897, chap. 38, § 82 (25) (coal mines).

New South Wales.—Coal mines regulation act 1896, § 47 (31).

Victoria.—Mines act 1890, § 357 (34).

New Zealand.—Mining acts, compilation act 1906, § 255 (35).

²² *Reeder v. Lehigh Valley Coal Co.* (1911) 231 Pa. 563, 80 Atl. 1121.

²³ *Ohio.*—Gen. Code 1910, § 957. Wires conducting electricity are to be insulated.

Sec. 961. Mining machines operated by electricity to be provided with a shield.

Oklahoma.—Comp. Laws 1909, § 4376. The wires conducting electricity in or about mines shall be insulated or otherwise protected.

Pennsylvania.—Act of May 15, 1893, art. 5, §§ 5-7. Electric wires to be insulated.

¹ *England.*—Coal mines regulation act 1887, § 20. Manager of mine must be a

registered holder of a first-class certificate of competency.

Coal mines regulation act 1887, § 20. Mines to be worked under a manager holding a first-class certificate.

Sec. 22. Contractor for mineral, or person employed by such a contractor, is not eligible for the post of manager or under-manager.

Alabama.—Code 1907, §§ 1006, 1007. Examination of mine bosses for certificates.

Secs. 1013, 1014. Certificates of competency of foremen.

Colorado.—Rev. Stat. 1908, § 642. No person to be knowingly employed as mining boss, unless he is experienced, competent, and sober.

P. 2734 (Laws 1895, p. 250, §§ 1, 4). Fire bosses must hold certificate of competency.

Illinois.—Hurd's Rev. Stat. 1908, p. 1429 (Laws of 1899, p. 300). Mine inspectors and managers required to pass examinations and procure certificates. For earlier enactments, see Starr & C. Anno. Stat. 1896, p. 2731 (Laws 1891, p. 168, §§ 1-5).

Indiana.—Burns's Anno. Stat. 1908, §§ 8579, 8592 (Laws 1905, chap. 50, §§ 11, 22). Mining and fire bosses must hold certificate of competency. (Earlier enactment, Laws 1897, chap. 84).

Iowa.—Code Supp. § 2489 (a)-(f), (Laws, 1900, chap. 82). Mine foremen and pit bosses must hold certificates of competency.

Kansas.—Gen. Stat. 1909, § 4987. Competent inside overseer or "mining boss" to be employed.

Under the Illinois act the same person may act both as mine manager and as mine examiner.²

With reference to a statute requiring the employment of a competent "mining boss," it has been held by an inferior court that such an employee need not be engaged for each opening. It was considered that, for the purposes of the duty thus imposed, a mine should be taken to mean such territory, whether including one or more drifts, as lay within a compact area and was comprehended within a single system of operations.³

(2) Provisions relative to the qualifications of employees discharging certain special functions which, although not concerned with superintendence, require considerable skill and are also of a peculiarly responsible character.⁴

Act No. 100, Mich. Pub. Acts 1905, imposes upon the owners or

Kentucky.—Stat. 1909, § 2739b (3) (act of March 20, 1908). Qualifications and examination of mine foremen.

Pennsylvania.—Act of June 2, 1891, P. L. 177 (anthracite coal mines), art. 8, §§ 1-9. Mine and fire bosses must hold certificates of competency.

Act of May 15, 1893, P. L. 52 (bituminous coal mines), art. 6, § 1. Inside overseer with a certificate of competency is to be employed.

Art. 15, §§ 1-4. Qualifications of mine foremen and fire bosses.

Tennessee.—Laws of 1903, chap. 237, § 12. Mine foreman, assistant, and fire boss must have competency certificates.

Sec. 21c. Gas bosses shall have certificate of competency.

Utah.—Comp. Laws 1910, § 1518 (1). Mine foreman must hold a certificate.

Sec. 1522. Examination and qualifications of mining bosses.

West Virginia.—Code 1907, § 410. Inside overseer or mine foreman to be employed.

Wyoming.—Comp. Stat. 1910, § 3511. Inside overseer or mining boss with certificate to be employed.

Secs. 3522, 3524. Fire bosses and mining bosses must hold certificates of competency.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 5 (1). Coal mines must be under the control of a manager holding a certificate of competency; (2) underground workings must be under daily supervision of certified underground manager and overseer.

New South Wales.—Coal mines regu-

lation act 1896, §§ 2, 5-15. Certificated manager to be appointed.

Sec. 4. Contractor for getting mineral, or person employed by such a contractor, not eligible for post of manager or under-manager.

New Zealand.—Mining acts, compilation act 1906, § 226. No person without a certificate is to be employed as mine manager or battery superintendent.

² *People v. Kolb Coal Co.* (1909) 151 Ill. App. 469.

³ *Com. v. Wighton* (1886) 2 Pa. Dist. R. 51.

⁴ *England*.—Coal mines regulation act 1887, § 49 (24). Competent person not less than twenty-two years of age is to be appointed for the purpose of working machinery which is used in raising and lowering persons. Machinery used in conveying persons along shafts, planes, or levels which are used for the purpose of communication from one part of the mine to another, is to be in charge of a competent male person not less than eighteen years of age.

Metalliferous mines regulation act 1872, § 7. No one shall have charge of any part of the machinery used for conveying persons in a shaft, inclined plane, or level, unless he is a male of at least eighteen years of age.

Alabama.—Code 1907, § 1029. Experienced, competent, and sober engineer to be placed in charge of engine of hoisting machinery.

Sec. 1031. Appointment of fire boss in mine where gas is known to exist.

Arkansas.—Kirby's Dig. 1904, § 5343.

operators of coal mines in this state a positive and continuing duty to employ only competent and trustworthy engineers to operate cages

No one but an experienced, competent, and sober person over eighteen years of age is to be placed in charge of an engine whereby men are lowered into or raised out of a mine.

Colorado.—Rev. Stat. 1908, § 642. No person to be knowingly employed as engineer, or to take charge of hoisting machinery, unless he is experienced, competent, and sober (coal mines).

Sec. 4284. No person addicted to the use of intoxicating liquors shall be employed as hoisting engineer in a metalliferous mine.

Illinois.—Hurd's Rev. Stat. 1908, p. 1430 (Laws 1899, p. 300). Hoisting engineers shall be over twenty-nine years of age, and pass examinations and procure certificates. None but certified engineers to be employed. For earlier enactment, see Starr & C. Anno. Stat. 1896, p. 2721, ¶ 7 (Laws 1879, p. 2041, as amended by Laws 1887, p. 234). Hoisting apparatus to be in charge of competent, experienced, and sober engineer and fireman, not under eighteen years of age. Earlier enactment, Laws 1874, chap. 93, §§ 6, 7. P. 2734 (Laws 1895, p. 250, §§ 1-4). Hoisting engineers must hold certificate.

PP. 1444 *et seq.* (Laws of 1905, p. 238; amended by Laws 1907, p. 401). Mine owners to provide shot firers who shall be practical experienced men. Provisions as to the firing of shots.

Indiana.—Burns's Anno. Stat. 1908, § 8592 (Laws 1905, chap. 50, § 22). Hoisting engineers must hold certificates.

Sec. 8578. The operator shall not place in charge of any engine used for conveying into or hoisting out of the mine any but experienced, competent, and sober engineers, who shall not permit any one to loiter about, and shall not speed the engine to exceed 600 feet per minute.

Sec. 8610. In any coal mine where the miners therein so elect, persons may be employed to act as shot firers, and their wages shall be paid by the miners working therein.

Iowa.—Code Supp. 1902, § 2489 (a)-(f). Hoisting engineers must hold certificates (Laws 1900, chap. 82, amending Code 1897, § 2489).

Sec. 2495b. Certified shot examiners to be employed.

Kansas.—Gen. Stat. 1909, §§ 4999, 5000. Competent shot firers to be employed, who shall fire all the shots in the mine.

Sec. 5002. Any miner or other person who shall fire any shot in violation of § 2 of this act shall be deemed guilty of a misdemeanor.

Kentucky.—Stat. 1909, §§ 2489a-2489a6. Shot firers to be employed.

Stat. § 2739b(4)-(6) (act of March 20, 1908). Employment and duties of "shot firers" in mines in which explosive gases are known to be generated in large quantities.

Michigan.—Pub. Acts 1905, act No. 100, § 3. Only competent and trustworthy engineers to be permitted to operate cages and hoisting devices in coal mines.

Missouri.—Rev. Laws 1909, § 8448. Only experienced persons are to handle explosives.

Sec. 8457. No one but an experienced, competent, and sober person not under eighteen years of age is to be placed in charge of an engine for hoisting or lowering miners.

Montana.—Rev. Codes 1907, § 1700. Competent mining bosses to be employed in mines where inflammable gases are known to exist (Laws 1891, p. 282, § 6).

Sec. 1701; Laws 1891, p. 282, § 6. Certified mine foreman and mine bosses to be employed.

North Carolina.—Pell's Revisal 1908, § 4935. None but competent and sober engineers to be in charge of hoisting engines.

Ohio.—Gen. Code 1910, § 916. Provisions for lowering and hoisting employees on cages. Competent top and bottom men to be furnished (Rev. Stat. § 297).

Sec. 920. Only experienced, competent, and sober engineers are to be employed to operate hoisting machinery.

Oklahoma.—Comp. Laws 1909, § 4395. Shot firers to be employed.

Pennsylvania.—Act of June 2, 1891, P. L. 177 (anthracite coal mines), art. 12, rule 18. Engineer placed in charge of an engine whereby persons are hoisted or lowered shall be a sober and competent person of not less than twenty-

and hoisting devices;⁵ and the master is not entitled to notice of the incompetency of an employee so employed.⁶

Under the Illinois statute the company will be liable for a personal injury to a person in its employ, while descending into the mine, resulting from the employment of an incompetent engineer to take charge of the engine used in lowering persons into and hoisting them out of the mine.⁷ The certificate of the mine examiners is not conclusive upon the question of the competency of a hoisting engineer.⁸

one years of age (similar provision in mines act 1885).

Act of May 15, 1893, P. L. 52 (bituminous coal mines), art. 32, rule 62. Engineer in charge of hoisting machinery must be a sober and competent person, and not less than twenty-one years of age.

Washington.—Rem. & Bal. Anno. Codes & Stats. 1910, § 7387 (3171). None but competent, experienced, and sober persons are to be placed in charge of hoisting machinery.

West Virginia.—Code 1907, § 408. Competent and sober engineers to be employed for hoisting machinery.

Wyoming.—Comp. Stat. 1910, § 3491. No person addicted to the use of intoxicating liquors, or under eighteen years of age, shall be employed as hoisting engineer in metalliferous mines.

Ontario.—Mines act 1906, chap. 11, § 195. Only males of more than twenty years of age to have charge of hoisting machinery driven by steam or any other mechanical power, or by any animal, or by manual labor.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 15. "Shot firers" must hold certificates of competency.

Chap. 20 (metalliferous mines) § 19 (3). Person in charge of machinery in shaft, etc., to be a male over eighteen.

New South Wales.—Coal mines regulation act 1896, § 47 (24). Hoisting machinery to be worked by a competent man not less than twenty-two years of age.

Sec. 47 (25). Machinery used for conveying persons from one part of the underground workings to another is to be in charge of a competent male person not less than eighteen years of age.

Victoria.—Mines act 1890, § 357 (31). No person under the age of eighteen

years is to be placed in charge of a steam engine.

Secs. 357-362. These provisions relate to (1) the examination of engine drivers; (2) certificates of competency; (3) disqualification of holders of certificates.

New Zealand.—Mining acts, compilation act 1906, §§ 226-239. Engine drivers and dredge masters must hold certificates of competency.

Sec. 242. No person under the age of eighteen years shall be employed as loader or bracman over any shaft.

Sec. 255 (29). No person under twenty-one years of age to have charge of any steam engine or boiler.

⁵ *Layzell v. J. H. Somers Coal Co.* (1909) 156 Mich. 268, 117 N. W. 179, 120 N. W. 996.

⁶ *Kleinfelt v. J. H. Somers Coal Co.* (1909) 156 Mich. 473, 132 Am. St. Rep. 532, 121 N. W. 118. To the same effect, *Layzell v. J. H. Somers Coal Co.* (1909) 156 Mich. 268, 117 N. W. 179, 120 N. W. 996.

⁷ *Niantic Coal & Min. Co. v. Leonard* (1888) 126 Ill. 216, 19 N. E. 294.

If mine foremen are known to be incompetent, their employment is negligence, no matter what experience they may have had. *Majestic Collieries Co. v. Bradley* (1909) 132 Ky. 533, 116 S. W. 738 (statute required mine foreman to have at least five years' experience).

⁸ If the employer ascertains, either from personal observation or the report of others, that the holder of a certificate is not, in fact, competent, and retains him in service, he will be liable for all injuries to other employees resulting from such incompetency. *Consolidated Coal Co. v. Seniger* (1898) 79 Ill. App. 456, affirmed in (1899) 179 Ill. 370, 53 N. E. 733.

A mine owner is liable for the failure of his superintendent in general charge of the mine to obey a statute providing that no person shall be placed in charge of any engine used in or about the operation of the mine but experienced and competent engineers, even though the disobedience consists in the superintendent's attempting to run the engine himself, knowing that he is incompetent to do so.⁹

(3) Provisions relative to the qualifications of ordinary miners.¹⁰

(4) Provisions relative to the supervision of inexperienced miners.¹¹

1888. System of operation.—The enactments under this head may be divided into the following classes:

(1) Provisions requiring frequent inspection of underground workings.¹

If the mine is in a dangerous condition, and the owner or opera-

⁹ *Beresford v. American Coal Co.* (1904) 124 Iowa, 34, 70 L.R.A. 256, 98 N. W. 902.

¹⁰ *Illinois*.—Hurd's Rev. Stat. 1908, p. 1446 (Law of July 1, 1908). Miners required to pass examination and procure certificate, to be entitled to work.

Missouri.—Rev. Stat. 1909, § 8479. No person allowed to work for himself underground in coal mines, unless he satisfies inspector of his qualifications.

Ohio.—Gen. Code 1910, § 969. No person to work by himself as a miner in a coal mine which generates fire damp, gas, or combustible matter, until he satisfies the mine boss that he has worked at least one year with or as a practical coal miner.

Pennsylvania.—Laws 1897, P. L. 287, § 1. Miners must procure certificate of competency.

Utah.—Comp. Laws 1910, § 1518 (17). It is unlawful to employ in a mine which generates explosive gases anyone who is not competent to understand the regulations of such a mine.

Nova Scotia.—Rev. Stat. chap. 19, § 15. Workmen in coal mines must hold certificates.

¹¹ *England*.—Coal mines regulation act 1887, § 49 (39).

Illinois.—Laws, 1897, p. 268. No person shall mine by himself unless with two years' practical experience. Otherwise he must be accompanied by practical miner.

Ohio.—Gen. Code 1910, § 969. None but competent miners to be permitted to work in mine alone (99 v. 21, § 1).

Pennsylvania.—Act of May 15, 1893, P. L. 52 (bituminous coal mines), art. 32, rule 74. No inexperienced person shall be employed to mine out pillars, unless in company with one or more experienced miners and with their consent.

West Virginia.—Code 1907, § 405. Every inexperienced person to work under the direction of the mine foreman or an experienced worker designated by him.

¹ *England*.—Coal mines regulation act 1887, § 21. Daily examination by manager or under-manager.

Sec. 49 (4). Inspection of underground workings before work is commenced.

Alabama.—Code 1907, § 1034, rule 3. Duty of workmen to examine place of work.

Sec. 1034, rule 2. Duty of employees to report unsafe condition.

California.—Stat. 1873-74, p. 426, § 5 (Gen. Laws, act 2223). Duty of inside overseer to examine coal mine daily.

Colorado.—Rev. Stat. 1908, § 655. Daily inspection of workings where there is danger of spontaneous combustion.

Illinois.—Hurd's Rev. Stat. 1908, p. 1436, § 18; Laws 1907, p. 387. (a) A mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it, and, first, he shall see that the air current is traveling in its proper course and in proper quantity. In order to correctly determine the quantity of air in circulation in different portions of the mine, it is hereby made his

tor has failed, with knowledge of its condition, to comply with the statute, he is liable, and he cannot excuse himself on the ground that he had the mine examined, and in good faith thought it was not dangerous.²

duty to measure with an instrument for that purpose the amount of air passing in the last cross-cut or break-through of each pair of entries, or in the last room of each division in a long wall mine, and at all other points where he deems it necessary, the same to be noted in the daily book kept for that purpose. He shall then inspect all places where men are expected to pass or to work, and observe whether there are any recent falls or obstructions in rooms or roadways, or accumulations of gas, or other unsafe conditions. He shall especially examine the edges and accessible parts of recent falls and old gobs and air-courses. As evidence of his examination of all working places he shall inscribe on the walls of each, with chalk, the month and the day of the month of his visit.

(b) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein except under the direction of the mine manager, until all conditions shall have been made safe.

(c) The mine examiner shall make a daily record of the conditions of the mine, as he has found it, in a book kept for that purpose, which shall be preserved in the office for the information of the company, the inspector, and all other persons interested, and this record shall be made each morning before the miners are permitted to descend into the mine.

Kansas.—Gen. Stat. § 5006. Mines to be examined daily.

Sec. 5011. All main air-ways in any underground workings shall be examined at least twice a week.

Kentucky.—Stat. 1909, § 2478. All mines known to generate fire damp or explosive gas shall, as nearly as practicable, be inspected every sixty days.

Missouri.—Rev. Laws 1909, § 8447.

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Daily examination to determine whether there are any dangerous accumulations of gas, or lack of proper ventilation, or obstruction to roadways or other dangerous conditions.

Montana.—Rev. Codes 1907, § 1699; Laws 1891, p. 282, § 6. Daily examination for explosive gases.

New Mexico.—Comp. Laws 1897, § 2343. Daily examination.

Pennsylvania.—Act of June 2, 1891, P. L. 177, art 12, § 5. Anthracite mines generating explosive gases to be examined every morning.

Act of May 15, 1893, P. L. 52, art. 5, § 2. Bituminous mines generating explosive gases are to be examined by the fire boss before a shift goes to work.

Utah.—Comp. Laws 1910, § 1518 (3). Daily examination of mines known to generate explosive gases.

West Virginia.—Code 1907, § 410. Daily examination by mine foreman.

Wyoming.—Comp. Stat. 1910, § 3514. Mining boss or assistant to examine every working place at least once every two days.

Ontario.—Mines act 1906, chap. 11, § 205 (30). Daily examination.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (2) (3). Daily examination for inflammable gas.

Sec. 44 (30). Examination of machinery and working places once a week by competent person.

British Columbia.—Rev. Stat. chap. 134, § 25 (11). Daily examination.

Chap. 38, § 82 (30). Daily inspection of coal mine.

New South Wales.—Coal mines regulation act 1896, § 47 (4). Inspection of working place before each shift begins.

New Zealand.—Mining acts, compilation act 1906, § 255 (43). Mine manager or other competent person to examine shafts, etc., every twenty-four hours.

New South Wales.—Coal mines regulation act 1896, § 3. Daily supervision by manager or under-manager.

Victoria.—Mines act 1890, § 357 (40). Daily examination.

² *Aetitus v. Spring Valley Coal Co.* (1910) 246 Ill. 32, 138 Am. St. Rep. 221,

Actual notice of the mine examiner or the mine manager of a dangerous condition in the mine is notice to the mine owner of such condition.³

The Illinois statute does not mean that a mine manager must be personally present at all times while conditions are being made safe.⁴

Provisions of § 18 of the Illinois mines and miners' act (Hurd's Rev. Stat. 1908, chap. 93) regarding the daily inspection and examination of a mine are for the protection not only of those who dig and remove the coal, but also for engineers, firemen, pumpmen, shot firers, drivers, and other workmen and employees at work about the mine.⁵ A statute of like tenor has been held to enure to the benefit of an employee engaged in timbering a shaft.⁶ But where a miner's employment at the time of the accident was not that of a miner engaged in digging coal, but as an employee whose duty it was to repair and make safe a dangerous working place, he was not then within the protection of the statute requiring dangerous places to be marked.⁷

The words "any dangerous condition," used in the Illinois mines and mining act, do not, under the doctrine of *ejusdem generis*, limit the dangerous condition to dangers, and to the same kind of dangers, expressly specified in the statute.⁸ The phrase includes places which

92 N. E. 579. The court said: "His liability does not rest upon the ground that in good faith or bad faith he thought there was no danger in the mine, but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the conditions in the mine, he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril, and he cannot excuse himself because he or his examiner or manager may think the mine safe. To so hold would be to permit the mine owner or operator, or his examiner or manager, to usurp the functions of the court and jury, and to pass upon a question which, in every case like this, is a matter of proof and is to be determined as a fact by the jury."

³ *Riverton Coal Co. v. Shepherd* (1904) 207 Ill. 395, 69 N. E. 921; *Olson v. Kelly Coal Co.* (1908) 236 Ill. 502, 86 N. E. 88.

⁴ *Kellyville Coal Co. v. Bruzas* (1906) 223 Ill. 595, 79 N. E. 309, reversing (1906) 125 Ill. App. 464; *Paietta v. Illinois Zinc Co.* (1910) 153 Ill. App. 506.

⁵ *Brennen v. Chicago & C. Coal Co.* (1909) 241 Ill. 610, 89 N. E. 756 (pumpman); *Houglund v. Avery Coal & Min. Co.* (1910) 246 Ill. 609, 93 N. E. 40, affirming (1910) 152 Ill. App. 573 (shot firers).

⁶ *Coal Run Coal Co. v. Jones* (1886) 19 Ill. App. 365, reversed in (1886) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89, but only on the ground that the breach of the statute did not contribute to the accident.

⁷ *Gallatin Coal & Coke Co. v. Andrewzewski* (1907) 137 Ill. App. 1.

⁸ *Dunham v. Black Diamond Coal Co.* (1909) 239 Ill. 457, 88 N. E. 216; *Fuchs v. Consolidated Coal Co.* (1910) 157 Ill. App. 41; *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743.

are dangerous either by virtue of their original construction, or by reason of conditions subsequently arising.⁹

The statute requiring all dangerous places to be marked applies to a pit car, clevis, and pin, cable, and the various parts of a rope haulage system; ¹⁰ to a defect in the roof of a room; ¹¹ and to a live wire so placed in the mine that a driver or his mule is exposed to contact therewith while in the mine.¹²

Where curves exist in the driveway of a mine around which mules could not be continuously so driven as to avoid coming in contact with the timbers or props upon the side of the mine, with the result that such timbers or props are actually knocked down, a "dangerous condition" prevails.¹³ But a chunk of coal lying beside the track in a mine is not a dangerous condition under § 18 of the mines and miners' act, so as to require the examiner to mark the place as unsafe and to make a special report with respect thereto.¹⁴ And Hurd's Rev. Stat. 1908, chap. 93, § 18, requiring mine examiners to mark dangerous conditions in working places, does not require the marking of a place where there is a space only 6 inches wide between a wall and passing cars, where it is not used as a working place.¹⁵

Burns's Rev. Stat. 1894, § 7479, provides that the operator of a coal mine shall employ a competent mining boss to carefully watch over the airways, etc. Section 7472 requires such boss to visit and examine every working place in the mine at least every alternate day, and to examine and see that such places are properly secured by props, and that safety is assured. A complaint alleging that a boss appointed by an operator failed to examine the mine in which plaintiff worked, as required, and, unknown to plaintiff, the walls between the places where coal was mined became so thin that a charge of powder used in mining blew one out, and plaintiff was injured, is not demurrable.¹⁶

A recovery cannot be had for the death of plaintiff's intestate, killed in a mine by the fall of a clod of dirt, on the ground that the defendant wilfully failed to examine the mine as required by Ill. Rev. Stat. chap. 93, § 14, before the men began work, when a sub-

⁹ *Dunham v. Black Diamond Coal Co.* (1908) 146 Ill. App. 140, affirmed in (1909) 239 Ill. 457, 88 N. E. 216.

¹⁰ *Pate v. Gus Blair Big Muddy Coal Co.* (1910) 158 Ill. App. 578.

¹¹ *Mertens v. Southern Coal & Min. Co.* (1908) 235 Ill. 540, 85 N. E. 743.

¹² *Dunham v. Black Diamond Coal Co.* (1909) 239 Ill. 457, 88 N. E. 216.

¹³ *Tennicot v. Donk Bros. Coal & Coke Co.* (1910) 158 Ill. App. 549.

¹⁴ *Kean v. Jones Bros. Coal & Min. Co.* (1909) 147 Ill. App. 319.

¹⁵ *Cook v. Big Muddy-Carterville Min. Co.* (1911) 249 Ill. 41, 94 N. E. 90.

¹⁶ *Eureka Block Coal Co. v. Wells* (1901) 29 Ind. App. 1, 94 Am. St. Rep. 259, 61 N. E. 236.

sequent examination was made in good faith, prior to the accident, and its cause not discovered.¹⁷ An instruction is erroneous which allows a recovery without requiring the jury to find from the evidence that the rock in question was loose and dangerous before or at the time the mine examiner inspected the room, or should have examined the roof to determine its safety.¹⁸

An instruction authorizing a verdict for the plaintiff in the event that the jury found that the dangerous condition was known to the mine manager, and that he did not personally "properly mark and display a danger signal at the bank of coal" where such condition existed, is erroneous as thereby permitting a recovery for the violation of an alleged duty not imposed by the statute, since the statute imposes only the duty to "see that all dangerous places above and below are properly marked, and that danger signals are displayed wherever they are required."¹⁹

A record made by a mine examiner by dating and signing a form for a record under some former law, instead of § 18 of the present mining act, does not comply with the statute, and constitutes a wilful violation thereof.²⁰ Where a mine examiner does not make a report specifying the dangers of the mine examined, it is not a compliance with the statute.²¹ In the cases cited below, the mine owner was held liable or not liable in accordance with the facts of the particular case.²²

¹⁷ *Missouri & I. Coal Co. v. Schwalb* (1897) 74 Ill. App. 567.

¹⁸ *Belskis v. Dering Coal Co.* (1908) 146 Ill. App. 124.

¹⁹ *Parrish v. Black Diamond Coal Co.* (1908) 143 Ill. App. 118; *Legru v. Penwell Coal Min. Co.* (1909) 149 Ill. App. 555.

²⁰ *Henrietta Coal Co. v. Martin* (1906) 221 Ill. 460, 77 N. E. 902.

²¹ *Marquette Third Vein Coal Co. v. Allison* (1907) 132 Ill. App. 221.

²² *Under Starr & C. Anno. Stat.* 2d ed. chap. 93, § 4, which provides that all mines in which men are employed shall be examined every morning to determine obstructions to roadways and other dangerous conditions, and § 14, giving a right of action to the widow and children of any person killed by the wilful violation or failure to comply with such law, where any injury happens contemporaneously with the continued violation of the statute, to a person within its protection, a verdict finding that the violation of the statute

caused the injury will not be set aside unless there is an entire absence of proof. *Jupiter Coal Min. Co. v. Mercer* (1899) 84 Ill. App. 96.

Where the report of an examination of defendant's mine did not show that all the conditions were safe, and plaintiff gave defendant notice of the dangerous condition of an entry, and was permitted to enter the mine to work, and was injured, there was evidence to support an instruction based on wilful violation of mining act, § 4, providing that all mines shall be examined every morning, and that no one shall be permitted to enter until the conditions are reported to be safe. *Pawnee Coal Co. v. Royce* (1900) 184 Ill. 402, 56 N. E. 621, reversing (1898) 79 Ill. App. 469.

The operator of a coal mine, who, before permitting persons to enter such mine, causes it to be examined by a competent and duly authorized agent, who in good faith makes an examination to ascertain if there are any dangerous conditions which render it

Under the British Columbia act it has been held that employers, not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, cannot be held responsible for the consequences of failure to provide complete and accurate plans of the mine.²³

(2) Provision requiring frequent inspection of the mechanical appliances in use in the mine.²⁴

That the top foreman had seen nothing wrong with the engine on the day of the accident, and that another employee who had been in-

unsafe for men to work therein, and reports the mine to be in a safe condition, when in fact it is not, cannot be sued under that provision of the statute which relates to the inspection of mines (2 Starr & C. Anno. Stat. 2719, chap. 92, §§ 4, 14), though possibly recovery may be had in a common-law action for negligence. *Himrod Coal Co. v. Schrooth* (1900) 91 Ill. App. 234.

²³ *Hosking v. Le Roi* (1903) 34 Can. S. C. 244.

²⁴ *England*.—Coal mines regulation act 1887, § 49 (5). Inspection of machinery above and below ground to be made every twenty-four hours.

California.—Stat. 1873-74, p. 426, § 1 (Gen. Laws, Act 2223). Boilers to be tested every six months.

Act 2223, § 6. The overseer shall see that hoisting machinery is kept constantly in repair and ready for use, to hoist the workmen in or out of the mine.

Act 2223, § 10. All boilers used for generating steam in and about coal mines shall be kept in good order, and the owner or agent thereof shall have them examined and inspected, by a competent boiler maker, as often as once in three months.

Colorado.—Rev. Stat. 1908, § 644. Inspection of steam boilers once every six months (coal mines).

Illinois.—Starr & C. Anno. Stat. p. 2723; Laws 1879, p. 204, § 8. Steam boilers used in coal mines to be examined once every six months.

Missouri.—Rev. Stat. 1909, § 8461. Steam boilers used in coal mines to be tested every six months.

New Mexico.—Comp. Laws 1897, § 2347. Boilers to be inspected once every three months.

New York.—Labor law 1909, § 124. Steam boilers to be inspected once in six months.

Oklahoma.—Comp. Laws 1909, § 4365. Ropes, chains, machinery, and all its connections, used for lowering or raising employees, shall be inspected once in every twenty-four hours.

Pennsylvania.—Act of May 15, 1893, P. L. 52, art. 2, § 8. Hoisting machinery to be examined daily in bituminous coal mines.

Act of June 2, 1891, P. L. 177, art. 4, § 13. Daily examination of hoisting apparatus in anthracite mines.

Art. 5, § 1. Boilers to be examined every six months in anthracite mines.

Utah.—Comp. Laws 1910, § 1513. Hoisting apparatus to be examined daily.

Washington.—Rem. & Bal. Anno. Codes & Stats. 1910, § 7389 (3173). Boilers to be examined.

West Virginia.—Code 1907, § 407. Examination of hoisting machinery every twenty-four hours.

Wyoming.—Comp. Stat. 1910, § 3507. Hoisting machinery and stairs shall be inspected every twenty-four hours (Laws of 1890-91, chap. 80, § 3; Rev. Stat. 1899, § 2564).

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (30). Examination of machinery once a week by a competent person.

New South Wales.—Coal mines regulation act 1896, § 47 (5). Inspection of machinery above and below ground.

New Zealand.—Mining acts compilation act 1906, § 255 (43). Mine manager or other competent person to examine machinery every twenty-four hours.

Victoria.—Mines act 1890, § 357 (21). Ropes and chains used for hoisting machinery are to be tested.

Sec. 357 (32). Machinery of which the motive power is steam, water, or air, is to be examined by an inspector before being erected.

structed by the top foreman to look after the machinery had been there the day before the accident, and found the machinery in good condition, is not a compliance with the statute requiring examinations to be made by a licensed mine examiner.²⁵

The duty of examination and inspection imposed by statute upon mine owners and operators includes stationary engines used to haul coal from around the top of the mine to the retail dump, and bring back the empty cars by means of cables.²⁶

Under the coal mines regulation act, 1887 (50 & 51 Vict. chap. 58), § 49, rule 5, which requires that a competent person appointed for the purpose shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, etc., in mines, and shall, once at least in every week, examine the state of the shafts by which persons ascend or descend, and shall make a true report of the result of such examination, and every such report shall be recorded in a book to be kept for the purpose, a report is to be recorded of the examination directed to be made once in every twenty-four hours, as well as of that directed to be made once in every week.²⁷

(3) Provisions requiring the promulgation of rules.²⁸

²⁵ *Spring Valley Coal Co. v. Greig* (1907) 226 Ill. 511, 80 N. E. 1042.

²⁶ *Spring Valley Coal Co. v. Greig* (1907) 226 Ill. 511, 80 N. E. 1042. The court said: "It is claimed the duties of examination and inspection of the mine required by the statute relate only to that portion of the mine or plant underground, together with the shaft from which coal is taken and men lowered and raised, and when the coal has been hoisted and dumped from the pit cars the mining operations concerned in the work have entirely ceased, and that machinery installed for a convenient handling of it from that time is not a part of the mine. Section 34 of the act concerning mines and miners (Hurd's Stat. 1905 p. 1394) defines the words 'mine' and 'coal mine' to mean 'any and all parts of the property of a mining plant, on the surface or underground, which contribute, directly or indirectly, under one management, to the mining or handling of coal.' It is just as necessary, and the provisions of the act referred to as certainly require, that coal, rock and other material brought up by way of the shaft out of the earth shall be moved away from the

shaft as that they shall be brought up out of the rooms and entries of the mine. Many of the provisions of the statute relate to the examination and safeguarding conditions on the top, and appliances for the removal of coal when brought up out of the shaft must be regarded as much a part of the mine as the appliances for bringing it up. No distinction can be made between appliances used for removing coal to the place where it is dumped on steam cars for shipment, and those used for removing it to the place where it is dumped for the convenience of the retail trade. In either event it is a part of the mining operation to remove the coal to some place where it will not render unsafe or dangerous to employees any conditions at the top of the mine."

²⁷ *Scott v. Bould* [1895] 1 Q. B. 9, 71 L. T. N. S. 577, 64 L. J. Mag. Cas. N. S. 16, 15 Reports, 134, 18 Cox, C. C. 52, 59 J. P. 390.

²⁸ *England*.—Metalliferous mines regulation act 1872, §§ 24 *et seq.* Promulgation of rules for the guidance of employees.

Alabama.—Code 1907, § 1033. Rules

A mine owner cannot escape the requirements of the statute by setting up general rules for the conduct of the business, as a substitute for the precautions prescribed by statute.²⁹ Notices and statements designed to relieve a mine owner from his duties and obligations to his employees are not contemplated by mining act 1899, § 32, which requires the mine owner to post rules not inconsistent with the act, which shall govern all persons working in the mine.³⁰ Under the Tasmania mining act, § 182, the owner is absolutely liable for an injury caused by a breach of rule formulated in accordance with the act.³¹

The delivery of a copy of the rules to a miner is not a condition precedent to the right to enforce them.³²

A mine owner by the appointment of a certified manager, who is part owner and sole manager of the colliery, and by publishing, and to the best of his power enforcing, the rules as regulations of the working of the mine, has taken all reasonable means to prevent non-compliance with the rules within coal mines regulations act, 35 & 36 Vict. chap. 76, § 51.³³

Employees in a mine who discharge themselves upon a moment's notice, as they have a right to do, are nevertheless bound by a special rule adopted in compliance with authority of a statute, which forbids anyone "employed in or about the mine" to ascend the pit contrary to the direction of the hooker-on.³⁴ Although the ladders in a mine did not in some particulars conform to the requirements of the mines act, this fact does not excuse a miner for using, in direct violation of rules, the cage, instead of the ladders, to ascend from the mine.³⁵

(4) Provisions requiring the installation of a signaling system, and the use of signals.³⁶

to be posted for information of employees.

Illinois.—Hurd's Rev. Stat. 1908, p. 1442, § 32. Every operator is required to post on the engine house at the pit top rules to govern all persons working in the mine.

West Virginia.—Code 1907, § 405. Inexperienced workmen to be instructed, and furnished with a copy of the mining law and the rules.

Wyoming.—Comp. Stat. 1910, § 3515. Posting of rules.

²⁹ *Pratt Consol. Coal Co. v. Davidson* (1911) 173 Ala. 667, 55 So. 886.

³⁰ *Consolidated Coal Co. v. Lundak* (1902) 196 Ill. 594, 63 N. E. 1079.

³¹ *Tasmania Gold Min. Co. v. Cairns* (1907–1908) 5 Austr. Comm. L. R. 280.

³² *Higginson v. Hapley* (1869) 19 L. T. N. S. 690 (conviction of miner for violation of rules confirmed).

³³ *Baker v. Carter* (1878) L. R. 3 Exch. Div. 132.

³⁴ *Higham v. Wright* (1877) L. R. 2 C. P. Div. 397, 46 L. J. Mag. Cas. N. S. 223, 37 L. T. N. S. 187, 10 Mor. Min. Rep. 24.

³⁵ *Anderson v. Mikado Min. Co.* (1902) 3 Ont. L. Rep. 581.

³⁶ *England*.—Metalliferous mines act 1872, chap. 77, § 23 (10); coal mines regulation act 1887, chap. 39, § 49, rule 25. Every "working shaft" exceeding 50 yards in depth is to be provided with

Where the evidence is such as to warrant the inference that the decedent was struck by a descending cage lowered in response to a sig-

guides and proper means of communicating distinct and definite signals from the bottom of the shaft and the entrances in use on the intermediate levels.

Metalliferous mines regulation act 1872, § 23 (3); coal mines regulation act 1887, § 49 (14). Signals on underground planes.

Arkansas.—Kirby's Dig. 1904, § 5342. Signals between top and bottom of shaft.

Sec. 5344. Signals on gangways.

California.—Gen. Acts 1909, act 2225. An elaborate system of mine bell signals to be used in all of the mines in the state, is provided.

Colorado.—Rev. Stat. 1908, § 4286. Uniform code of signals to be established in metalliferous mines by the commissioner of mines (metalliferous mines).

Sec. 640. Signals; coal mines.

Illinois.—Hurd's Rev. Stat. 1908, p. 1439 (Laws of 1905, p. 329). Earlier provisions, Starr & C. Anno. Stat. 1896, p. 2721, ¶ 6 (Laws 1879, p. 204, as amended by Laws 1887, p. 230). Code of signals to be used in connection with hoisting machinery.

Indiana.—Burns's Anno. Stat. 1908, § 8575; Laws 1905, chap. 50, § 7. Code of signals for shafts.

Iowa.—Code 1897, § 2489. Speaking tube or other means of communication from top to bottom of shaft.

Kansas.—Gen. Stat. 1909, §§ 4984, 4987.

Missouri.—Rev. Stat. 1909, § 8461. Signaling system in underground planes.

Sec. 8456 (Rev. Stat. 1899, 8811, as amended by Laws 1905, p. 237). Signals between bottom and top of shafts.

Sec. 8460 (act March 15, 1899, p. 310, as amended Laws 1909, p. 696). A man shall be placed at top of shaft and one at bottom, to answer signals for lowering or hoisting men.

Montana.—Rev. Codes 1907, § 1704; Laws 1891, p. 282, § 8. Code of signals.

Sec. 1705; Laws 1891, p. 282, § 8. Means of signaling on underground planes.

Sec. 1703; Laws 1891, p. 282, § 7. Signalmen to be stationed at top and bottom.

Ohio.—Gen. Code 1910, § 918. Metal speaking tube to be provided in shafts so deep that persons at the top cannot be heard at the bottom.

Oregon.—Gen. Laws 1910, § 5152 (Laws 1901, p. 151, § 1). Code of signals prescribed.

Oklahoma.—Comp. Laws 1909, § 4366. Metal tube shall be installed for communicating signals from top to the bottom of every shaft.

Pennsylvania.—Act of May 15, 1893, P. L. 52, art 3, § 1. Speaking tubes and means of signaling from top to bottom of shaft in bituminous coal mines.

Art. 32, rule 70. Signals to be used in hoisting by machinery, persons, coal, or other material in bituminous coal mines.

Act of June 2, 1891, P. L. 185, art. 4, § 9. Speaking tubes and means of signaling from top to bottom of shafts in anthracite mines.

South Dakota.—Comp. Laws 1910 p. 644; Laws 1903, chap. 181. Code of signals for use at mines where hoisting apparatus is used.

Tennessee.—Laws 1903, chap. 237, § 28c. Speaking tubes or telephones.

Texas.—Acts 1907, p. 331, § 1. Speaking tubes or telephones. Traveling ways equipped with means of signaling.

Utah.—Comp. Laws 1907, § 1520. Speaking tubes.

Washington.—Rem. & Bal. Codes & Stats. 1910, § 7386 (3170*). Signaling in shafts.

West Virginia.—Code 1906, § 407. Speaking tubes; signaling apparatus.

Wyoming.—Comp. Stat. 1910, § 3489. Code of signals for shafts in metalliferous mines.

Ontario.—Rev. Stat. 1897, chap. 36, § 69 (12). Signals in working shafts.

Nova Scotia.—Rev. Stat. 1900, chap. 19, § 44 (10). Signals in underground places, coal mines.

Sec. 44 (17). Signals in working shafts. Coal mines.

New South Wales.—Coal mines regulation act 1896, § 47 (26). Signals in shafts.

Sec. 47 (14)-(16). Signals.

New Zealand.—Mining acts compilation act 1906, § 255 (12), (13), (15), (16). Signals in working shafts.

Sec. 255 (3). Signals.

nal not in accordance with the code of signals prescribed, the case is for the jury.³⁷

The Illinois statute (Rev. Stat. chap. 93, § 8), providing for signals, applies to all coal mines without reference to the motive power.³⁸

(5) Provisions regulating the operation of the hoisting machinery.³⁹

A mine owner cannot delegate to its engineer the right to lower into its mine the cage, and thereby relieve itself from liability in case the cage is lowered at a rate of speed prohibited by the statute and injury follows, as the duty to lower the cage at a rate of speed not in excess of 600 feet per minute is a personal duty resting upon the owner.⁴⁰ But the duty to lash all timbers, tools, etc., which are to be lowered or raised, and which are longer than the depth of the bucket, securely to the upper end of the cable, imposed by the act of 1893, § 4, is not to be construed as a personal duty of the master, but

Nova Scotia.—Rev. Stat. chap. 20, § 19 (13). Signals in working shafts—metalliferous mines.

Sec. 19 (5), (7), (8). Signals in underground planes. Metalliferous mines.

Victoria.—Mines act 1890, § 357 (3)—(5). Signals and manholes on underground planes.

Sec. 357 (13). Signaling between top and bottom of shafts.

Sec. 357 (16). Signaling along drives in alluvial mines.

British Columbia.—Rev. Stat. chap. 134, § 25 (8). Code of signals—metalliferous mines.

Chap. 38, § 82 (2). Mines (coal), regulation of—signals.

³⁷ *Tasmania Gold Min. Co. v. Cairns* (1907–1908) 5 Austr. Comm. L. R. 280.

³⁸ *Sangamon Coal Min. Co. v. Wiggerhaus* (1887) 25 Ill. App. 77 (1887) 122 Ill. 279, 13 N. E. 648.

³⁹ *Illinois*.—Hurd's Rev. Stat. 1908, p. 1440 (Laws of 1899, p. 300). At every shaft operated by steam power the operator must station at the top and at the bottom a competent man charged with the duty of attending to signals and enforcing the rules governing the carriage of men on the cages.

Iowa.—Code 1897, § 2491; Laws 1880, chap. 202, § 15. Declaring it a misdemeanor to ride upon loaded car in shaft or slope.

Missouri.—Rev. Stat. 1909, § 8457; act March 15, 1897, p. 199. Engineer

in mine not to have charge of hoisting machinery unless he can be near enough to both engine and drum to control both.

Washington.—Rem. & Bal. Codes & Stats. § 7387 (Laws 1888, p. 36, § 7; Laws 1891, p. 162, § 19). No person shall ride upon a loaded cage or car used for hoisting purposes in any shaft or slope, and in no case shall more than twelve persons ride on any cage or car at one time in any such shaft. Nor shall more than five persons for each and every ton's capacity of the hoisting apparatus ride in any cage or car at any one time, in any such slope, excepting in the case of persons employed as rope riders or couplers; nor shall any coal be hoisted out of any coal mine while persons are descending into such mine, notice of which shall be kept posted at such mines. The number of persons permitted to ascend out of or descend into any coal mine at one time shall be determined by the inspector, and such persons shall not be lowered or hoisted more rapidly than 600 feet per minute. Whenever a cage-load of persons shall come to the bottom to be hoisted out, who have finished their day's work or otherwise been prevented from working, an empty cage shall be given them to ascend, except in mines having slopes, or provided with stairways in escapement shafts.

⁴⁰ *Joseph Taylor Coal Co. v. Dawes* (1906) 220 Ill. 145, 77 N. E. 131.

he fulfils his duty if he furnishes the proper material for the lashing to the servant whose duty it is to do the lashing.⁴¹

The statute relative to the safety of miners being lowered into and raised from mines does not enure to the benefit of a hoistman who is engaged at the top of the shaft.⁴² The Montana statute which requires the door of cages in mines to be closed when raising or lowering "the men" is applicable although but one minor was in the cage.⁴³

By the Victoria regulation of mines act 1877, § 6, subs. 20, it was provided that no person in charge of steam machinery in connection with the working of any mine shall, under any pretext whatever, unless relieved by a competent person for that purpose, absent himself or cease to have continual supervision of such machinery during the time it is used in working the mine. Held, that this provision applies only in the case of machinery in connection with "the working of the mine," and not to the mere erection of machinery.⁴⁴ But a special rule under coal mines act 1887, § 49 (24), requiring an engineman to remain in charge of his engine at all times, was held to be applicable to cases where the engine was used for raising and lowering materials as well as men.⁴⁵

An engine driver in charge of winding machinery in a mine, who allowed the engine, owing to his attention being diverted, to overwind, is rightly convicted for a breach of the provisions of § 200 of

⁴¹ *Manning v. App Consol. Gold. Min. Co.* (1906) 149 Cal. 35, 84 Pac. 657. The court said: "When rule 4 is considered without relation to the general scope and purpose of the act, or its other provisions, it will be observed that there is an entire absence of any language in it which in any manner indicates upon whom is cast the duty of doing the lashing. As far as any intention is expressed, it amounts to no more than that the legislature deemed that mining timbers or poles of certain character should be lashed. Whether the legislature intended to fix a personal duty upon the employer to do this, or whether it considered that in the exercise of ordinary care the employer would furnish the necessary lashing material, and that the employee whose duty it was to respond to the signal to send down timbers should lash them before sending them down, is a matter upon which there is not the faintest indication in the rule. On this subject it is absolutely silent. In this indefinite condition of the rule itself

as to what was intended in this respect, it is not to be assumed that the legislature intended, by a system of signals and rules designed for the benefit of the employees in the mine, to be used in relation with each other in prosecuting their common employment, to interfere with the general rule of law that the duty of the employer is discharged when he furnishes to his employees suitable and proper appliances to do their work, and that it is their negligence, and not his, should one of their fellow employees neglect to use them."

⁴² *Barron v. Missouri Lead & Zinc Co.* (1903) 172 Mo. 228, 72 S. W. 534.

⁴³ *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499.

⁴⁴ *Dunstan v. Stewart* (1880) 6 Vict. L. R. 175 (platform used by defendant, a contractor, for the removal and re-erection of certain machinery, gave way while he was absent).

⁴⁵ *Soutar v. Clark* (1906) 7 Sc. Sess. Cas. 5th series, 1.

the mining act of 1898, which provides that any person who by negligence causes another person to be injured or killed is guilty of an offense (§ 220). The act also provides that no person in charge of steam machinery working in a mine shall, under any pretext whatever, unless relieved by a competent person, absent himself or cease to have continual supervision during the time such machinery is so used (§ 214, subs. 17).⁴⁶ The responsible manager of a pit who was present when the banksman let more than eight men down, which it was his duty to prevent, is properly convicted of a violation of the English statute which forbids such practice.⁴⁷

Iowa Laws 1880, chap. 202, § 15, which declares it to be a misdemeanor to ride upon a loaded car or wagon in a shaft or slope, does not apply to a servant who, as conductor, accompanies a train of cars which is being hauled out of the mine. The prohibition is aimed merely at intermeddlers.⁴⁸

(6) Provisions regulating the withdrawal of men from especially dangerous portions of the mine.⁴⁹

The duty imposed by Burns's Anno. Stat. 1908, § 8580, upon the operator of a coal mine, to exclude the employees until the mine is made safe, is absolute, and he is not authorized to exercise any discretion as to the practicability of making it safe without interfering with the work.⁵⁰

(7) Provisions regulating the storage and use of explosives.⁵¹

⁴⁶ *Fryar v. Smith* (1903) Queensl. St. Rep. 291.

⁴⁷ *Howells v. Wynne* (1863) 15 C. B. N. S. 3, 32 L. J. Mag. Cas. N. S. 241, 9 Jur. N. S. 1041.

⁴⁸ *Crabell v. Wapello Coal Co.* (1886) 68 Iowa, 751, 28 N. W. 56.

⁴⁹ *England*.—Coal mines regulation act 1887, § 49 (7). Workmen to be withdrawn from any part of the mine which is found to be dangerous by reason of inflammable gases, or any other cause.

Illinois.—Hurd's Rev. Stat. 1908, p. 1434, § 16. Mine manager in case of accident by which the currents are obstructed or stopped, to order at once the withdrawal of the men, and to prohibit their return until thorough ventilation is re-established.

P. 1836, § 18 (b). No one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe.

Iowa.—Code Supp. 1907, § 2488; 27 G. A. chap. 59, § 1. Mine inspector empowered to order miners out of mine where air is insufficient.

Oklahoma.—Comp. Laws 1909, § 4375. Miners shall not be permitted to go into dangerous portions of the mine until they shall have been examined by the fire boss.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (6). Withdrawal of workmen from dangerous place—coal mines.

New South Wales.—Coal mines regulation act 1896, § 47 (7). Withdrawal of workmen from dangerous place.

⁵⁰ *Princeton Coal Min. Co. v. Howell* (1910) 46 Ind. App. 572, 92 N. E. 122.

⁵¹ *England*.—Coal mines regulation act 1887, § 49 (12). Storage and use of explosives regulated.

Gen. Rule 12 (e). No explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged, the explosive shall not be unrammed.

Under the coal mines regulation act 1872, § 51, forbidding the use of gunpowder or other explosive or inflammable substance in the mine

Colorado.—Rev. Stat. 1908, § 4280. Storage of explosives (metalliferous mines).

Sec. 4277. Oil not to be kept near explosives.

Sec. 4282. Use of iron tamping bar prohibited.

Illinois.—Hurd's Rev. Stat. 1908, 1428, 1437; Laws 1899, p. 300 (For earlier provisions see Starr & C. Anno. Stat. p. 2719; Laws 1879, p. 204, § 4). Explosives stored in fireproof building. Miners must keep their explosives in wooden box. Copper tamping tools to be used. Only one shot at a time.

P. 1444 (Laws of 1903, p. 252). The quantity of powder used is prescribed, and the tamping of any drill hole with dust or other inflammable material is prohibited.

Indiana.—Burns's Anno. Stat. 1908, § 8587; Laws 1905, chap. 50, § 17. Lights must be kept at least 5 feet distant when kegs or boxes containing explosives are opened. No iron or steel tools shall be used in tamping, but such tools shall be made of copper. No inflammable material shall be used in tamping.

Sec. 8602; Laws 1907 chap. 204, § 1. Possession of explosives in mines without the consent of the foreman prohibited.

Sec. 8606. Simultaneous explosions forbidden.

Sec. 8603. This section provides for the method of boring holes and preparing the shot.

Sec. 8609 (Acts 1907, p. 347). Non-inflammable material for tamping to be furnished.

Kansas.—Gen. Stat. 1909, § 5020. Use of explosives regulated; amount that any miner may have in his possession limited.

Missouri.—Rev. Stat. 1909, § 8449. Coal miners not to charge a blasting hole with loose powder, or otherwise than with a properly constructed cartridge; and in dry and dusty mines, cartridges are to be loaded only with a powder can constructed for the purpose (Rev. Stat. 1899, § 8804).

Sec. 8477. Storage of explosives in strong box.

Montana.—Rev. Codes 1907, § 8546 (Laws 1897, p. 282). Storage of explosives regulated.

New York.—Labor law 1909, §§ 125, 134. Use of explosives.

Sec. 123. Storage of powder, oils, and supplies of an inflammable and destructive nature regulated.

Ohio.—Gen. Code 1910, §§ 963-968. Keeping of explosives—blasting.

Oklahoma.—Comp. Laws 1909, §§ 4397 *et seq.* Use of explosives regulated.

Pennsylvania.—Act of June 2, 1891, P. L. 177, art. 12, rules 26-36. Care and use of explosives in anthracite mines.

Act of May 15, 1893, art. 32, rules 49, 50. Use and storage of explosives.

Art. 8, § 5. Explosives not to be stored in a bituminous coal mine.

Art. 5, §§ 1-4. Precautions against explosive gases.

Texas.—Acts 1907, p. 331, § 5. Regulations as to powder.

Utah.—Comp. Laws 1910, § 1540x2. Storage of powder underground—not more than enough for twenty-four hours.

Comp. Laws 1907, § 1518 (10)-(15). Storage and use of explosives regulated.

Sec. 1540x2. Storage of powder in metalliferous mines regulated.

Washington.—Rem. & Bal. Codes & Stats. § 7405 (3183a). Copper tools to be used in tamping.

Ontario.—Mines act 1906, chap. 11, § 205 (3)-(12). Storage and use of explosives for blasting purposes.

Nova Scotia.—Rev. Stat. chap. 20, § 19 (2). Storage and use of explosives—metalliferous mines.

Chap. 19, § 44 (8). Storage and use of explosives.

British Columbia.—Rev. Stat. chap. 134, § 25 (2)-(6). Explosives—metalliferous mines.

Chap. 38, § 82 (9). Regulation of coal mines—explosives.

New South Wales.—Coal mines regulation act 1896, § 47, (12). Storage and use of explosives.

Victoria.—Mines act 1890, § 357 (2). Storage and use of explosives.

New Zealand.—Mining acts, compilation act 1906, § 255 (2). Storage and use of explosives.

during three months after any inflammable gas has been found in any such mine, if it issued so freely that it showed a blue cap on the flame of the safety lamp, except when the persons ordinarily employed in the mine are out of the mine, "or out of the part of the mine where it is used," the expression, "part of the mine," does not mean the neighborhood where the gunpowder would be used, but such a part of the mine as could be treated under the statute as a separate mine.⁵²

It has been held that the word "case" in the clause which provides that an explosive shall not be taken into a mine except in a "case or canister" means a "case in the nature of a canister—a solid substantial thing of wood, metal, or stone, or some other such solid substance," and that a bag is not sufficient.⁵³

An attempt to pull out the electric wires communicating with a detonation at the bottom of the hole is not an unramming.⁵⁴

Upon the question whether the mine authorities had done their duty in taking proper care of the safety of the miners in respect to the use of explosives in accordance with the rules of the coal mines regulation acts, the burden of proof does not lie on the plaintiff.⁵⁵

1889. Health of employees.—The enactments under this general head may be divided into the following classes:

(1) Provisions requiring the mine owners to provide wash rooms for the miners.¹

⁵² *Wales v. Thomas* (1885) L. B. 16 Q. B. Div. 340. The court said: "But the statute recognizes a part of a mine for purposes of ventilation and other purposes, and I am of opinion that these words were inserted to limit the necessity for removing men from the whole mine when it is cut up into parts with separate systems of ventilation. In that case it is only requisite to get the men out of that part where the shot is fired. It is true that a mine may be cut up into panels, and I do not myself see the difference for this purpose between a panel and a part of a mine; but it seems to me that the true construction of the statute is that, unless the mine is cut up into parts or panels, in which case the part or panel is, pursuant to the statute, to be deemed a separate mine, when the shot is fired the men must be out of the mine altogether."

⁵³ *Foster v. Diphwys Casson Slate Co.* (1887) L. R. 18 Q. B. Div. 428, 56 L. J. Mag. Cas. N. S. 21, 51 J. P. 470.

⁵⁴ *Lynch v. Baird* (1904) 6 Sc. Sess. Cas. 5th series, 271, 41 Scot. L. R. 214, 11 Scot. L. T. 597.

⁵⁵ *Brittanic Merthyr Coal Co. v. David* [1910] A. C. 74, 79 L. J. K. B. N. S. 153, 101 L. T. N. S. 833, 26 Times L. R. 164, 54 Sol. Jo. 151, 47 Scot. L. R. 609, order of the court of appeal for a new trial [1909] 2 K. B. 146, 78 L. J. K. B. N. S. 659, 100 L. T. N. S. 678, 25 Times L. R. 431, 53 Sol. Jo. 398, affirmed, but some of the propositions disapproved in general language, without indicating which or the reasons therefor.

¹ *England.*—Metalliferous mines regulation act 1872, § 23 (16). Accommodation to be provided for enabling employees to dry and change their dresses conveniently.

Indiana.—Burns's Anno. Stat. 1908, § 8623; Laws 1907, p. 193. Washhouses for laborers to be furnished.

Montana.—Rev. Codes 1907, § 1708. Washhouses.

To charge one designated as "superintendent" of a mine with violating Acts 1907, p. 193, chap. 121, requiring the owner, operator, lessee, superintendent, or other person in charge of a coal mine to provide a washroom for the employees, it is necessary to show that he was in charge of the mine.²

(2) Provisions relative to the meals of the miners.³

(3) Statutes designed to protect miners against dust in mines in which dry crushing operations are carried on.⁴

(4) Statutes designed to secure a sufficient supply of pure air for the miners. (See § 1885, (3), *ante*.)

1890. Medical aid.—In a number of jurisdictions, enactments have been passed, requiring the master to provide surgical appliances or medical assistance for miners who may be injured or taken sick in the mines.¹

New York.—Labor law 1909, § 133. Washrooms.

Oklahoma.—Comp. Laws 1909, § 4344. Toilet rooms to be provided for the employees of coal mines, for the purpose of washing themselves and changing their clothing.

Pennsylvania.—Act of May 15, 1893, art. 32, rule 69. Washhouses.

Act of June 2, 1891, P. L. 177, art. 6, § 1. Washhouses in anthracite mines.

Ontario.—Mines act 1906, chap. 11, § 205 (38). Dressing rooms in mines where more than ten persons to each shift are ordinarily employed.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (26). Washhouses—coal mines.

Chap. 20, § 19 (21). Washhouses—metalliferous mines.

Victoria.—Mines act 1890, § 357 (30). Dressing rooms for men.

New Zealand.—Mining acts, compilation acts 1906, § 255 (29). Dressing rooms.

² *Hewitt v. State* (1908) 171 Ind. 283, 86 N. E. 63.

³ *Missouri.*—Rev. Laws 1909, § 8439, act of May 8, 1899, p. 309. Requires mine operators to allow miners to come to the surface to eat their noon day meal, or any other meal for which, under the rules of the mine, a time is set apart.

⁴ *South Dakota.*—Political Code § 2581. Operators of smelters or dry crushing reduction works to provide exhaust fans for the removal of all gases, etc.

New Zealand.—Mining acts, compila-

tion act 1906, § 255 (1). Fans to keep air pure where quartz is dry-crushed.

¹ *England.*—Coal mines regulation act 1887, § 49 (34). Surgical appliances.

Alabama.—Code 1907, § 1020. Stretchers, etc., to be kept for injured persons.

Illinois.—Hurd's Rev. Stat. p. 1441 (Laws 1899, p. 300). Stretchers, blankets, bandages, and linseed or olive oil to be provided.

Indiana.—Burns's Anno. Stat. 1908, § 8581, Laws 1905, chap. 50, § 13. Stretchers, etc., for injured employees.

New York.—Labor law 1909 (as amended by Laws 1912, chap. 39) § 134-b. Various provisions made for guarding the health and for furnishing medical attendance to employees at work in any tunnel, caisson, or other work in the prosecution of which they are employed or permitted to work in compressed air.

Ohio.—Gen. Code 1910, § 925. Provision for appliances for injured employees.

Oklahoma.—Comp. Laws 1909, § 4392. Stretchers, blankets, bandages, linseed or olive oil, or other remedial agents to be kept on hand.

Pennsylvania.—Act of May 29, 1901, P. L. 342. Provision is made for "first aid" to injured workmen in anthracite mines. Care and treatment of injured. (Earlier act, Laws 1891, P. L. 187, art. 7, Dig. p. 1349.)

Act of May 15, 1893 (P. L. 52), art. 18, § 1. Appliances for treating injured persons in bituminous coal mines.

Utah.—Comp. Laws 1907, §§ 1514,

Code 1907, § 1019, requiring the operator of a mine to keep thereat a supply of oil, bandages, etc., is intended only for the benefit of employees engaged at the mine.²

Proof that the mine physician had a full supply of medicine and medicinal supplies for cases of injury at the mines does not show a compliance with the statute, where his office was some distance from the mines.³

1891. Places within purview of mining acts.—The provisions in respect to the places to which the statutes relative to mines are applicable may be divided into two classes:

(1) Those which more or less elaborately define the term "mine" with reference to the physical conditions of the place itself.¹

1540x3. Appliances for treatment of injured miners to be kept.

Washington.—Rem. & Bal. Codes & Stats. 1910, § 7396 (3180); act March 5, 1891, chap. 81. Owners of coal mines to provide stretchers for injured employees.

West Virginia.—Code 1907, § 410. Medical appliances.

Wyoming.—Comp. Stat. 1910, §§ 3489, 3527. Medical appliances and stretchers to be furnished.

Ontario.—Mines act 1906, chap. 11, § 205 (31). Medical aid.

Nova Scotia.—Rev. Stat. chap. 19, § 44 (34). Ambulances, stretchers, etc.,—coal mines.

New South Wales.—Coal mines regulation act 1896, § 47 (35). Medical appliances.

² *Whitmore v. Alabama Consol. Coal & I. Co.* (1909) 164 Ala. 125, 137 Am. St. Rep. 31, 51 So. 397 (complaint merely stated that the plaintiff's intestate was working in the mine).

³ *Smith v. Woolf* (1909) 160 Ala. 644, 49 So. 395.

¹ *Illinois.*—Hurd's Rev. Stat. 1908, p. 1442 (Laws of 1899, p. 300). (a) It is provided that the words "mine" and "coal mine" are intended to signify any and all parts of the property of a mining plant on the surface or underground, which contribute directly or indirectly under one management to the mining or handling of coal.

(b) The words "excavations" and "workings" signify any or all parts of a mine excavated or being excavated, including shafts, tunnels, entries, rooms, and working places, whether abandoned or in use.

(c) The word "shaft" means any ver-

tical opening through the strata, which is or may be used for purposes of ventilation or escapement, or for the hoisting or lowering of men and material in connection with the mining of coal.

(d) The term "slope" or "drift" means any inclined or horizontal way, opening, or tunnel to a seam of coal, to be used for the same purposes as a shaft.

Pennsylvania.—Laws of 1891, P. L. 207, art. 18. The term "coal mine" or "colliery" includes every operation and work, both under and above ground, used or to be used for the purpose of mining or preparing coal. The term "mine" includes all underground working and excavations and shafts, tunnels, and other ways and openings; also all such other shafts, slopes, tunnels, and other openings in course of being sunk or driven, together with all roads, appliances, machinery, and materials connected with the same below the surface.

Act of May 15, 1893, art. 22, § 1. The term "coal mine" includes the shafts, slopes, adits, drifts, or inclined planes connected with excavations, penetrating coal stratum or strata, which excavations are ventilated by one general air current or division thereof, and connected by one general system of mine railroads, over which coal may be delivered to one or more common points outside the mine, when such is operated by one operator.

Laws of May 29, 1901, P. L. 342, § 7. The term "coal mine" as herein used includes the shafts, slopes, drifts, or inclined places connected with the excavations, penetrating coal stratum or

(2) Those which limit the application of the statute to such mines as employ more than a specified number of men.²

In a case decided long before any of the mining acts discussed in this chapter were passed, it was held that a seam which was unopened was not a mine.³ So it has been held that the engine and construction equipment at the opening of a mine are not a part of a mining plant which contributed directly to the mining or handling of coal, so as to require the master to comply with the statute in regard to hoisting machinery in mines.⁴ And the statute does not apply to mines while in the process of construction and before they have reached that stage of completion at which they might be put to one of the specified uses.⁵ And the statute is not applicable to a tunnel which is being driven for the purpose of exploring and discovery, no coal having been found.⁶ But it is not necessary that the process of min-

strata, which excavations are ventilated by one general air current or a division thereof, and connected by one general system of mine railroads over which coal may be delivered to one or more parties outside the mine. The term "anthracite mine" shall include any coal mine not now included in the bituminous boundaries.

² *Colorado*.—Stat. Anno. 1911, § 650.

The provisions of the coal mines act do not apply to a mine in which not more than ten men are employed during each twenty-four hours.

Utah.—Comp. Laws 1907, § 1523. The provisions of the Utah mining acts do not apply to or affect any coal or hydrocarbon mine in which not more than six men are employed in twenty-four hours.

Washington.—Rem. & Bal. Codes & Stats. § 7374 (Laws 1897, p. 61, § 6). No coal mine shall be considered a coal mine for the purpose of enumeration in a district to increase the number of inspectors, unless ten men or more are employed at one time in or about the mine; nor shall mines employing less than ten men be subject to the provisions of this act.

West Virginia.—Code 1906, § 417; Acts of 1887, chap. 50. The provision of the coal mines act applies only to coal mines in which ten or more persons are employed in a period of twenty-four hours.

Wyoming.—Comp. Stat. 1910, § 3529. The provisions of this chapter shall not apply to any mine employing an average

of less than ten persons during any one twenty-four hours (Laws of 1890–91, chap. 80, § 22; Rev. Stat. 1899, § 2585).

³ *Astry v. Ballard* (1678) 2 Mod. 193, 8 Mor. Min. Rep. 316.

⁴ *Moore v. Dering Coal Co.* (1909) 242 Ill. 84, 89 N. E. 674.

⁵ *Cox v. Mt. Olive & S. Coal Co.* (1906) 127 Ill. App. 24.

⁶ *Hemmingson v. Carbon Hill Coal Co.* (1911) 62 Wash. 28, 112 Pac. 1111.

The court said: "In speaking to a like question, the appellate court of Illinois said, in *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 60: 'It is argued that the object and purpose of the statute was to guard against accidents and injuries of the exact kind and character as that which resulted in the death of the husband of the appellee, and that her case is clearly within the reason and spirit of the enactment. This is as fully true of all pits or holes made in the earth, and, if allowed to control, would extend the operation of the statute to pits or holes by which it was designed to reach and open lead or other mines of every kind. Pits or holes intended to be used as salt wells, or to procure water for stock or other purposes, where employees would be exposed to like danger as that which caused death in the case at bar, would be equally within the spirit and reason of the statute. The general assembly, however, restricted the statute to coal mines. Courts may expound statutes, but have no power to enact them, nor to extend such as are enacted to cases

ing coal shall have actually begun before, in order to make the statute applicable.⁷

A "mine" has been held to include any siding "adjacent to and

which it might seem in good reason ought to be, but are not, included within them. All authorities agree, it is said in Sutherland on Statutory Construction, § 235, that courts cannot correct the excesses or supply omissions in legislation.' In considering the applicability of certain instructions such as were given by the court in this case, and to which exceptions were taken, the court said, in the same case: 'Each of the instructions assumes that the pit or hole in which the deceased was working was a coal mine, and each declares that the statute required the mouth of the pit to be fenced. Whether it was a coal mine was a question of fact. The declaration alleged, and the proof indisputably showed, that the deceased, when killed, was engaged in digging the earth in the bottom of a pit or hole which was intended, when completed, to be used as the shaft of a coal mine which the appellant company designed to open and operate. No mine was being operated or worked; no coal had been mined; none had been found to mine; nor was it ever shown that there were any indications of the existence of coal that the pit or hole would ever reach.' The ordinary definition of a mine is familiar, but a coal mine has not been so frequently defined. In *Westmoreland Coal Co.'s Appeal* (1877) 85 Pa. 344, 10 Mor. Min. Rep. 394, the court said: 'It may be conceded that the term "mine," when applied to coal, is generally equivalent to a worked vein, for by working the vein it becomes a mine.' Just when a tunnel or shaft may develop into a mine may be determined with reasonable certainty. In *Coal Run Coal Co. v. Jones* (1885) 19 Ill. App. 365, it was contended that a certain shaft was not a 'coal mine,' and that the statute did not apply. The facts and conclusion of the court are as follows: 'The Coal Run Company had just completed an extension of its shaft below a vein of coal that it had been working and mining, and had reached and dug through a lower vein, and had dug several feet below it for the purpose of collecting the drainage of the mine,' and the opin-

ion of the court says, 'Workmen were actually engaged in mining coal from the first vein. . . . The deceased himself was about to pick up and place in the cage a lump of coal sufficient to justify a finding that the place was a coal mine, within the meaning of the statute, and we think nothing beyond that is or was intended to be held.'

⁷ The shaft of a lead mine, which is completed and has a tunnel driven from the bottom of it for the purpose of arriving at the ore, although no ore has yet been got out, is a "working shaft" within the meaning of the English metalliferous mines regulation act 1872, § 23, subs. 10; and the owners of the mine are liable to be convicted of an offense against that section, if the men employed in the mine are drawn up the shaft in a bucket unprovided with guides. *Foster v. North Hendre Min. Co.* [1891] 1 Q. B. 71, 60 L. J. Mag. Cas. N. S. 6, 63 L. T. N. S. 458, 17 Cox, C. C. 216, 55 J. P. 103. The decision was based on the principle that the danger to the miners is the same whether the mine is productive or not.

"In making application of the statute to a case such as the present, where a mine is being opened up, and the mining of coal is but an incident to the prosecution of necessary development work, the true construction of the statute leads to the conclusion that the men employed in mining should have the protection of the statute just as soon as cages conforming to the specifications thereof can be put in successful operation. To require the mine owner to install them at a time when they would be wrecked or disabled by the expansive force of necessary explosions would be unreasonable, and, on the other hand, to say that the owner may delay their installation until such time as mining becomes the chief, and not the incidental, object of the operations, might unnecessarily deprive miners of the protection of a wise and humane law during a period when it could be given them." *Welch v. Kansas City Midland Coal & Min. Co.* (1910) 151 Mo. App. 438, 132 S. W. 49 (covers to cages).

belonging to the mine.”⁸ The bottom of the shaft where the cage stops to let men off to go to their respective places of work is a “landing,” within the meaning of § 28 of the mines and miners act.⁹ The word “sinking,” as used in Mont. Rev. Codes, § 8536, requiring the use of steel cages equipped with doors in mine shafts over 300 feet deep, except when such cage is used for sinking only, does not include the cutting of stations, so as to relieve the operators from providing doors to the cages during such operations.¹⁰ A shaft in which the work of excavation is finished is not an “excavation” within the meaning of the Western Australia mines regulation act 1895 (59 Vict. No. 37, §§ 4, 23, rules 8, 20, 28) requiring excavations to be safe.¹¹ A similar holding has been made in reference to the provisions of § 214, subs. 9, of the mining act of 1898, which provides that “every drive and every excavation of any kind in connection with the working of a mine shall be securely protected and made safe for persons employed therein.”¹²

The appliances used for removing coal to the place where it is dumped on steam cars for shipment are as much a part of the mine as those used for removing it to the place where it is dumped for the convenience of the retail trade.¹³

A complaint under the Indiana statute is bad if it does not allege that ten or more men worked in the mine.¹⁴

⁸ *Anderson v. Lochgelly Coal Co.* 1905, p. 1394) defines the words ‘mine’ (1904) 7 Sc. Sess. Cas. 5th series, 187.

⁹ *Robertson v. Donk Bros. Coal & Coke Co.* (1908) 143 Ill. App. 391, affirmed in (1909) 238 Ill. 344, 87 N. E. 373.

¹⁰ *Osterholm v. Boston & M. Consol. Copper & S. Min. Co.* (1910) 40 Mont. 508, 107 Pac. 499.

¹¹ *Metcalf v. Great Boulder Proprietary Gold Mines Co.* (1906) 3 Austr. Comm. L. R. 543.

¹² *Milne v. Bonnie Dundee Gold Mines* (1903) Queensland St. Rep. 303.

¹³ *Spring Valley Coal Co. v. Greig* (1907) 228 Ill. 511, 80 N. E. 1042. The court said: “Section 34 of the act concerning mines and miners (Hurd’s Stat.

1905, p. 1394) defines the words ‘mine’ and ‘coal mine’ to mean ‘any and all parts of the property of a mining plant, on the surface or underground, which contribute, directly or indirectly, under one management, to the mining or handling of coal.’ It is just as necessary, and the provisions of the act referred to as certainly require, that coal, rock, and other material brought up by way of the shaft out of the earth shall be moved away from the shaft as that they shall be brought up out of the rooms and entries of the mine.”

¹⁴ *L. T. Dickason Coal Co. v. Unverferth* (1902) 30 Ind. App. 546, 66 N. E. 759.

CHAPTER LXXXI.

STATUTES RELATIVE TO THE SAFETY AND HEALTH OF EMPLOYEES IN OTHER OCCUPATIONS.

1892. Statutes relative to appliances used in the construction of buildings, and to completed buildings.
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1892. Statutes relative to appliances used in the construction of buildings, and to completed buildings.—In a number of jurisdictions statutes have been passed relative to the safety of employees engaged in the construction or repair of buildings and other structures. The most comprehensive of these have provisions relative to (1) the safety of the scaffolding used; (2) the stability of swinging scaffolds; (3) the building of secondary scaffoldings; (4) the erection of railings around openings or scaffoldings; (5) the safety of the hoisting apparatus; (6) the laying of floors as the work progresses; (7) the installation of an efficient signaling system; (8) an efficient system of inspection.

California.—Act 2141, § 1. Any building more than three stories high in the course of construction shall have the joists, beams, or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered with flooring laid close together, or with other suitable material, to protect workmen engaged in such building from falling joists or girders, and from falling bricks, rivets, tools, and other substances whereby life and limb are endangered.

Penal Code, 402c. Misdemeanor to furnish employee knowingly or negligently with unsafe scaffolding.

Illinois.—Laws of 1907, p. 312, § 1 (Hurd's Rev. Stat. 1908, p. 1047). All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances

erected or constructed by any person, firm, or corporation in this state, for the use in erection, repairing, alteration, removal, or painting of any house, building, bridge, viaduct, or other structure, shall be erected in a safe and proper manner, so as to give proper and adequate protection to persons employed or engaged thereon, or in passing under or by the same, and in such manner as to prevent the falling of materials therefrom. Scaffolding or staging swung from an overhead support more than 20 feet from the ground shall, where practicable, have a safety rail at least 34 inches from the floor entirely around the scaffold, and such scaffolding or staging shall be fastened so as to prevent the same from swaying from the structure.

Sec. 5. In the erection, repair, etc., of any water pipe, standpipe, tank, smoke-stack, chimney, tower, steeple, pole, staff, dome, or cupola, when the use of a scaffold or other similar contrivance is required or used at a height of 32 feet, a secondary scaffold shall be maintained.

Sec. 6. Provision requiring that floors shall be laid whenever the walls have been erected to a certain number of stories.

Sec. 7. Elevating machines or hoisting apparatus shall be securely built and properly guarded.

Sec. 7a. A complete and adequate system of communication by signals shall be used whenever hoisting appliances are used, if operated by other than hand power.

Indiana.—Burns's Anno. Stat. § 3859; Laws 1903, p. 151. In the construction of buildings three stories or more in height, the construction of the third story, or any story above, shall not be begun until a flooring upon the story below shall be put down.

Sec. 3860. Shafts or openings for elevating machines or hoisting apparatus used in the construction of buildings, etc., to be inclosed by a barrier at least 4 feet high.

Kansas.—Rev. Stat. 1909, § 4684. That whenever it shall come to the notice of any workman, laborer, or mechanic employed in the construction, repairing, or painting of any building, tower, tank, or other structure, or of any other person or persons, that the staging, scaffolding, stays, or other appliances used for the purpose of supporting said workmen, etc., their tools, and all necessary material, while at work on such building, etc., are not of sufficient strength safely to carry the weight of such workmen, etc., their tools, and all necessary material, while working thereon, or if any elevator, derrick, or hoist used for the purpose of raising or lowering workmen or material to be used in the aforesaid construction, etc., is not of sufficient strength to do the work required of it, or is not surrounded by the proper safeguards, said workmen, laborers, mechanics, or other person or persons may make complaint to the state factory inspector, who shall forthwith inspect, or cause to be inspected by his assistant or deputy, such insufficient staging, etc., used in the said construction, etc., and if found, upon inspection, to be insufficient and unsafe, or not properly surrounded by safeguards, it shall be his duty then and there to notify the contractor, owner, superintendent, or person in charge of the construction, etc., of said building, etc., of the conditions of such staging, etc. It shall then become incumbent upon the said contractor, etc., having in charge the said construction, etc., having been so notified, immediately to reconstruct, repair, strengthen, or cause to be reconstructed, repaired, or strengthened, such defective staging, etc., and put in place and maintained, or cause to be put in place and maintained, such railing or other safe-

guards as may be deemed necessary by the said inspector, his assistant or deputy, to bring the appliances safely within the provisions of this act.

Sec. 4685. A penalty is imposed for a violation of the statute.

Louisiana.—Laws 1908 (p. 384) No. 264, § 6. Scaffoldings for workmen engaged on buildings in course of erection are to be made safe.

Maryland.—Pub. Gen. Laws 1904, §§ 77, 78; Laws 1894, chap. 158. Scaffolding used in the construction, altering, repairing, or painting of buildings within the limits of any city or town, to be made safe and not dangerous to life and limb of any persons.

Sec. 79. All swinging and stationary scaffolding shall be so constructed as to bear three times the maximum weight required to be dependent from or placed thereon when in use, and not more than one man shall be allowed on a given scaffold to each tackle, and each man shall be provided with a life line sufficiently strong to bear twice his weight, secured independently of the other scaffolding.

Minnesota.—Rev. Laws 1905, § 1815; Laws 1903, chap. 397. Every hoisting apparatus used in the construction of any building shall be securely guarded.

Missouri.—Rev. Stat. 1909, § 7843. All scaffolds or structures used in or for the erection, repairing, or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or to prevent the falling of such materials or articles as may be used, placed, or deposited thereon. All persons engaged in the erection, repairing, or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or near by. (Rev. Stat. 1899, § 6477.)

St. Louis Rev. Ordinances, § 165. It shall be the duty of the person or persons having charge of the construction of any building hereafter erected, to have the joists or girders of each floor above the second floor covered with scaffold boards or other suitable material as the building progresses, so as sufficiently to protect the workmen either from falling through such joists or girders, or to protect the workmen or others who may be under or below each floor from falling bricks, tools, or other substances, whereby accidents happen, injuries occur, and life and limb are endangered.

Nebraska.—Comp. Stat. 1911, § 3793o. Provisions in respect to scaffolds, hoists, etc., similar to the Illinois statute set out above.

Sec. 3793s. Any person, firm, or corporation in this state hiring, employing, or directing another to perform labor of any kind in the erecting, altering, repairing, or painting of any water pipe, standpipe, tank, smokestack, chimney, tower, steeple, pole, staff, dome, or cupola, when the use of any scaffolding, staging, swing, hammock, support, temporary platform, or other similar contrivance is required or used in the performance of such labor, shall keep and maintain at all times while such labor is being performed, and such mechanical device is in use or operation, a safe and proper scaffold, stay, support, or other suitable device, not less than sixteen (16) feet below such working scaffold, staging, swing, hammock, support, or temporary platform, when such work is being performed at a height of thirty-two (32) feet or more. (§ 5.)

Sec. 3793t. Where the floors are to be arched between the beams thereof, or where the floors or filling in between the floors are fireproof material or brickwork, the flooring or filling in is to be completed as the building progresses, to

within at least two tiers or beams below that where the ironwork is being erected; otherwise, under flooring or a safe temporary floor on each story shall be laid as the building progresses, to within at least two stories or floors below the story where the work is being performed. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected, shall be planked over except such spaces as may be reasonably required for the proper construction of such iron or steel work, and for the raising or lowering of materials, or as may be designated by the plans and specifications for stairways and elevator shafts. (§ 6.)

Sec. 3793u. Shafts or openings for elevating machines or hoisting apparatus to be inclosed on all sides by a barrier at least 8 feet high; such elevating machine or hoisting apparatus to be placed on ground if possible, and if not, its foundation must be capable of sustaining twice the weight of such machine. (§ 7.)

Sec. 3793v. Elevating machines or hoisting apparatus operated or controlled by other than hand power, used in the construction, alteration, or removal of any building or other structure, to be provided with a complete and adequate system of communication by means of signals. (§ 8.)

Sec. 3793w. Architects and draftsmen shall provide their specifications and drawings in accordance with the provisions of the act, under penalty.

Sec. 3793x. Penalty for any violation of the act by owner, contractor, sub-contractor, foreman, or other person having in charge the erection, etc., of any building or other structure within the provisions of the act.

New York.—Labor Law 1909, § 18 (as amended Laws 1911, chap. 693). A person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoist, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged. Scaffolding or staging swung or suspended from an overhead support, or erected with stationary supports, more than 20 feet from the ground or floor, except scaffolding wholly within the interior of a building and which covers the entire floor space of any room therein, shall have a safety rail of suitable material, properly bolted, secured, and braced, rising at least 34 inches above the floor or main portions of such scaffolding or staging, and extending along the entire length of the outside and the ends thereof, with such openings as may be necessary for the delivery of materials, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure.

Sec. 19. Provisions in regard to the inspection of scaffolding and the enforcement of the statute by the labor commissioner.

New York Labor Law, § 20. Floors in buildings under construction must be laid as the building progresses to not less than three tiers of beams below that on which the ironwork is being erected. Temporary floors are to be laid where floor beams are of iron or steel. Elevator shafts or openings on each floor shall be inclosed or fenced. If the building is more than five stories in height, no lumber or timber needed for such construction shall be hoisted or lifted on the outside of the building. (As amended, Laws 1911, chap. 693.)

Earlier enactments, Laws 1891, chap. 214; Laws 1897, chap. 415.

Ohio.—Gen. Code, §§ 12,593, 12,594. Suitable and proper scaffolding, hoists, stays, ladders, and other mechanical contrivances are to be provided. Swinging scaffolding or staging more than 20 feet from the ground floor must be provided with a safety rail at least 34 inches above the scaffold, which is capable of sustaining the weight of a man's body.

Sec. 12,576. Counter floors are to be placed on joists as soon as they are laid in the construction of buildings.

Oklahoma.—Comp. Laws, 1909, § 4047 (Laws 1907-8, p. 519). Provision relative to scaffolds, hoists, etc., similar to the Illinois statute set out above.

Sec. 4048 (Laws of 1907-8, p. 519). In the erection of iron or steel frame buildings, each story shall be floored as erected.

Oregon.—The statute adopted by the people of Oregon on November 8, 1910, by virtue of the initiative power vested in them by the state Constitution, provides as follows: § 1. All owners, contractors, subcontractors, corporations, or persons whatsoever engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission, and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work, or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging, or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided that a strong and efficient safety rail or other contrivance so as to prevent any person from falling therefrom.

Pennsylvania.—Purdon's Dig. Supp. 1905-1909, p. 5737, §§ 84 *et seq.*; Laws 1907, P. L. 81, §§ 1 *et seq.* General provisions concerning the safety of scaffolds and all similar appliances used in cities of the first, second, and third class in the state.

Wisconsin.—Sanborn & S. Stat. Supp. 1906, § 1636-81; Acts of 1901, chap. 257. Regulation of scaffoldings and other appliances used in erecting buildings or other structures.

Sec. 1636-83. Flooring to be laid as work progresses; openings for hoisting machines to be guarded.

Quebec.—Rev. Stat. 1909, § 3791. Every contractor or builder who makes use of a scaffolding at least 15 feet high shall obtain a certificate of inspection signed by one or other of certain designated officials.

Sec. 3794. The inspectors of industrial establishments are authorized to inspect scaffolding, to condemn such as they think dangerous, and to prosecute offenders against the provisions of the statute.

In a few jurisdictions there are statutes relative to the safety of buildings when completed.

Illinois.—Hurd's Rev. Stat. 1908, p. 1047; Laws 1907, p. 312, § 2. In buildings other than private residences, where the distance between the inclosing walls is more than 24 feet, proper supports for the joists shall be provided, and the

floors shall be so constructed as to bear a live load of 50 pounds for every square foot of surface, outside of the weight of the permanent structure itself.

Nebraska.—Comp. Stat. 1911, § 3793p. Provisions similar to those in the Illinois statute.

Ohio.—Gen. Code, § 12,581. All floors to be capable of sustaining a live load of 100 pounds per square foot with a safety factor of 5.

§§ 12,582–12,588. Elaborate provisions with respect to the strength of the walls, buttresses, roof, etc.

Pennsylvania.—Laws 1905, No. 226, § 11. There shall not be in any manufacturing establishment machinery in excess of the sustaining power of the floors and walls thereof.

1892a. Construction and effect of these statutes.—a. Scaffolds.—

(As to the applicability of the maxim *res ipsa loquitur* to the fall of a scaffold under the New York statute, see § 1601, *ante*.) The statutes relative to scaffolding are to be “liberally construed” as being “remedial.”¹ They impose a non-delegable duty upon the master,² and this duty is continuous.³

Before the enactment of the New York statute relative to scaffolding, it had been held that a staging or scaffolding erected for workmen was not a place in which to do their work, but an appliance or instrumentality by means of which the work was to be done, so that when the master had exercised reasonable care in the selection of competent fellow workmen and suitable materials for the proper construction of the appliance, he was not liable for injuries sustained by one workman through the fault or negligence of another. But the statute of 1897 established a different rule in specified instances where the employer assumes, or is charged with, the duty of furnishing scaffolding for the use of his employees.⁴ In some

¹ *Zeller, McClellan & Co. v. Vinardi* (1908) 42 Ind. App. 232, 85 N. E. 378; *Lockhart v. Hoffman* (1910) 197 N. Y. 331, 90 N. E. 943.

² *Gombert v. McKay* (1911) 201 N. Y. 27, 30, 42 L.R.A.(N.S.) —, 94 N. E. 186; *Cummings v. Kenny* (1910) 97 App. Div. 114, 89 N. Y. Supp. 579; *Siversen v. Jenks* (1905) 102 App. Div. 313, 92 N. Y. Supp. 382; *Haggblad v. Brooklyn Heights R. Co.* (1907) 117 App. Div. 838, 102 N. Y. Supp. 1039; *Anderson v. Miliken* (1908) 123 App. Div. 614, 108 N. Y. Supp. 61.

³ *Berthelson v. Gabler* (1906) 111 App. Div. 143, 97 N. Y. Supp. 421; *Buckley v. Beinhauer* (1910) 136 App. Div. 540, 121 N. Y. Supp. 180.

An employer is not only bound to furnish a safe scaffold, but must main-

tain it in such condition during the work. *Healy v. Burke* (1901) 35 Misc. 384, 71 N. Y. Supp. 1027.

⁴ The labor law of 1897, chap. 415, §§ 18 and 19, enlarged the duty of the master or employer, and extended it to responsibility for the safety of the scaffold itself, and thus for the want of care in the details of its construction. *Stewart v. Ferguson* (1900) 164 N. Y. 553, 58 N. E. 662. The court said: “This section differs from § 1, chapter 314, Laws of 1885, in this respect: That section provides for the punishment of knowingly or negligently doing the acts mentioned in this section. This section omits the words ‘knowingly or negligently,’ and declares that the acts shall not be done. The plaintiff would have to prove either knowledge or actual neg-

cases in the lower courts, it has been held that the master is not liable for defects in the material of a scaffolding, which could not have been discovered by reasonable inspection.⁵ But this view appears to be inconsistent with a subsequent decision of the court of appeals quoting and expressly approving an earlier decision which stated that the employer's knowledge was immaterial;⁶ and a still

ligence under the earlier act, and the defendant, no doubt, could invoke, for his protection upon the charge of negligence, the distinction between his negligence and that of his servants as laid down in the case of *Butler v. Townsend* (1891) 126 N. Y. 105, 26 N. E. 1017. This probably explains why the earlier act was not noticed in *Butler v. Townsend*; *Kimmer v. Weber* (1897) 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860, and in the cases in the appellate division cited by the appellant. Section 18 is a positive prohibition laid upon the master, without exception upon account of his ignorance or the carelessness of his servants. The evidence tended to show that this scaffold was not overloaded, but was bearing the weight usually required in the performance of the labor for which it was an appliance. Prima facie it was so constructed as to bear less than one fourth the weight required by § 19. Its fall, in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption. It is circumstantial evidence, and if it does convince the jury, it justifies their verdict."

The rule that the duty of a master to his servants, where the details of the construction of a scaffold for their use have been intrusted to his servants, is fully performed by the furnishing of proper materials for the construction of a scaffold, has been changed by § 18 of the labor law. *Holloway v. McWilliams* (1904) 97 App. Div. 360, 89 N. Y. Supp. 1074.

"The purpose of the statute was to insure greater protection and security for workmen. The courts have established the rule already referred to, that an employer might relieve himself from any personal responsibility in the con-

struction of a scaffold. This statute revoked such rule, and placed upon him the obligation of a personal duty to exercise proper care to make any such construction safe for the men who might be called to go upon it. The underlying thought, of course, was that a scaffold, by its very nature, would be raised a greater or less distance from the ground, and that a faulty or negligent construction causing it to give way would in many cases result in serious injuries to those who were upon it. The injury of workmen falling by reason of defective scaffolds was the thing to be avoided. It was an entirely immaterial circumstance before this general purpose, whether the scaffold should happen to be around a house, a barn, a vessel, or a flag pole. If it fell 40 feet, the man upon it would be injured in one case as readily as in the other, and it was against that injury that the legislature sought to guard by imposing additional responsibilities upon the employer in favor of the employee." *Chaffee v. Union Dry Dock Co.* (1902) 68 App. Div. 578, 73 N. Y. Supp. 908.

Prior to the enactment of this statute a master was not liable for injuries to a mechanic resulting from a negligent use, or selection from a proper supply furnished by the master, of material for a scaffold which it was the duty of such mechanic and his fellow mechanics to construct. *Banzhaf v. Ludwig* (1899) 28 Misc. 496, 59 N. Y. Supp. 535, reversing (1899) 27 Misc. 821, 57 N. Y. Supp. 828 (see §§ 1545-1547, ante).

⁵ *Petersen v. Rahtjen's American Composition Co.* (1908) 127 App. Div. 32, 111 N. Y. Supp. 329. See also *Lorenzo v. Faillace* (1909) 132 App. Div. 103, 116 N. Y. Supp. 326.

⁶ In *Caddy v. Interborough Rapid Transit Co.* (1909) 195 N. Y. 418, 30 L.R.A. (N.S.) 30, 88 N. E. 748, the court said: "In considering this statute in the case of *Stewart v. Ferguson*, [note 4, *supra*] this court holds that § 18 lays upon the master a positive prohibition,

more recent decision in an inferior court held that the statute eliminated all questions of mere negligence on the part of the master, and he was liable although the defects, if any did in fact exist, were latent and not discoverable by inspection.⁷

In a Federal case it was held that the fundamental condition of the application of the Ohio statute is the negligence of the master.⁸ While it may be said that in one sense this is true, even under the New York decisions, it is to be remembered that in New York the test of such negligence is the furnishing of a scaffold or other appliance which is unsafe.

It has frequently been held that the statute enures not only to the benefit of the master's servants, but of all other persons who may rightfully use it.⁹

An employee who deliberately approved a plan devised by his fellow servants for the construction and support of a scaffold, and assisted in the construction thereof in accordance with such plan, and knew fully the materials and manner of construction, assumed the risks of any defects therein.¹⁰ The statute does not make the

from the violation of which neither his own ignorance nor the carelessness of his servants will shield him. In that case the statute as it now stands was compared with the provisions of an earlier one (Laws 1885, chap. 314, § 1), under which the master was charged with responsibility for 'knowingly and negligently' furnishing defective scaffolding, etc., and the decision was predicated upon the obvious purpose of the legislature to impose upon the employer the affirmative and imperative duty to furnish to his employees stagings and scaffoldings for certain purposes that are safe, suitable, and proper, regardless of the employer's knowledge or negligence in the matter. This is absolute and unequivocal. Whenever a scaffold is furnished or caused to be furnished by an employer, to be used in erecting, repairing, altering, or painting a house, building, or structure, it must be safe, suitable, and proper, or the employer is liable."

⁷*Smith v. Variety Iron & Steel Co.* (1911) 72 Misc. 537, 130 N. Y. Supp. 277, following the *Caddy Case*, and holding the *Pettersen* and *Lorenzo Cases* to be contrary to the clear ruling of the highest court.

⁸*Noble v. C. Crane & Co.* (1909) 94 C. C. A. 423, 169 Fed. 55; *C. Crane &*

Co. v. Sesher (1909) 96 C. C. A. 665, 172 Fed. 1022.

⁹The purpose of the legislature was to impose the duty of constructing safe scaffoldings in and about buildings in the course of construction, for the use of those who might be employed in the general work, and that a failure on the part of the master, by which any employee sustained injury, operates to give a cause of action, even though the person so injured was not necessarily upon such platform. *Swenson v. Wilson & B. Mfg. Co.* (1905) 102 App. Div. 477, 92 N. Y. Supp. 849, affirmed in (1906) 186 N. Y. 555, 79 N. E. 1116.

The provisions of a statute requiring a master to furnish a safe scaffolding apply not only to his immediate employees, but to all others lawfully using the same. *Huston v. Dobson* (1910) 138 App. Div. 810, 123 N. Y. Supp. 892.

A general contractor is liable for injuries to an employee of a subcontractor, caused by defects in the scaffolding furnished by the general contractor, as the statute enures to the benefit of any person lawfully engaged in the work. *Quigley v. Thatcher* (1911) 144 App. Div. 710, 129 N. Y. Supp. 170.

¹⁰*Gombert v. McKay* (1911) 201 N. Y. 27, 42 L.R.A. (N.S.) 1234, 94 N. E.

master liable for injuries caused by a defective scaffold where the men who were to use it constructed it themselves, and he did not furnish it to them as a completed scaffold;¹¹ it applies only to a completed structure;¹² and the statute does not require the master to superintend the mere details of removing and reconstructing a scaffold.¹³ If a ladder as furnished by a master was safe, he cannot be held for a violation of § 18 of the labor law, because the ladder slipped while the employee was using it, if the latter placed it in position himself.¹⁴

But the mere fact that the plaintiff and his fellow servants partook in the work of constructing the scaffold will not relieve the master, if they were working under the direct orders of the master or his agent.¹⁵

186, affirming (1909) 134 App. Div. 970, 119 N. Y. Supp. 1126.

¹¹ *Rotondo v. Smyth* (1904) 92 App. Div. 153, 86 N. Y. Supp. 1103; *Williams v. Ransom* (1911) 234 Mo. 55, 136 S. W. 349.

In *Stokes v. New York L. Ins. Co.* (1906) 112 App. Div. 77, 98 N. Y. Supp. 135, it was held that a servant who was one of a corps of men hired to clean and keep a building in repair, and who was hurt by the falling of a temporary platform, an appliance negligently put up on horses by fellow servants, could not recover.

The Missouri statute relative to scaffolds (Rev. Stat. 1909, § 7843) was not intended to enure to the benefit of workmen, fellow servants of each other, charged with the duty of selecting sound material from a mass of other material, and engaged in the matter of erecting a scaffold out of such selected material. The primary object of this law was that scaffolding should be so safely built that others having no part in its building, and in nowise responsible for its safe construction, when called upon to use such scaffolding, might not be injured. *Forbes v. Dunnivant* (1906) 198 Mo. 193, 211, 95 S. W. 934.

The fact that the servant who erected the scaffold, and the servant who was injured, were both engaged in the same work for which the scaffolding was used, did not make them fellow servants so that the master was relieved from liability for such injuries. *Kuss v. Freid* (1900) 32 Misc. 628, 66 N. Y. Supp. 487.

¹² In *Pursley v. Edge Moor Bridge Works* (1900) 56 App. Div. 71, 67 N. Y. Supp. 719, affirmed in (1901) 168 N. Y. 589, 60 N. E. 1119, the statute was held to have reference to a completed scaffold only, and not to one in process of erection. And to the same effect was the decision in *Welk v. Jackson Architectural Iron Works* (1906) 184 N. Y. 519, 76 N. E. 1116, the court adopting the dissenting opinion in the court below (1904) 98 App. Div. 247, 90 N. Y. Supp. 541.

¹³ In *Hutton v. Holdbrook, C. & D. Contracting Co.* (1905) 139 Fed. 734, the court said that the act did not require the master, after furnishing a safe scaffold, to see that his servants used proper care in removing it and in re-erecting it.

"It was not the duty of the master to stand around and wait for the work to be done up to a certain point, and then to construct a scaffolding that the work might be completed. He had done his duty when he had furnished the materials and competent fellow servants for performing the work in hand, and the construction of this scaffolding was as much a detail of the work as would be the placing of the boards and nailing them in position." *Sutherland v. Ammann* (1906) 112 App. Div. 332, 335, 336, 98 N. Y. Supp. 574.

¹⁴ *Seredinski v. Balaban* (1909) 136 App. Div. 20, 120 N. Y. Supp. 122.

¹⁵ A scaffolding built by the plaintiff and his fellow workmen under the direction of the master's superintendent is one furnished by the master, within the meaning of the statute. *Berthelson*

That a support to a scaffold consisting of a thin piece of wood, and extending from the ground to about 3 feet above the flooring of the scaffold, broke when an employee on the scaffold fell and grasped it to sustain him, in consequence of which he fell to the ground and was injured, is not evidence that the scaffold was unsafe.¹⁶ The fact that one of several planks 3 inches thick and 12 inches wide, which rested on horses 10 or 12 feet apart, sagged as the employee stepped on it, while throwing a shovelful of cement from a wheelbarrow, which caused the barrow to tip over and throw the employee off the scaffold, does not show that the scaffold was unsafe.¹⁷

A considerable number of cases will be found in the note below construing the statute with reference to the determination of the question what is a "scaffold" within the meaning of the statute. It is to be noted that this question has two phases; first, Could the appliance in and of itself be considered a scaffold, and, second, was the use to which it was put at the time of the injury within the contemplation of the statute?¹⁸

v. *Gabler* (1906) 11 App. Div. 142, 97 N. Y. Supp. 421.

The fact that plaintiff and his fellow servant put a scaffold in position at the place and for the purpose ordered does not bar plaintiff's right to recover. *Warren v. Post & McCord* (1908) 128 App. Div. 572, 112 N. Y. Supp. 960, affirmed in (1910) 198 N. Y. 624, 92 N. E. 1106.

The scaffold was furnished by the master, although the plaintiff and a fellow servant placed the plank upon which they stood, where neither of them devised such method or followed it until ordered to do so by defendant's foreman in charge of the work. *Anderson v. Milliken Bros.* (1908) 123 App. Div. 614, 108 N. Y. Supp. 61.

¹⁶ *Connolly v. Peterson* (1909) 62 Misc. 624, 116 N. Y. Supp. 11, 12.

¹⁷ *Cunningham v. Peirce* (1906) 112 App. Div. 65, 98 N. Y. Supp. 60.

¹⁸ (a) *Appliances held to be scaffolds.*—Planks placed on crosspieces resting on two rows of upright timbers. *Herman v. P. H. Fitzgibbons Boiler Co.* (1910) 136 App. Div. 286, 120 N. Y. Supp. 1074.

Planks laid across iron beams in a building in process of erection. *Nixon v. Thompson-Starrett Co.* (1909) 131 App. Div. 152, 115 N. Y. Supp. 130.

A board laid across stringers in the hallway of a building in process of erection. *Convey v. Finn* (1909) 130 App. Div. 440, 114 N. Y. Supp. 864.

A staging built in the hold of a large vessel by laying timbers across the hold 6 or 7 feet from the bottom, with the ends resting upon the channel irons at each side of the vessel, and then laying a floor of planks upon such timbers. *Chaffee v. Union Dry Dock Co.* (1902) 68 App. Div. 578, 73 N. Y. Supp. 908.

A freight elevator in a building adjoining the one upon which the work was being done. *Croce v. Buckley* (1906) 115 App. Div. 354, 100 N. Y. Supp. 898.

Scaffold in a subway, used for painting the interior, and constructed by placing planks on joists which were supported by hooks fastened to the iron-work. *Bower v. Holbrook, C. & R. Corp.* (1908) 125 App. Div. 684, 110 N. Y. Supp. 164.

Loose planks resting on stringers laid on angle irons about 3 feet from the floor, on each side of an open bin, and used to remove false work in the ceiling, about 5 feet above the planks. *MacDonald Engineering Co. v. Manns* (1910) 101 C. C. A. 373, 177 Fed. 203.

A scaffold used for erecting a house

As to what constituted a scaffold under the English workmen's compensation act of 1897, see § 1843, *c*.

which was built in sections, two planks laid side by side resting on crosspieces, one end of a crosspiece being nailed to the house and the other end to an upright, the scaffold being raised as the work progressed. *Jones v. Gamble* (1910) 140 App. Div. 733, 735, 126 N. Y. Supp. 143.

A scaffold consisting of joists laid upon irons constituting a part of the permanent structure of a dock, across which joists planks were placed, so that they could be shifted as occasion required. *O'Neil v. Manufacturers' Automatic Sprinkler Co.* (1911) 143 App. Div. 56, 59, 127 N. Y. Supp. 692.

A patent ladder or scaffold, consisting of two ladders placed perpendicularly, and a horizontal ladder extending between them. *Schmidt v. Rohn* (1908) 127 App. Div. 220, 110 N. Y. Supp. 1086.

Planks placed 8 feet from the ground on painter's horses, to be used in repairing a car. *Caddy v. Interborough Rapid Transit Co.* (1909) 195 N. Y. 415, 30 L.R.A.(N.S.) 30, 88 N. E. 747.

A plank on horses in a building in process of erection, used to facilitate the work of securing a derrick to be used in putting beams into position. *Warren v. Post & McCord* (1908) 128 App. Div. 572, 112 N. Y. Supp. 960.

Timbers placed on empty barrels, used to facilitate passing lumber to workmen higher up. *McLaughlin v. Eidlitz* (1900) 50 App. Div. 519, 64 N. Y. Supp. 193.

Planks laid on braces extending diagonally across the inner corners of a steel grain bin, and used by workmen in building the bin higher. *Anderson v. Milliken Bros.* (1908) 123 App. Div. 614, 108 N. Y. Supp. 61, affirmed in (1909) 194 N. Y. 521, 87 N. E. 1114.

Planks laid across a pocket in the hold of a scow, for the purpose of placing a beam through the center of the pocket. *Madden v. Hughes* (1905) 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in (1906) 185 N. Y. 466, 78 N. E. 167.

Scaffold used to install machinery in a factory which was being fitted up by the defendants. *Wingert v. Krakauer* (1904) 92 App. Div. 223, 87 N. Y. Supp. 261.

Scaffold used for installing heating apparatus. *Tracey v. Williams* (1908) 127 App. Div. 126, 111 N. Y. Supp. 114.

Platform made of planks laid across girders in a building, and used for storage of materials and for mixing concrete. *Swenson v. Wilson & B. Mfg. Co.* (1905) 102 App. Div. 477, 92 N. Y. Supp. 849, affirmed in (1906) 186 N. Y. 555, 79 N. E. 1116.

A scaffold built around a house in the process of construction is being used for the erection of a house, within the meaning of the statute, although, at the time of the accident, the workman was using it to construct another scaffold higher up. *Jones v. Gamble* (1910) 140 App. Div. 733, 126 N. Y. Supp. 143.

If a scaffold one side of which is supported by masonry, and the other is swung from hooks or hangers suspended from a traveler, is not, as a matter of law, embraced by the phrase, "all swinging or stationary scaffolding," as used in the statute, it certainly may be found so as a matter of fact. *Flannigan v. Ryan* (1903) 89 App. Div. 624, 85 N. Y. Supp. 947.

A wooden box in which concrete is spread, so that when it hardens the box may be removed and the concrete become part of the floor of the building, and upon which the workmen are required to stand, cannot be considered a scaffold, but is a "mechanical contrivance," within the meaning of the statute. *Michael v. Standard Concrete Steel Co.* (1907) 55 Misc. 255, 105 N. Y. Supp. 131. The court said: "While it can hardly be said that the box or temporary floor can be included in the term 'scaffolding, hoists, stays, or ladders,' nevertheless, when the legislature used the words 'mechanical contrivances,' it is reasonable to suppose that they intended to include contrivances other than those specifically mentioned. In other words, the use of these words was intended to give the section a broader meaning than it would have if those words were not used, and it cannot be presumed that the legislature intended said words to be meaningless. Giving these words their usual and ordinary signification, the box or temporary

A number of cases passing upon the question what is a structure within the statute will be found in the note below.¹⁹

floor in question comes fairly within the meaning of 'mechanical contrivances.'"

(b) *Appliances held not to be scaffolds.*—A plank laid across two wooden horses, used to facilitate the work of putting a casing in a window frame. *Williams v. First Nat. Bank* (1907) 118 App. Div. 555, 102 N. Y. Supp. 1031.

Timber lashed at the ends to steel columns of a building, and intended to hold iron girders until the wall was built up for them to rest on. *Welk v. Jackson Architectural Iron Works* (1906) 184 N. Y. 519, 76 N. E. 1116, reversing the court below on the dissenting opinion (1904) 98 App. Div. 247, 90 N. Y. Supp. 541.

The platform of a bridge in the process of erection. *Brady v. Pennsylvania Steel Co.* (1909) 134 App. Div. 372, 119 N. Y. Supp. 75.

The projecting end of a loose tie which had been used as a portion of a temporary track to support a derrick is not a scaffold within the meaning of the labor law. *Ibid.*

A 12 inch board which chanced to be lying across two beams does not fall within § 18 of New York act of 1897, chap. 415, prohibiting a person employing another in erecting a house to furnish or erect, or cause to be erected, unsafe or unsuitable scaffolding, hoists, stays, ladders, or other mechanical appliances. *Schneider v. American Bridge Co.* (1908) 31 App. D. C. 420.

The Missouri statute providing for safe scaffolds so as to prevent injury to persons working thereon or passing under the same does not apply to appliances used inside a building for the purpose of supporting outside scaffolds. *Loehring v. Westlake Constr. Co.* (1906) 118 Mo. App. 163, 183, 94 S. W. 747.

Platform used in erecting a temporary partition in a store to protect goods from dust. *Sutherland v. Ammann* (1906) 112 App. Div. 332, 98 N. Y. Supp. 574, affirmed in (1907) 190 N. Y. 514, 83 N. E. 1133.

A scaffold or platform on horses, used daily by janitors and their help for washing ceilings, is not a scaffold. *Stokes v. New York L. Ins. Co.* (1906) 112 App. Div. 77, 98 N. Y. Supp. 135.

Planks with one end resting on cleats nailed onto a building, and the other

on horses, used for the purpose of removing pipes connecting a boiler on the outside of the building with one on the inside. *Conley v. Lackawanna Iron & Steel Co.* (1904) 94 App. Div. 149, 88 N. Y. Supp. 123, affirmed in (1905) 183 N. Y. 551, 76 N. E. 1092.

Staging 4 or 5 feet high above the floor, used for attaching fixtures. *Schapp v. Bloomer* (1905) 181 N. Y. 125, 73 N. E. 563.

In the last case the court, in holding that a scaffolding composed of horses with planks thereon, to furnish a platform for workmen to stand on in installing shafting in a completed building, was not within the meaning of the statute, said: "As we have seen, the statute limits the scaffolding to be constructed to certain specified cases, such as the erection, repairing, altering, or painting of a house, building, or structure. The limitation to specified cases shows that it was not intended to include scaffolding in all cases. What the legislature evidently had in mind was scaffolding on buildings or structures where its use was obviously dangerous to life and limb of an employee thereon in case of a fall. If ordinary staging put up in a room, from 4 to 6 feet above the floor, to facilitate the placing of fixtures, was intended to be included as among the specified cases, we should find it difficult to suggest a scaffold that would not fall within the limitation of the statute."

A temporary or false arch used to support and shape a permanent arch until that arch should be set and hardened sufficiently to justify the removal of the temporary structure does not become a scaffold because of the habit of the workmen of stepping on it while at work. *Haughey v. Thatcher* (1903) 89 App. Div. 375, 85 N. Y. Supp. 935.

¹⁹ A car 47 feet long and 16 feet high, jacked up 6 feet from the floor, is a structure. *Caddy v. Interborough Rapid Transit Co.* (1909) 195 N. Y. 415, 30 L.R.A.(N.S.) 30, 88 N. E. 747, affirming (1908) 125 App. Div. 681, 110 N. Y. Supp. 162.

So, is a vessel in the course of construction in a shipyard. *Chaffee v.*

It is not necessary to plead the statute and allege a violation thereof.²⁰

b. Hoisting machines.—A master who has furnished a derrick which may be operated in safety fully performs his duty, and is not liable for injuries caused by the falling of the derrick in consequence of the negligent operation thereof by a fellow servant.²¹

The New York statute relative to the safety of hoisting machinery used in the construction of buildings does not apply to the case of a completed building undergoing repairs.²²

As to who is liable under these statutes, see § 1913, *post*.

Union Dry Dock Co. (1902) 68 App. Div. 578, 73 N. Y. Supp. 908.

And a vessel in a dry dock. *Gruner v. Texas Co.* (1909) 133 App. Div. 413, 117 N. Y. Supp. 741, motion for leave to appeal to the court of appeals denied in (1909) 134 App. Div. 931, 118 N. Y. Supp. 1110.

And a vessel to which iron plates were being attached. *Herman v. P. H. Fitzgibbons Boiler Co.* (1910) 136 App. Div. 286, 120 N. Y. Supp. 1074.

And a scow in which repairs were being made. *Madden v. Hughes* (1905) 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in (1906) 185 N. Y. 466, 78 N. E. 167.

But a portable upright boiler standing on the ground outside a building, and temporarily connected by a pipe running through the wall of the building with a large boiler permanently located within the building, is not a "structure." *Conley v. Lackawanna Iron & Steel Co.* (1904) 94 App. Div. 149, 88 N. Y. Supp. 123.

In *Caddy v. Interborough Rapid Transit Co.* (1909) 195 N. Y. 415, 30 L.R.A. (N.S.) 30, 88 N. E. 747, in holding that a street car that was being repaired was a structure, the court said: "Counsel for the defendant, in a very lucid and forceful argument, invokes the rule of *ejusdem generis*. His contention reduced to its shortest statement is that the general word 'structure' must be limited by and comprehended within the specific terms 'house' and 'building,' and when thus construed it necessarily excludes all structures which do not fall within the generic description of houses and buildings. To this argument counsel for the plaintiff replies that the words 'house' and 'building' are in themselves so general and comprehensive that

the word 'structure' cannot possibly broaden or amplify their meaning, and need not necessarily be associated therewith; that the term 'structure' was used, not to make more definite the description of 'house' and 'building,' but to enlarge to the fullest extent the list of artificial physical objects to which the reason of the statute can be applied. The question is not free from doubt, but we incline to the view that the rule of *ejusdem generis* does not apply. The term 'house' as used in common speech embraces every form of structure designed for human habitation, but in a legal sense it is even more comprehensive, as is shown by the statute relating to burglary, arson, and other crimes which involve acts committed in or upon buildings or structures. A building is a structure which, of course, includes every form of artificial house, but also many structures not included in that more restricted term. And so the word 'structure' in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner, and its extended legal significance can easily be gathered from the great variety of subjects to which it is applied in creating and penalizing what are known as statutory misdemeanors."

²⁰ *Riley v. McNulty* (1906) 115 App. Div. 650, 100 N. Y. Supp. 985; *Hagglad v. Brooklyn Heights R. Co.* (1907) 117 App. Div. 838, 102 N. Y. Supp. 1039; *Flanagan v. F. W. Carlin Constr. Co.* (1909) 134 App. Div. 236, 118 N. Y. Supp. 953.

²¹ *Walters v. George A. Fuller Co.* (1903) 82 App. Div. 254, 257, 81 N. Y. Supp. 919.

²² *Lockhart v. Hoffman* (1910) 197

c. Guarding scaffoldings or dangerous openings.—The statute as to guarding elevator openings in buildings under construction does not apply where the servant fell from the elevator itself.²³ The manifest purpose of such statute is not to protect men working at the shaft, hauling or unloading materials, before the floor is laid, but to protect workmen and others using the floor from walking or falling into the opening.²⁴

Openings left in the second floor of a barn in process of construction, to be used when the barn was completed for putting down hay, are not within the provisions of the statute requiring hoisting apparatus used in the construction of a building to be guarded.²⁵

It is not a compliance with the Illinois act to erect a barrier at such a distance from the opening of an elevator shaft that workmen other than those engaged in unloading material were obliged to go within the barrier to perform their work.²⁶

It is a question of fact whether a scaffolding in any particular case is sufficient to comply with the requirements of the law, and the plaintiff must show that a scaffolding without railing or guard was improper or unsuitable for this work.²⁷

As to who is liable under these statutes, see § 1913, *post*.

d. Construction of floors.—Section 20 of the New York labor law is not applicable until the third floor of the building has been laid.²⁸ But it applies where the iron floor beams are laid in a brick wall as well as where laid on structural ironwork,²⁹ and was intended for the benefit both of men laying floor beams, and of those working below.³⁰

The Indiana act (Burns's Anno. Stat. 1908, § 3859) requiring that, in constructing buildings of "three stories in height or more," temporary floors shall be provided, does not apply where an employee is working on a skylight under which there is no intention of constructing any floor, although the building is in fact five stories in height.³¹

N. Y. 331, 90 N. E. 943, reversing (1908) 129 App. Div. 930, 113 N. Y. Supp. 1137.

²³ *Genovesia v. Pelham Operating Co.* (1909) 130 App. Div. 200, 114 N. Y. Supp. 646.

²⁴ *McHugh v. Grand Central Bldg. & Constr. Co.* (1909) 133 App. Div. 100, 117 N. Y. Supp. 714.

²⁵ *Johnson v. Klarquist* (1911) 114 Minn. 165, 130 N. W. 943.

²⁶ *Claffy v. Chicago Dock & Canal Co.* (1911) 249 Ill. 210, 94 N. E. 551.

²⁷ *Connolly v. Peterson* (1909) 62 Misc. 624, 116 N. Y. Supp. 11.

²⁸ *McNeill v. Bottsford-Dickinson Co.* (1908) 128 App. Div. 544, 112 N. Y. Supp. 867.

²⁹ *Schramme v. Lewinson* (1908) 126 App. Div. 279, 110 N. Y. Supp. 599.

³⁰ *Schramme v. Lewinson* (1908) 126 App. Div. 279, 110 N. Y. Supp. 599.

³¹ *Lagler v. Bye* (1908) 42 Ind. App. 592, 85 N. E. 36.

The St. Louis ordinance, cited § 1892, *supra*, has been held not to prevent a removal of the temporary floor when it became necessary to proceed with the work of laying a permanent floor.³²

1893. Enactments relative to rural occupations.—In a few jurisdictions statutes relative to rural occupations have been enacted.

England.—Agricultural gangs act 1867, § 4 (1). No females shall be employed in the same agricultural gang with males; nor (2) in any gang under a male gang master, unless a female licensed to act as gang master is also present with the gang.

New Zealand.—Agricultural laborers accommodation act 1907, § 5. Proper accommodation is to be provided for agricultural laborers.

Sec. 7. Separate accommodation to be provided for laborers of the Asiatic race.

The importance of sheep raising industry in Australia has led to the enactment of special provisions regulating the quality of the accommodation, food, etc., to be furnished to sheepshearers.

Queensland.—Act No. 9 of 1905.

South Australia.—Act of 1905, No. 887.

1894. Enactments relative to the food of seamen.—The English merchant shipping acts have fixed the daily allowance in money (to be recovered as wages) to which seamen are entitled for any period during which the provisions served out have been reduced in quantity, or have been bad in quality and unfit for use.¹

The United States Congress has appointed a scale of provisions to be served to crews of American ships during a voyage.² The enactments on this subject are remedial in their nature, and should be liberally construed, so as to give their humane purpose full and practical effect, and cause them to be respected by shipowners and mas-

³² *Butz v. Murch Bros. Constr. Co.* (1909) 137 Mo. App. 222, 117 S. W. 635.

¹ Act of 1854, § 223; Act of 1894, § 199.

Where, owing to the unexpected length of a voyage, the crew of a vessel had been put upon short allowance, they were held to be entitled to compensation under this provision. *The Josephine* (1856) Swabey, 152, 2 Jur. N. S. 1148.

In *The Heathcraig* (1901) 108 Fed. 419, the British consul at an American port had, in accordance with the act, inquired into the justice of a complaint

made by the seamen of a British ship, and ordered a written complaint to be filed and a thorough examination to be made. This was not done, and the seaman subsequently left the ship and brought suit for their wages in an American court of admiralty. Held, that, as no oppression or gross hardship had been shown, and there was no proof that the consul would not accord them a fair and impartial hearing, the court should decline jurisdiction.

² United States Rev. Stat. § 4568, U. S. Comp. Stat. 1901, p. 3099 (amended by Act Dec. 21, 1898 and United States Rev. Stat. § 4612.

ters.³ By another statute it has been provided that, if the master, or any officer of an American vessel, shall through malice, hatred, or revenge, and without justifiable cause, withhold from the crew suitable food and nourishment, or inflict upon them cruel or unusual punishment, he shall be subject to a penalty.⁴

³ *The H. E. Thompson v. Martin* (1900) 16 App. D. C. 222, where it was held that proof of a substantial failure by the master to observe the requirements of the law, with such reasonable particularity as to the number of days on which the scale was not observed, as will enable the court to assess the compensation with reasonable certainty, is sufficient, without showing a failure from day to day to observe the scale.

A ship is liable for a deficiency in the quantity and variety of food furnished the crew, although she was sufficiently supplied for her voyage from Hong Kong to New York by way of the Cape of Good Hope, where, in consequence of adverse winds and delays, the master changes to the longer route by way of Cape Horn, and fails to stop at any of the convenient ports along the route to obtain the requisite additional food. *The T. F. Oakes* (1897) 82 Fed. 759.

In *The Mary C. Hale* (1904) 132 Fed. 800, it was held that it was no defense to a proceeding founded on this statute, that after the ship was provisioned but before actually sailing she was detained a month for repairs.

⁴ U. S. Rev. Stat. § 5347, U. S. Comp. Stat. 1901, p. 3631. In a case where the defendant was indicted under this statute, Brown, J., charged the jury as follows: "Every master, when sailing to or from a foreign port, is bound to see before he sets sail that his vessel is properly provisioned for the intended voyage. By 'properly provisioned' is not meant a bare sufficiency for a quick passage. He is bound to make reasonable provision for what is liable to happen upon the seas, though it be unexpected. He is bound to provide for such storms, such delays, such calms as often happen, which may prolong a voyage. Those are among the ordinary contingencies of the sea." *United States v. Reed* (1897) 86 Fed. 308. He also laid it down that it is a justifiable cause for putting the crew of a vessel on short allowance, that, by stress of weather, she is detained long beyond the usual passage, and there are no ports where food can be procured, so that the allowance must be shortened in order to enable her to reach port.

CHAPTER LXXXII.

STATUTES RESTRICTING THE EMPLOYMENT OF WOMEN AND CHILDREN.

- 1895. Enactments relative to women.
- 1896. Construction and effect of these statutes.
- 1898. Statutes relative to children.
- 1899. Construction and operation of these enactments. **Generally.**
- 1900. Persons subject to the statutory duties imposed.
- 1901. What constitutes an "employment" within the meaning of the statutory restrictions.
- 1902. Descriptions of employment to which the restrictive provisions apply.
- 1903. Misstatement concerning minor's age; effect of.
- 1904. Parents' consent to illegal employment of minor child; effect of.

1895. Enactments relative to women.—England.—Factory and workshop act 1901, § 13 (3). A woman or young person must not be allowed to clean such part of the machinery as is mill gearing, while the machinery is in motion for the purpose of propelling any part of the manufacturing machinery.

Sec. 76. A woman, young person, or child shall not be employed in any part of a factory where wet spinning is being carried on, unless sufficient means are employed for protecting the workers from being wetted, nor, where hot water is used, for preventing the escape of steam into the room used by the workers.

Sec. 77, subsec. 2. A female young person or child shall not be employed in a factory in which the process of melting or annealing glass is carried on.

Sec. 77, subsec. 3. A girl under the age of sixteen years must not be employed in any factory in which there is carried on either the making or finishing of bricks or tiles, not being ornamental tiles, or the making or finishing of salt.

Sec. 61. An occupier of a factory or workshop shall not knowingly allow a woman or girl to be employed therein four weeks after she has given birth to a child.

Sec. 12 (3). A woman must not be allowed to work between the fixed or traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or any other mechanical power.

Metalliferous mines regulation act 1872, § 3. No girl or woman of any age shall be employed below ground in any mine to which the act applies.

The provision in § 4 of the coal mines regulation act 1887 is to the same effect.

Arizona.—Laws 1907, chap. 13, § 1. It shall be unlawful for the owner of any saloon to permit any woman or minor, either for hire or otherwise, to sing, to recite, to dance, to play on any musical instrument, to give any theatrical or other exhibition, to drink, serve drinks or any other form of refreshments or viands, or to solicit for the purchase or sale, thereof; to engage in, or to take part in, any game of chance or amusement, or to loiter in any saloon or in any room or apartment, except the lobby of a legitimate hotel, opening from or into any saloon within the territory.

Arkansas.—Kirby's Dig. 1904, § 5343. No female of any age shall be permitted to enter any mine to work therein.

Colorado.—Anno. Stat. 1911, § 642; Rev. Stat. 1908, § 642; Mills's Anno. Stat. § 3185, Laws 1883, p. 106, § 5; Gen. Stat. 1883, pp. 164, 165, § 180, amended by Laws 1885, p. 138, § 5. No woman or girl of any age is permitted to enter any coal mine to work therein.

Illinois.—Hurd's Rev. Stat. 1908, p. 1438, § 32; Mines act of April 18, 1899, § 22. No woman or girl of any age shall be permitted to do any manual labor in or about any mine. (There was a similar provision in Laws 1879, p. 204, § 6; Starr & C. Anno. Stat. 1896, p. 2721, ¶ 6.)

P. 1031 (Laws of 1871-72, p. 578). It is provided that no person shall be precluded or debarred from any occupation on account of sex, but that the act shall not be construed as requiring any female to work on streets or roads.

Indiana.—Burns's Anno. Stat. 1908, §§ 2626, 8594. Employment of females in any mine is unlawful. (Earlier provision in Laws 1891, chap. 49.)

Iowa.—Code Supp. 1902, § 4999b. No female under eighteen years of age shall be directed to clean machinery in motion.

Louisiana.—Laws 1908, No. 301 (p. 453). No woman shall be required to clean any part of the mill gearing or machinery in any establishment while it is in motion.

Laws 1894, chap. 43. The employment of women in houses where spirituous liquors are sold at retail is prohibited.

Maryland.—Pub. Gen. Laws 1904, art. 27, § 116, p. 815. It shall be unlawful for any proprietor, lessee, or manager of any variety entertainment or concert hall (whether an admittance fee is charged or not), to employ, engage, or allow any female sitters (or whatever other name they may be called), in or about said entertainment or concert hall, building, room, or premises; and all females who are allowed in or about the said premises who shall drink, smoke, or partake of any kind of eatables or refreshments at the expense of others, or solicit others to purchase such things as may be purchased there, upon which they shall receive or expect to receive a commission, or who may be paid a regular salary therefor, or who participate in any way in profits thereof, shall be deemed sitters under this section. (Laws 1888, art. 27, § 85; Laws 1886, chap. 171, § 1.)

Michigan.—Laws 1907, No. 1, No. 169, § 3. No female under the age of twenty-one years shall be employed at an employment whereby her life or limbs shall be endangered, or health likely to be injured, or her morals may be depraved, and no such female shall be allowed to clean machinery in motion.

Laws 1905, No. 172, § 1. No female shall be employed in operating any of the wheels or belts mentioned in the principal act, Laws 1899, No. 202.

Missouri.—Rev. Stat. 1909, § 7829. Women not to be required to clean certain machinery while in motion. For full text of provision, see § 1898, *post*.

Sec. 4740. Women not to be employed in places where intoxicating liquors are sold.

Sec. 8456. No female of any age is permitted to enter any mine to work therein.

New York.—Labor law 1909, § 93. No woman under twenty-one years of age shall be permitted or directed to clean machinery while in motion.

Sec. 171. No woman shall be employed or directed to work in the basement of a mercantile establishment, unless permitted by the health authorities.

Ohio.—Gen. Code 1910, § 1027 (15). No female to be employed in operating emery wheels on belts. (Laws 1900, p. 42, § 1.)

Oklahoma.—Comp. Laws 1909, § 631 (act of March 2, 1909). No girl or woman shall be employed or permitted or suffered to work underground in any mine or quarry.

Sec. 4402. Women and girls shall not be employed underground.

Pennsylvania.—Purdon's Dig. p. 2599, § 348; act of May 15, 1893, art. 17, § 1. No woman or girl of any age shall be employed or permitted to be in the workings of any bituminous coal mine for the purposes of employment or for any other purpose.

P. 2572, § 154; act of June 2, 1891, art IX., § 1. No woman or girl shall be employed in any anthracite coal mine.

Laws of March 28, 1878, P. L. 9, § 1. Employment of females in licensed places prohibited.

P. L. 10, § 3. No license shall be issued for the sale of intoxicating liquors to any person except on the express condition that no female shall be employed therein.

Utah.—Comp. Laws 1907, § 1338 (Laws 1896, chap. 28). No woman shall be employed in a mine or smelter.

Vermont.—Pub. Stat. 1906, § 5130. No female shall be employed in any bar-room.

Washington.—Rem. & Bal. Codes & Stats. § 6285 (Laws of 1895, p. 177). The employment of women in any saloon, beer hall, barroom, theater, or other place of amusement where intoxicating liquors are sold as beverages, was prohibited.¹

Sec. 7388 (3172). No female of any age to be employed in any mine.

Sec. 2447. (Laws 1909, p. 948, § 195). The employment of female children under sixteen years of age in or about any mine is prohibited. The provision is in these terms; but the limit of age in respect of females was presumably in-

¹ Pronounced constitutional in *Re Considine* (1897) 83 Fed. 157.

It may be mentioned here that, in some cities, municipal ordinances of the same tenor as the above statute have been adopted. These have been held to be constitutional. *Hoboken v. Goodman* (1902) 68 N. J. L. 217, 51 Atl. 1092. These are also deemed to be within the authority conferred upon a city by statute to regulate places where intoxicating liquors are sold. *Bergman v. Cleveland* (1884) 39 Ohio St. 651, construing the act of 1875, § 199, subdvs. 5, 6 (Ohio Rev. Stat. § 1692).

tended to apply merely to the other occupations besides mining, which are specified. In any event, the categorical words of the section above cited are doubtless controlling.

West Virginia.—Code 1906, § 442; Acts 1901, chap. 19. No female of any age shall be permitted to clean machinery while the same is in motion.

Code Supp. 1907, § 412. No female of any age shall be permitted to work in any coal mine.

Wyoming.—Laws 1890–91, chap. 20, § 5 (Comp. Stat. 1910, § 3107). No woman of any age shall be employed in any mine, or underground works, or dangerous place.

Ontario.—Mines act; Stat. 1906, chap. 11, § 192. Except in the case of mica-trimming works, no girl or woman shall be employed at any mining work. The prohibition in the mines act 1892 (Ont. Rev. Stat. chap. 36) § 60, was unqualified.

British Columbia.—Mines (metalliferous) inspection act (Rev. Stat. 1897, chap. 134), § 12. No woman or girl of any age shall be employed below ground in any mine to which the act applies.

There is a similar provision in the coal mines regulation act (B. C. Rev. Stat. 1897, chap. 138), § 4.

New South Wales.—Coal mines regulation act 1902, § 34. No female shall be employed in or about a mine.

Victoria.—Factories and shop act 1905 (No. 1975). § 36. Similar to provision as to wet spinning in § 76 of the English factory and workshop act 1901.

Sec. 39. Similar to provision regarding certain unhealthy kinds of work in § 77 of the English factory and workshop act 1901, except that the ages of the employees designated are differently fixed.

Sec. 62. A person under eighteen years of age, or a woman, must not be allowed to clean such part of machinery as is mill gearing, while the machinery is in motion for the purpose of propelling any part of the manufacturing machinery, and must not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other mechanical power.

Mines act 1890, § 353. Females not to be employed below ground in any mine.

Queensland.—Mining act 1898, § 212. No woman shall be employed underground in any mine.

New Zealand.—Mining acts compilation act 1906, § 241. Except in clerical employments, no female person of any age shall be employed for hire in any capacity in or about a mine.

1896. Construction and effect of these statutes.—These enactments have not often been before the courts for construction.

The weaving or plaiting by steam or other mechanical power of cotton thread into a covering for strips of steel to be used for making “crinoline skirts” is a manufacture or process incidental to the manu-

facture of a cotton fabric, within the meaning of the 73d section of the factory act, 7 & 8 Vict. chap. 15.¹

It has been held that a statute prohibiting the employment of females in saloons as waiters or conversationalists cannot be evaded by discharging such servants, and then entering into a colorable partnership with them.²

1898. Statutes relative to children.—The legislation relative to the employment of children is in a state of confusion. In practically no jurisdiction has there been passed a comprehensive law upon the subject, but provisions restricting the employment of children will be found in various other acts, such as the factory act, labor law, mines act, education law, Penal Code, etc. Many of these enactments cover the same ground, and not infrequently they will be found to be inconsistent.

England.—Factory and workshop act 1901, § 62. A child under twelve years of age shall not be employed in a factory or workshop.

Sec. 13 (1). A child must not be allowed to clean any part of any machinery, or any place under any machinery other than overhead mill gearing, while the machinery is in motion by the aid of steam, water, or other mechanical power.

Sec. 13 (2). A young person must not be allowed to clean any dangerous part of the machinery while it is in motion by the aid of steam, water, or other mechanical power.

Sec. 12 (3). A young person or child must not be allowed to work between the fixed or traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or any other mechanical power.

Sec. 77 (1). In the part of a factory or workshop in which there is carried on (a) the process of silvering of mirrors by the mercurial process; or (b) the process of making white lead, a young person or child must not be employed.

(2) In the part of a factory in which the process of metaling of annealing glass is carried on, a female young person or a child must not be employed.

(3) In a factory or workshop in which there is carried on (a) the making or finishing of bricks or tiles, not being ornamental tiles; or (b) the making or finishing of salt, a girl under the age of sixteen years must not be employed.

(4) In the part of a factory or workshop in which there is carried on (a) any dry grinding in the metal trade; or (b) the dipping of lucifer matches, a child must not be employed.

(5) Notice of a prohibition contained in this section must be affixed in the factory or workshop to which it applies.

Metalliferous mines regulation act 1872, § 4, as amended by the mines (prohi-

¹ *Whympere v. Harney* (1865) 18 C. B. N. S. 243. Williams, J., said: "When once it is made out that steam or other mechanical power is employed in the manufacture of any of the fabrics enumerated, it is unnecessary to show what becomes of it afterwards."
² *Walter v. Com.* (1878) 88 Pa. 137, 32 Am. Rep. 429.

bition of child labor underground) act. No boy under the age of thirteen years shall be employed in any mine below ground. (Limit of age in original provision was twelve years.)

The provision in the coal mines regulation act 1887, § 4, as amended, is to the same effect.

The children's dangerous performances act 1879, § 3. A penalty is imposed upon any person who causes a child under the age of fourteen years to take part in any public exhibition or performance, whereby the life or limits of such may be endangered.

Sec. 3. Whenever any person is charged with an offense against the act in respect of a child who, in the opinion of the court trying the case, is apparently of the age alleged by informant, it shall be in the persons charged to prove that the child is not of that age.

The dangerous performances act 1897, § 1. The provisions of the act of 1879 are declared to be applicable in the case of any male young person under the age of sixteen years, and any female young person under the age of eighteen years, in like manner as they apply in the case of a child under the age of fourteen years.

The prevention of cruelty to children and acts 1894 and 1904, § 2. A penalty is imposed upon any person who causes, or procures, or allows a boy under the age of fourteen years, or a girl under the age of sixteen years, (a) to be in any street, premises, or place, for the purpose of begging or receiving, whether under the pretense of singing, playing, performing, offering anything for sale or otherwise; or (b) to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed according to law for public entertainments, for the purpose of singing, playing, or performing for profit, or offering anything for sale, between 9 P. M. and 6 A. M.

(c) A like penalty is also imposed upon any person who causes, procures, or allows any child under the age of eleven years to be at any time in any street, or in any premises licensed for the sale of intoxicating liquor, or in premises licensed according to law for public entertainments, or in any circus or other place of public amusement, for the purpose of singing, playing, or performing for profit, or offering anything for sale.

(d) A penalty is also imposed upon any person who causes, procures, or allows a child under the age of sixteen years to be in any place for the purpose of being trained as an acrobat, contortionist, a circus performer, or of being trained for any exhibition or performance which in its nature is dangerous.

One executive proviso in this section is to the effect that the section shall not apply in the case of any occasional sale or entertainment the net proceeds of which are wholly applied for the benefit of any school or charitable object, if such sale or entertainment is held elsewhere than in premises which are licensed for the sale of any intoxicating liquor, but not licensed according to law for public entertainments, or if, in the case of a sale or entertainment held in such premises as aforesaid, a special exemption from the provisions of the section has been granted under the hand of two justices. By another clause, local authorities are empowered to extend or restrict the hours mentioned in par. (b), and by another it is declared that par. (d) shall not apply in the case of a person who is the parent or legal guardian of a child, and himself trains the child.

Employment of children act 1903, § 1. Any local authority may make by-laws (I.) prescribing for all children, or for boys and girls separately, and with respect to all occupations or to any specified occupation, (a) the age below which employment is illegal; and (b) the hours between which employment is illegal; and (c) the number of daily and weekly hours beyond which employment is illegal; (II.) prohibiting absolutely or permitting, subject to conditions, the employment of children in any specified occupation.

Sec. 2. Any local authority may make by-laws with respect to street trading by persons under the age of sixteen, and may by such by-laws prohibit such street trading, except subject to such conditions as to age, sex, or otherwise, as may be specified in the by-law, or subject to the holding of a license to trade, to be granted by the local authority.

Sec. 3. (2) A child under the age of eleven years shall not be employed in street trading.

(3) No child who is employed half time under the factory and workshop act 1901 shall be employed in any other occupation.

(4) A child shall not be employed to lift, carry, or move anything so heavy as to be likely to cause injury to the child.

(5) A child shall not be employed in any occupation likely to be injurious to his life, limb, health, or education, regard being had to his physical condition.

Sec. 13. The expression "child" means a person under the age of fourteen years.

The expressions "employ" and "employment," used in reference to a child, include employment in any labor exercised by way of trade or for the purposes of gain, whether the gain be to the child or to any other person.

The expression "street trading" includes the hawking of newspapers, matches, flowers, and other articles, playing, singing, or performing for profit, shoeblack-ing, and any other like occupation carried on in streets or public places.

Elementary education act 1876, § 5, as amended by the elementary education act of 1899. No person shall (except as hereinafter provided) take into his employment any child (1) who is under the age of twelve years; or (2) who, being of the age of twelve years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous attendance at a certified efficient school, as in this act in that behalf mentioned, unless such child, being of the age of twelve years or upwards, is employed, and is attending school in accordance with the provisions of the factory act, or of any by-law of the local authority hereinafter mentioned. (The limit of age in the original act was ten years.)

Sec. 6. Certain exceptions to the prohibition of employment are specified.

Sec. 47. A parent of a child, who employs it in any labor exercised by way of trade or for the purpose of gain, shall be deemed, for the purposes of the act, to take such child into his employment.

Elementary education act 1880, § 4. Every person who takes into his employment a child of the age of twelve and under fourteen years, resident in a school district, before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemptions of the children of like age from the obligation to attend

school, shall be deemed to take such child into his employment in contravention of the elementary education act of 1876.

By 62 & 63 Vict. chap. 51 (1899), it is provided that the age at which a child may, in pursuance of any by-law made under the elementary education acts 1870 to 1891, obtain total or partial exemption from the obligation to attend school, by obtaining a certificate as to the standard of examination which he has reached, shall be raised from ten (as in the act of 1876), to twelve.

Factory and workshop act 1901. This statute contains several detailed provisions, the effect of which, speaking generally, is to insure that children working in factories shall attend school during a portion of each week, until they have attained the required standard of proficiency.

Sec. 69. Every occupier of a factory or workshop in which a child is employed is required to obtain every week from the teacher of a recognized school a certificate respecting the attendance of the child at school in accordance with the act. The employment of a child without such a certificate is declared to be an employment contrary to the act. This requirement as to the procuring of the certificate is also found in most of the repealed English statutes by which work in factories was regulated.

Alabama.—Crim. Code 1907, § 6428. No child under twelve years of age shall be employed or permitted to work in or be in or about any mill, factory, or manufacturing establishment. (Aug. 9, 1907, p. 757, § 1.)

Sec. 6429. No child between the ages of twelve and sixteen years shall be employed or be permitted to work or be detained in or about any mill, factory, or manufacturing establishment in this state, unless such child shall attend school for eight weeks in every year of employment, six weeks of which shall be consecutive. (§ 1.)

Sec. 6433. It shall be unlawful for any person, firm, or corporation to employ, or detain in, or permit to work in, or be in or about, any mill, factory or manufacturing establishment, any child under eighteen years of age, without first requiring said child to present on a blank furnished by the employer, the form of which shall be provided by the inspector, the affidavit of the parent or guardian or other person standing in parental relation to such child, stating the date and place of birth of said child. (§ 4.)

Arizona.—Laws 1907, chap. 13, § 1. Unlawful to employ minors in various designated occupations regarded as dangerous to morals. For text of provision, see § 1895, *ante*.

Arkansas.—Kirby's Dig. 1904, § 5343. No person under the age of fourteen years, or female of any age, shall be permitted to enter any mine to work therein; nor shall any boy under sixteen years of age, unless he can read and write, be allowed to work in any mine.

Sec. 1947. No child under twelve years of age, shall be employed in any manufacturing establishment, unless a widowed mother or a totally disabled father is dependent upon such child, or he is an orphan, and has no other means of support. No child under ten years of age shall be so employed under any circumstances.

Sec. 1948. Unlawful for any manufacturing establishment to hire any child unless there is placed on file at the office of the employer an affidavit as to age, signed by the parent of the child or his guardian, or person standing towards him in the parental relation.

Sec. 1949. No child under the age of fourteen shall be employed at labor, or detained in any factory or manufacturing establishment in this state, between the hours of 7 P. M. and 6 A. M., or for more than sixty hours in any one week, or more than ten hours in any one day.

Sec. 1950. No child under fourteen years of age shall be employed in any manufacturing establishment unless he can read and write his name and simple sentence in the English language.

Sec. 1951. No child under fourteen years of age shall be employed in any manufacturing establishment unless he attends school for at least twelve weeks of each year.

Acts of 1907, p. 1230, § 1. It is provided that it shall be unlawful to employ any child under twelve years of age in any factory or manufacturing establishment except in industries engaged in the preservation of fruits or vegetables during the school vacation.

Sec. 2. No child under fourteen years of age shall be employed unless he is an orphan, and has no other means of support, or unless a widowed mother or aged or disabled father is dependent upon him, and a certificate to this effect must be procured.

Sec. 3. No child under fourteen years of age shall be employed between the hours of 7 P. M. and 6 A. M., nor more than sixty hours in any one week, nor more than ten hours in any one day.

Sec. 4. By this section the employment of children under fourteen years of age is forbidden unless they have had certain educational privileges.

California.—Gen. Acts; act 1611, § 2. No minor under the age of sixteen years shall be employed or permitted to work in any mercantile institution, office, laundry, manufacturing establishment, workshop, place of amusement, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages between the hours of 10 o'clock in the evening and 6 o'clock in the morning.

The second clause of § 2 of the act provides that no child under fourteen years of age shall be employed in any mercantile institution, office, laundry, manufactory, workshop, restaurant, hotel, or apartment house, or in the distribution or transmission of merchandise or messages; provided, that upon the sworn statement of the parent that the child is over twelve years of age, and that the parent or parents are unable, from sickness, to labor, the judge of the juvenile court, in his discretion, may issue a permit allowing such child to work for a specified time; and provided further, that during the time of the regular vacation of the public schools of the city or county, any child over twelve years of age may work at any of the prohibited occupations, upon a permit from the principal of the school attended by the child during the immediately preceding term. Section 4 of the act declares that a violation of any of the provisions of the act shall be a misdemeanor.

Penal Code, § 272; Laws 1905, p. 759. Substantially to the same effect as the New York Penal Code, § 292.

Colorado.—Constitution, art. 16, § 2. The legislature is directed to pass a law prohibiting the employment of children under twelve years of age in mines.

Stat. Anno. 1911, § 531 (Acts of 1899, § 2). No child under the age of fourteen years shall be employed during the school term and while the public schools

are in session unless the parent or guardian shall have procured a written permit.

Sec. 541. No child under the age of fourteen years shall be employed during the school hours during any school day of the school term unless such child shall have had certain educational advantages.

Sec. 547. Children under fourteen years of age are not to be employed in any mine, smelter, or factory.

Secs. 550, 551. (Act of April 13, 1891 [superseding act of 1885], § 1.) It shall be unlawful for any person having the care, custody, or control of any child under the age of fourteen years, to exhibit, use, or employ as an actor or performer in any concert hall or room where intoxicating liquors are sold or given away, or in any variety theater, or for any illegal, obscene, indecent, or immoral purpose, exhibition, or practice whatsoever, or for or in any business, exhibition, or vocation injurious to the health or dangerous to the life or limb of such child, or cause, procure, or encourage such child to engage therein. Nothing in this section contained shall apply to or affect the employment or use of any such child as a singer or musician in any church, school, or academy, or at any respectable entertainment, or the teaching or learning the science or practice of music.

Sec. 2. It shall also be unlawful for any person to take, receive, hire, employ, use, exhibit, or have in custody any child under the age and for the purpose prohibited in the 1st section of this act.

Sec. 3920. No child between the ages of fourteen and sixteen years shall be employed in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, theater, concert hall, or place of amusement, passenger or freight elevator, factory or workshop, or as messenger or driver therefor, unless he shall first procure a schooling certificate.

Sec. 3920a (act of 1911, § 1). Children under the age of fourteen are prohibited from being employed in a gainful occupation in any theater, concert hall, or place of amusement where intoxicating liquors are sold, or in any mercantile institution, laundry, manufacturing establishment, passenger or freight elevator, factory or workshop, or as messenger or driver therefor; no child under the age of fourteen shall be employed at any work while the public schools are in session.

Sec. 3920b. (act of 1911, § 2). No child under the age of sixteen shall be employed in any concert hall or room where intoxicating liquors are sold, or in any variety theater, or for any illegal, obscene, indecent, or immoral purpose.

Sec. 3920c (act of 1911, § 3). Children under sixteen years of age shall not be employed in any underground works or mine, or in any of a large number of designated dangerous occupations. (Earlier enactments. Rev. Stat. 1908, § 642; Mills's Anno. Stat. § 3185; Laws of 1883, p. 106, § 5; Gen. Stat. 1883, pp. 164, 165, § 180, amended 1885, p. 138, § 5. No young person under twelve years of age shall work in any coal mine; nor any person under the age of sixteen years, unless he can read and write.)

Connecticut.—Gen. Stat. § 4704 (act of May 9, 1895, chap. 118). No child under fourteen years of age shall be employed in any mercantile, mechanical, or manufacturing establishment. (In earlier statute the limit of age was thirteen years.)

Laws 1899, chap. 41. Children under fourteen not to be employed at labor during school hours.

Delaware.—Laws 1904, 1905, chap. 123, § 1. No child under the age of fourteen shall be employed in any factory or workshop.

Sec. 2. No child between the ages of fourteen and sixteen years shall be employed in any factory or workshop, unless he has fulfilled certain conditions as to attendance at school.

Sec. 7. The provisions of the act shall not apply to any person or corporation engaged in the canning of fruit, vegetables, or provisions, or in the carrying on of any agricultural business, or to any person, etc., engaged in the manufacture of fruit and berry baskets.

Florida.—Laws 1907, No. 91, § 1. No child under twelve years of age shall be employed at any time in any factory or workshop, bowling alley, barroom, beer garden, or place of amusement where intoxicating liquors are sold, or in or about any mine.

Sec. 2. No child under twelve years of age shall be employed, required, or permitted to work for wages, or gain, to whomsoever payable, at any occupation at any time, except when there is no public school open. Such child may be employed in any store, office, hotel, mercantile establishment, laundry, or other reputable place of work, not hereinbefore forbidden; provided a certificate authorizing such employment is first obtained from a county or municipal judge.

Sec. 9. Act is not applicable to household or agricultural work.

Gen. Stat. 1906, § 3237. Provisions of same general tenor as New York Penal Code, § 292.

Georgia.—Code 1911, § 3143. No child under ten years of age shall be employed or allowed to labor in or about any factory or manufacturing establishment within this state, under any circumstances.

Sec. 3144. On and after January 1, 1907, no child under twelve years of age shall be so employed, or allowed to labor, unless such child be an orphan and has no other means of support, or unless a widowed mother or an aged or disabled father is dependent upon the labor of such child, in which event, before putting such child at such labor, such father shall produce and file in the office of such factory or manufacturing establishment a certificate from the ordinary of the county in which such factory or establishment is located, certifying under his seal of office to the facts required to be shown as herein prescribed: Provided, that no ordinary shall issue any such certificate except upon strict proof in writing and under oath, clearly showing the necessary facts: And provided further, that no such certificate shall be granted for longer than one year, nor accepted by any employer after one year from the date of such certificate.

Sec. 3145. On and after January 1, 1908, no child under fourteen years of age shall be employed or allowed to labor in or about any factory or manufacturing establishment within this state between the hours of 7 P. M. and 6 A. M.

Sec. 3146. On and after January 1, 1908, no child, except as heretofore provided, under fourteen years of age, shall be employed or allowed to labor in or about any factory or manufacturing establishment within this state, unless he or she can write his or her name and simple sentences, and shall have attended school for twelve weeks, of the preceding year, six weeks of which school attendance shall be consecutive; and no such child, as aforesaid, between the ages of fourteen and eighteen years, shall be so employed unless such child shall have attended school for twelve weeks of the preceding year, six weeks of which school attendance shall be consecutive; and at the end of each year, until such child

shall have passed the public-school age, an affidavit certifying to such attendance as is required by this section shall be furnished to the employer by the parent or guardian or person sustaining parental relation to such child. The provisions of this section shall apply only to children entering such employment at the age of fourteen years or less.

Sec. 3147. It shall be unlawful for any owner, superintendent, agent, or any other person acting for or in behalf of any factory or manufacturing establishment to hire or employ any child without procuring and placing on file in the office of such employer an affidavit signed by the parent, guardian, or person standing in parental relation thereto, certifying to the age and date of birth of such child.

Idaho.—Constitution, art. 13, § 4. Employment of children under the age of fourteen years in underground mines is unlawful. See also following provision.

Rev. Code 1908, § 1466. No child under fourteen years of age shall be employed in, or permitted or suffered to work in or in connection with, any mine, factory, workshop, mercantile establishment, store, telegraph or telephone office, laundry, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any such business or service whatever, during the hours in which the public schools of the district in which the child resides are in session, or before the hour of 6 o'clock in the morning, or after the hour of 9 o'clock in the evening: Provided, that any such child, over the age of twelve years, may be employed at any of the occupations mentioned in this article during the regular vacations of two weeks or more, of the public schools of the district in which such child resides.

Sec. 1467. No minor who is under sixteen years of age shall be employed or permitted to work at any gainful occupation during the hours that the public schools of the school district in which he resides are in session, unless he can read at sight, and write legibly, simple sentences in the English language, and has received instruction in spelling, English grammar, and geography, and is familiar with the fundamental operations of arithmetic up to and including fractions, or has similar attainments in another language.

Sec. 1468. Every person, firm, corporation, agent, or officer of a firm or corporation employing or permitting minors under sixteen years of age and over fourteen years of age to work in any of the occupations designated in § 1466 shall keep a record of the names, ages, and places of residence of such minors.

Sec. 1471. Provisions of substantially the same tenor as in New York Penal Code, § 292.

Sec. 1472. Any person, whether as parent, guardian, employer, or otherwise, and any firm or corporation, who, as employer or otherwise, shall send, direct, or cause to be sent or directed, any minor to any saloon, gambling house, house of prostitution, or other immoral place; or who shall employ any minor to serve intoxicating liquors to customers, or who shall employ a minor in handling intoxicating liquors or packages containing such liquors, in a brewery, bottling establishment, or other place where such liquors are prepared for sale or offered for sale, shall, for each offense, be punished by a fine or imprisonment.

Illinois.—Hurd's Rev. Stat. 1908, p. 715, §§ 42a *et seq.* (Laws of 1907, p. 266). Any person having the care or custody of any child under fourteen is forbidden to exhibit, use, or employ, or in any manner whatsoever dispose of, such child

for the purpose of singing, playing on musical instruments, dancing, etc., begging, or peddling, or as a gymnast, contortionist, rider, or acrobat in any place whatsoever, or for any obscene, indecent, or immoral purpose, or in any business, exhibition, or vocation injurious to the health or dangerous to the life or limb of such child. It shall also be unlawful for any person to take, hire, use, or have in custody, any child under such age for the purposes prohibited above.

Pp. 1036 *et seq.* Factory act 1893, p. 99, § 4. No child under the age of fourteen shall be employed in a factory or workshop.

No child between fourteen and sixteen shall be employed without procuring from his parent or guardian an affidavit as to his age. A list of the names and ages of children is to be kept posted in factories. (Earlier provision, in which the limit of age was thirteen years, Laws 1891, p. 87.)¹

P. 1032; Laws of 1903, p. 187, § 1. No child under the age of fourteen years shall be employed, permitted, or suffered to work in any gainful occupation in any theater, concert hall, or place of amusement where intoxicating liquors are sold, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory or workshop, or as a messenger or driver therefor, within this state. No child under fourteen years of age shall be employed at any work performed for wages or other compensation, to whomsoever payable, during any portion of any month when the public schools of the town, township, village, or city in which he or she resides are in session.

Sec. 2. Those who employ minors between fourteen and sixteen years of age in the places above enumerated are required to keep a register showing the name, age, and place of residence of every employee of that age.

Secs. 3-8. The general effect of these sections is that minors between the ages of fourteen and sixteen years shall not be employed, in the places above enumerated, unless the employer keeps on file an age and school certificate, the latter of which must show either that the minor can read and write, or that, if he cannot do so, he is attending a night school.

Sec. 11. No child under the age of sixteen years shall be employed at sewing belts, or to assist in sewing belts, in any capacity whatever, nor shall any child adjust any belt to any machinery; they shall not oil or assist in oiling, wiping, or cleaning machinery; they shall not operate or assist in operating circular or band saws, wood shapers, wood jointers, planers, sandpaper or wood-polishing machinery; emery or polishing wheels used for polishing metal, wood-turning or boring machinery, stamping machines in sheet metal and tinware manufacturing, stamping machines in washer and nut factories, operating corrugating rolls, such as are used in roofing factories, nor shall they be employed in operating any passenger or freight elevators, steam boiler, steam machinery, or other steam generating apparatus, or as pin boys in any bowling alleys; they shall not operate or assist in operating dough brakes, or cracker machinery of any description; wire or iron straightening machinery; nor shall they operate or assist in operating rolling mill machinery, punches or shears, washing, grinding, or mixing mill or calender rolls in rubber manufacturing, nor

¹ This provision was not repealed by *Program Co. v. Crejezyk* (1897) 125 Ill. App. 1; *Struthers v. People* (1904) 116 Ill. App. 481. § 11 of the act of May 15, 1903, which is set out below. *Jefferson Theatre*

shall they operate or assist in operating laundry machinery; nor shall children be employed in any capacity in preparing any composition in which dangerous or poisonous acids are used, and they shall not be employed in any capacity in the manufacture of paints, colors, or white lead; nor shall they be employed in any capacity whatever in operating or assisting to operate any passenger or freight elevator; nor shall they be employed in any capacity whatever in the manufacture of goods for immoral purposes, or any other employment that may be considered dangerous to their lives or limbs, or where their health may be injured or morals depraved; nor in any theater, concert hall, or place of amusement wherein intoxicating liquors are sold; nor shall females under sixteen years of age be employed in any capacity where such employment compels them to remain standing constantly. (The above statute repeals the act of June 17, 1891.)

P. 1039, § 37 (act of June 9, 1897, § 6). No child under the age of sixteen years shall be employed or permitted or suffered to work by any person, firm, or corporation in this state at such extrahazardous employment whereby its life or limb is in danger, or its health is likely to be injured, or its morals may be depraved.

P. 1438, § 32; Laws 1905, p. 326. No boy under sixteen shall be employed in or about any mines.

Mines act of April 18, 1899, § 22. No boy under the age of fourteen years, and no woman or girl of any age, shall be permitted to do any manual labor in or about any mine; and before any boy can be permitted to work in any mine, he must produce to the mine manager or operator thereof an affidavit from his parent or guardian or next of kin, sworn and subscribed to before a justice of the peace or notary public, that he, the said boy, is fourteen years of age. (Same limit of age in Laws 1879, p. 204, is amended by Laws 1887, p. 230; Starr & C. Anno. Stat. 1896, p. 2721.)²

Indiana.—Burns's Anno. Stat. § 2620 (§ 2237). Persons or companies engaged in manufacturing iron, steel, nails, metals, machinery, or tobacco, shall not employ any child under fourteen years of age. (Acts 1893, chap. 78, § 1 [1].)

Secs. 2623–2625 (§§ 2241–2243). These sections contain provisions of the same general tenor as the New York Penal Code, § 292.

Secs. 2626 (2344), 8594 (7452). Employment of boys under fourteen years of age in any underground work or mine unlawful. These two provisions are similar, but not verbatim. Earlier provisions in Laws 1891, chap. 49.

Factory act, Laws 1899, chap. 142, § 2; Burns's Anno. Stat. 1908, § 8022. No child under fourteen years of age shall be employed in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery, or printing office within this state. It is further required that every person employing young persons under the age of sixteen years shall keep a record of such employees, and it is provided that it shall be unlawful to employ any such young person without procuring an affidavit as to the age, or to employ

² On the ground that employment in a mine is "dangerous to life and limb," as it permitted the employment of children of the age of fourteen years. 187, § 11, *ante*, it has been held that *Struthers v. People* (1904) 116 Ill. App. this later enactment has impliedly re- 481.

one not blind who cannot read or write simple sentences in the English language, except during the vacation season.

Sec. 4; § 8024. No person, company, corporation, or association shall employ or permit any young person (*i. e.*, one between the age of fourteen and sixteen years) to have the care or management of any elevator.

Sec. 9; § 8029. No person under sixteen years of age, and no female under eighteen years of age, shall be allowed to clean machinery while in motion.

Iowa.—Factory act, 29 Gen. Assemb. chap. 149, § 2; Code Supp. 1902, § 4999(b); Code 1907, § 4999-a2. No person under sixteen years of age and no female under eighteen years of age shall be permitted or directed to clean machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind.

Code Supp. 1907, § 2477a. No person under fourteen years of age shall be employed with or without wages or compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughterhouse, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in the operation of any freight or passenger elevator. (31 G. A. chap. 103, § 1.)

Sec. 2477b. No person under sixteen years of age shall be employed at any work or occupation by which, by reason of its nature or the place of employment, the health of such person may be injured, or his morals depraved, or at any work in which the handling or use of gunpowder, dynamite, or other like explosive is required; and no female under sixteen years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing. (§ 2.)

Sec. 2477d. Employers required to keep lists of employees under sixteen years of age. (§ 4.)

Sec. 2477e. Penalty provided for making false statements to procure the certificate; also for employing minors in violation of the act.

Kansas.—Gen. Stat. 1909, § 5094. No child under fourteen years of age shall be at any time employed, permitted, or suffered to work in, or in connection with, any factory, workshop, not owned or operated by the parent or parents of the said child, theater or packing house, or operating elevators, or in or about any mine. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever during the hours in which the public school is in session in the district in which said child resides. Earlier enactments, Laws of 1905, chap. 278, § 1; Laws of 1883, chap. 117, § 17 (age limit twelve.)

Sec. 5096. Employers of children under sixteen in any of the occupations mentioned in § 5094 must obtain age certificate.

Sec. 4996. No child under twelve shall be employed in any coal mine, and no child under sixteen, unless he can read and write.

Kentucky.—Stat. 1909, § 3237. No child under fourteen years of age shall be employed, permitted, or suffered to work in or in connection with any factory, workshop, mine, mercantile establishment, store, business office, telegraph office, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever, during any part of the term during which the public schools

of the district in which the child resides are in session. Earlier enactment, Laws 1906, chap. 52, § 2.

Sec. 3228. Employers of children between fourteen and sixteen years of age shall procure employment certificates and keep records of such employees.

Secs. 3239-3243 provide for the procuring of the employment certificates mentioned in § 3238.

Sec. 3247. Children under sixteen not to be employed in a large number of designated employments; provisions similar in terms to the Illinois statute set out above, with the addition of the following paragraph: Nor shall any child under sixteen years of age be employed at any occupation dangerous or injurious to health or morals, or to lives or limbs; and as to these matters, the decision of the county physician or city health officer, as the case may be, shall be final. Earlier enactment, Laws 1906, chap. 52, § 3.

Sec. 3248. No person under eighteen years of age shall be allowed to clean machinery while in motion.

Sec. 3252. Provisions of the same general tenor as New York Penal Code, § 292.

Louisiana.—Wolf's Rev. Laws 1904-8, p. 414; Laws 1908, No. 301, § 1. No child under the age of fourteen years shall be permitted to work or labor in any mill, factory, mine, packing house, manufacturing establishment, workshop, laundry, millinery or dressmaking store, or other mercantile establishment in which there are more than five persons employed, or in any theater, concert hall, or in or about any place of amusement where intoxicating liquors are made or sold, or in any bowling alley, boot-blackening establishment, freight or passenger elevator, or in the transmission or distribution of messages, either telegraph or telephone, or any other messages or merchandise, or in any other occupation not enumerated which may be deemed unhealthful or dangerous. Act does not apply to agricultural or domestic industries.

Sec. 2. Children between the ages of fourteen and sixteen must procure age certificates.

Sec. 4. No boy under the age of sixteen and no girl under the age of eighteen shall be employed at any work before the hour of 6 in the morning or after the hour of 7 at night.

Sec. 6. All persons employing five or more children between the ages of fourteen and eighteen are required to keep a record of the same.

Sec. 7. Age certificates, by whom issued. Record to be kept. Evidential documents. Form of certificate.

Sec. 12. Factories employing children are required to notify the state inspector in writing.

Sec. 17. No minor shall be required to clean any part of the mill, gearing, or machinery while the same is in motion.

Maine.—Rev. Stat. 1903, chap. 40, § 52, as amended, Laws 1909, chap. 257. No child under fourteen shall be employed or work in any manufacturing, mechanical, mercantile, or other business establishment, or in any telephone or telegraph office; or in the delivery of messages during school hours. (In the Revised Statute the age was twelve.)

Sec. 53, as amended, Laws 1909, chap. 257. No child between fourteen and sixteen shall be employed in any manufacturing or mechanical establishment without producing an age certificate; if under fifteen, he must also produce a

schooling certificate; if over fifteen, he must also produce a school certificate if it is at a time that the schools are in session.

Sec. 54. Employers required to procure and keep age certificates.

Laws 1907, chap. 4, § 1. No child under fifteen shall have the care of or operate any elevator; and no child under eighteen shall have the care of or operate any elevator with a speed of over 200 feet a minute.

Maryland.—Pub. Gen. Laws 1904, p. 2126, § 4. Owners of mills or factories (other than those for canning) are prohibited from employing a minor under fourteen years, unless he is the sole support of a widowed mother, or an invalid father, or is solely dependent upon such employment for his support.

Code Supp. 1906, p. 174, § 4 (Laws 1906, chap. 192). No children under twelve, except in the counties from June 1st to October 15th in every year, shall be employed in any mill, factory, workshop, office, restaurant, hotel, apartment house, store, telephone or telegraph office, or any other establishment or business.

Sec. 5. No child between twelve and sixteen shall be employed in any office, establishment, or business mentioned in the preceding section without an employment permit showing the age of the child.

Pub. Gen. Laws 1904, p. 1443, § 98; Laws 1902, chap. 291, § 86c. No minor shall be employed to sell or dispense liquor.

P. 884, § 318; Laws 1900, chap. 334, § 208a. Provisions of the same general tenor as the New York Penal Code, § 292, but the age limit is fixed at fourteen.

P. 885, § 320; Laws 1902, chap. 506. No minor under sixteen shall be employed to handle liquor.

P. 885, § 322; Laws 1890, chap. 6. No person engaged in any business upon or near a street, and not having a fixed store, shop, or place of business, shall have in his possession or company while so engaged any boy or girl under the age of eight years.

Massachusetts.—Laws 1905, chap. 267. No child under the age of fourteen years, and no child over fourteen and under sixteen, who does not have an employment certificate, shall be employed in any factory, workshop, or mercantile establishment. No child under the age of fourteen years shall be employed during the hours when the public schools are in session, or before 6 o'clock in the morning, or after 7 in the evening. Earlier enactment, see Rev. Laws 1902, chap. 106, §§ 28–32.

Rev. Laws 1902, § 5. While a public evening school is maintained in the city or town in which any minor who is over fourteen years of age, and who cannot read at sight and write legibly simple sentences in the English language, resides, no person shall employ him, and no parent, guardian, or custodian shall permit him to be employed, unless he is a regular attendant at such evening school or at a day school; but, upon presentation by such minor of a certificate signed by a registered practising physician, and satisfactory to the superintendent of schools, or, if there is no such superintendent, to the school committee, showing that his physical condition would render such attendance in addition to daily labor prejudicial to his health, said superintendent or school committee shall issue a permit authorizing the employment of such minor for such period as said superintendent or school committee may determine. Said superintendent or school committee, or teachers acting under authority thereof,

may excuse any absence from such evening school which arises from justifiable cause.

Sec. 43. Whoever employs or permits a child under fifteen years of age to have the care, custody, management, or operation of an elevator, or employs or permits a child under eighteen years of age to have the care, custody, management, or operation of an elevator running at a speed of over 200 feet a minute, shall be punished by a fine.

Sec. 45. No person shall employ, exhibit, or sell, apprentice or give away, a child under fifteen years of age, for the purpose of employing or exhibiting him in dancing on the stage, playing on musical instruments, singing, walking on a wire or rope, or riding or performing as a gymnast, contortionist, or acrobat in a circus, theatrical exhibition, or in any public place, or cause, procure, or encourage such child to engage therein; but the provisions of this section shall not prevent the education of children in vocal and instrumental music or dancing, or their employment as musicians in a church, chapel, school, or school exhibition, or prevent their taking part in any festival, concert, or musical exhibition upon the special written permission of the mayor and aldermen of a city or of the selectmen of a town.

Sec. 46. A license shall not be granted for a theatrical exhibition or public show in which children under fifteen years of age are employed as acrobats or contortionists or in any feats of gymnastics or equestrianism, or in which such children who belong to the public schools are employed or allowed to take part as performers on the stage in any capacity, or if, in the opinion of the board authorized to grant licenses, such children are employed in such a manner as to corrupt their morals or impair their health; but the provisions of this section shall not prevent the granting of special permission authorized by the preceding section.

Sec. 8. "Young person" means a person over the age of fourteen years, and under the age of eighteen.

Laws 1902, chap. 350, § 1. All freight and passenger elevators running at a speed of more than 100 feet a minute shall be operated by competent persons not less than eighteen years of age, and no other person shall have the care or charge of such an elevator.

Sec. 2. No freight or passenger elevator shall be operated by or placed in charge of any persons under sixteen years of age.

Michigan.—Pub. Laws, 1907, No. 169, § 2. No child under the age of twenty-one years shall be employed, permitted, or suffered to work in any theater, concert hall, or place of amusement where intoxicating liquors are sold, and no child under the age of fourteen years shall be employed in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, passenger or freight elevator, factory or workshop, telegraph or messenger service within this state. Employers of children under the age of sixteen shall procure an age certificate. For the earlier enactments, see factory act 1889, § 2; act May 27, 1893, chap. 126; act April 24, 1897, chap. 92; act May 17, 1899, chap. 77; Pub. Laws 1901, No. 113, § 2; Pub. Laws 1905, chap. 171, § 2.

Sec. 3. No male under the age of eighteen years shall be employed at an employment whereby his life or limbs shall be endangered, or health likely to be injured, or his morals may be depraved, and no such male shall be allowed to clean machinery in motion. (There was a similar provision in the act of 1889.)

Factory act 1889, § 4. Factory inspectors shall have power to demand from the county physician a certificate of the physical fitness of any child under sixteen years of age, and to prohibit the employment of any child who cannot obtain such a certificate. (This provision has apparently not been repealed by the act of 1907.)

Minnesota.—Rev. Laws 1909, § 1811-1; Laws 1907, chap. 299. No child under fourteen years of age shall be employed at any time in or in connection with any factory, mill, or workshop, or in or about any mine; and it shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever, during any part of the term during which the public schools of the district in which the child resides are in session. (The earlier enactments are found in Laws 1895, chap. 171, as amended by Laws 1897, chap. 360; Rev. Laws 1905, §§ 1804 *et seq.*)

Sec. 1811-2. No child between the ages of fourteen and sixteen shall be employed in any business or service during any part of the term in which the public schools are in session without an employment certificate.

Sec. 1811-11. Employment of children under sixteen in a large number of occupations prohibited. Provisions similar in terms to the Illinois statute set out above, with the addition of the following proviso:

Provided, that in any action brought against an employer of any child under sixteen years of age, on account of injuries sustained by the child while so employed, if the employer shall have obtained, and kept on file in like manner as herein provided for employment certificates, an affidavit of the parent or guardian, stating in substance that the child is not less than sixteen years of age, such employment shall not be deemed a violation of this act. Any person employing any child in violation of the provisions of this section shall be guilty of a gross misdemeanor.

Rev. Laws 1905, § 1806. No person shall employ or permit any child under the age of sixteen years to have the care, management, or operation of any elevator, or permit any minor under eighteen years to manage or operate any elevator capable of running over two hundred feet a minute (Laws 1895, chap. 171, § 6).

Sec. 4939; Laws 1899, chap. 33. Employment of minors prohibited; provisions of the same general tenor as § 292 of the New York Penal Code.

Mississippi.—Laws 1908, chap. 99, § 1. No children under the age of twelve years shall be employed or permitted to work in any mill, factory, or manufacturing establishment.

3. Unlawful to employ a child under the age of sixteen years, without first requiring him to present the affidavit of the parent, guardian, or person standing in the parental relation to him, stating the place and date of his birth, and certain particulars as to his schooling.

Missouri.—Rev. Laws 1909, § 1715. No child under the age of fourteen years shall be employed, permitted, or suffered to work at any gainful occupation in any theater, concert hall, or in or about any place of amusement where intoxicating liquors are sold, or in any manufacturing establishment, laundry, bowling alley, freight elevator, factory, or workshop within this state, nor in any store or mercantile establishment in which more than ten persons are employed; nor in the transmission or distribution of messages or merchandise. The provisions

of this section shall apply only in cities of ten thousand inhabitants or more. (Laws 1907, p. 86, superseding Laws 1897, p. 143)

Sec. 1717. It is unlawful for any person to employ in any of the designated occupations a minor between fourteen and sixteen, without keeping a record thereof, and procuring and keeping on file an age certificate.

Sec. 1719. No child under sixteen years of age, and over fourteen years of age, shall be employed in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, theater, concert hall, or place of amusement, factory or workshop, passenger or freight elevator, or in any messenger or express service, or as messenger or driver therefor, unless there is first produced and placed on file in such mercantile institution, etc., an age certificate.

Sec. 1720. State factory inspector authorized to issue age certificates.

Sec. 1721. Evidence which is to be furnished regarding age; form of age certificate.

Sec. 1723. No child under the age of sixteen years shall be employed to adjust any belt to any machinery, or to oil or assist in oiling, wiping, or cleaning machinery; nor shall any such child operate or assist in operating circular or band saws, wood shapers, wood jointers, planers, sandpaper or wood-polishing machinery, emery or polishing wheels used for polishing metal, wood-turning or boring machinery, stamping machines in sheet metal and tinware manufacturing, stamping machines in washer and nut factories, operating corrugating rolls, such as are used in roofing factories; nor shall they be employed in operating any steam boiler, steam machinery, or other steam generating apparatus; they shall not operate or assist in operating dough brakes, or cracker machinery of any description; wire or iron straightening machinery; nor shall they operate or assist in operating rolling-mill machinery, punches or shears, washing, grinding, or mixing mill or calender rolls in rubber manufacturing; nor shall they operate or assist in operating laundry machinery; nor shall such children be employed in any capacity in preparing any composition in which dangerous or poisonous acids are used; and they shall not be employed in any capacity in the manufacture of paints, colors, or white lead; nor shall they be employed in any capacity whatever in the manufacture of goods for immoral purposes, or any other employment that may be considered dangerous to their lives or limbs, or where their health may be injured or morals depraved; nor in any messenger or express service, which requires them to carry messages or merchandise to or from houses of ill fame, nor in any theater, concert hall, or place of amusement wherein intoxicating liquors are sold. (Laws 1907, p. 86.)

Sec. 4741. Provisions of the same general tenor as § 292 of the New York Penal Code. Age limit fixed at fourteen years.

Sec. 4744. No child under the age of fourteen years shall be employed in any manufacturing or mechanical establishment in this state wherein steam, water, or any other mechanical power is used in the manufacturing process carried on therein, or where the work to be done by such child would, in the opinion of two reputable physicians in the locality where such work is to be done, be dangerous to the health of such child. (Rev. Stat. 1899, § 2189.)

Sec. 7829. No minor or woman shall be required to clean any part of the mill, gearing, or machinery while it is in motion in such establishment, nor [shall any minor under the age of sixteen years be] required to work between the fixed and

traversing or the traversing parts of any machine while it is in motion by the action of steam, water, electricity, or other mechanical power; and no woman shall be required to work between the fixed and traversing or the traversing parts of any such machine, except the machine being operated by her. (Rev. Stat. 1899, § 6434, as amended by law, 1909, p. 502, inserting words in brackets.)

Sec. 8456. No male person under the age of fourteen years, or female of any age, shall be permitted to enter any mine to work therein; nor shall any boy under the age of sixteen years, unless he is able to read and write, be allowed to work in any mine.

Sec. 10,903. No child between eight and fourteen years of age shall be employed in any mine, factory, workshop, mercantile establishment, or in any other manner, during the usual school hours, unless the person employing him shall first procure a certificate from the superintendent or teacher of the school he attended, stating that such child attended school for the period required by law, or has been excused from attendance, as provided in § 10,897; and it shall be the duty of such superintendent or teacher to furnish such certificate upon application of the parent, guardian, or other persons having control of such child entitled to the same. (Laws 1905, p. 146.)

Sec. 10,913. No child between the ages of fourteen and sixteen shall be employed or be engaged in service in any mine, factory, workshop, business house, place of amusement, or in any other place or manner, who has not first furnished his employer a properly attested birth certificate, or an affidavit, as provided for in § 10,909, giving the date of birth and physical characteristics, and the signature of the child. (Laws 1907, p. 428.)

Montana.—Rev. Codes 1907, § 966. No child under fourteen years of age shall be employed or be in the employment of any person, company, or corporation during the school term and while the public schools are in session, unless such child shall present to such person, company, or corporation an age and schooling certificate herein provided. (Act March 3d, 1903, § 2.)

Sec. 967. No person shall employ any such minor during the time schools are in session, and, having such minor in their employ, shall immediately cease such employment upon notice from the truant officer.

Sec. 1746. Any person, company, firm, association, or corporation, or any agent, officer, foreman, or other employee having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any mine, mill, smelter, workshop, factory, steam, electric, hydraulic, or compressed air railroad, or passenger or freight elevator, or where any machinery is operated, or for any telegraph, telephone, or messenger company, or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may be in any way detrimental to the morals of said child, shall be guilty of a misdemeanor. (Act March 5, 1907, § 1.)

Sec. 1752. Provisions similar to those in § 1746, but applicable to mines only.

Nebraska.—Comp. Stat. 1911, § 3793a. No child under fourteen years of age shall be employed, permitted, or suffered to work in, or in connection with, any theater, concert hall, or place of amusement, or any place where intoxicating liquors are sold, or in any mercantile institution, store, office, hotel, laundry, manufacturing establishment, bowling alley, passenger or freight elevator, factory

or workshop, or as a messenger or driver therefor, within this state. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever during the hours when the public schools of the town, township, village, or city in which the child resides are in session. (1907, H. R. 9, § 1.)

Sec. 3793b. No child between fourteen and sixteen years of age shall be employed, permitted, or suffered to work in any of the places designated above unless the person or corporation employing him procures and keeps on file, and accessible to the proper public officer, an employment certificate.

Sec. 3793m. No child under the age of sixteen years shall be employed in any work which, by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health may be injured or its morals may be depraved.

For the earlier provisions see Laws 1899, chap. 108. See also Comp. Stat. 1911, § 7914j.

New Hampshire. Laws 1901, chap. 6. The following provisions supersede those of the corresponding number of Pub. Stat. chap. 93.

Sec. 10. No child under the age of twelve years shall be employed in any manufacturing establishment. No child under the age of fourteen years shall be employed in any manufacturing establishment, nor in any mechanical, mercantile, or other employment during the time in which the public schools are in session in the district in which he resides.

Sec. 11. No child under the age of sixteen years shall be employed in any manufacturing establishment, or in any mechanical, mercantile, or other employment, during the time in which the public schools are in session in the district in which he resides, without first presenting a statement of his age from his parent or guardian, sworn to before the superintendent of schools, or, if there is no superintendent of school, by some person authorized by the school board of the district in which such child is employed. And no child under the age of sixteen years shall be employed as aforesaid during the time in which the public schools are in session in the district in which he resides without first presenting a certificate from the superintendent of schools, or, if there is no superintendent of schools, some person authorized by the school board, that such child can read at sight and write legibly simple sentences in the English language.

Sec. 12. No minor shall be employed in any manufacturing establishment, or in any mechanical, mercantile, or other employment, who cannot read at sight and write legibly simple sentences in the English language, while a free public evening school is maintained in the district in which he resides, unless he is a regular attendant at such evening school or at a day school; provided, that upon presentation by such minor of a certificate signed by a regular practising physician, and satisfactory to the superintendent of schools, or, where there is no superintendent of school, the school board, showing that the physical condition of such minor would render such attendance in addition to daily labor prejudicial to his health, said superintendent of schools or school board shall issue a permit authorizing the employment of such minor for such period as said superintendent of schools or school board may determine.

Pub. Stat. 1901, chap. 265, § 3. Employment of children under fourteen in public shows is prohibited.

New Jersey.—Comp. Stat. 1910, p. 3023. No child under the age of fourteen years shall be employed, allowed, or permitted to work in any factory, workshop, mill, or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent, parents, or custodian of any child who shall violate any of the provisions of this section shall be liable to a penalty of \$50 for each offense. (P. L. 1904, p. 152, § 1.) Earlier enactment, Gen. Stat. 1896, p. 1900, § 11.

P. 3023-4. If at the time of the employment of a child, the proofs of age specified in subdivisions I. and II. of this section are filed with the corporation, firm, or person employing the child, such proofs shall be conclusive evidence of the age of child in a suit against such employer for a violation of § 1. (§ 3.)

P. 3028. Children under sixteen shall not be permitted to clean moving machinery. (§ 21.)

P. 3040. Employers of minors in factories, etc., to keep register of children under sixteen. (Pub. L. 1907, p. 552.)

P. 2816. Children under fifteen shall not be employed in vocations injurious to morals. (P. L. 1880, p. 124, § 2.)

Children under eighteen shall not be employed for mendicant purposes. (§ 3.)

Children under fifteen shall not be employed in dance houses, concert saloons, or theaters. (§ 4.)

Children under twelve shall not be employed in mines. (§ 5.)

P. 2520; Pub. Laws 1903, p. 100. Children under eighteen prohibited from working in bakeries between 7 P. M. and 7 A. M. (Similar provision in P. L. 1905, p. 206; Comp. Stat. 1910, p. 3037.)

New York.—Labor law 1909, § 70 (Laws 1897, chap. 415, as enacted by Laws 1903, chap. 184). No child under the age of fourteen years shall be employed, permitted, or suffered to work in any factory. No child between the ages of fourteen and sixteen years shall be so employed, unless an employment certificate, issued as provided in § 71, shall have been filed in the office of the employer at the place of the employment of such child.

Sec. 71. The official designated for issuing the certificate forbidden to issue it until he has received, examined, approved, and filed the various papers enumerated. (As amended, Laws 1912, chap. 333.)

Sec. 72. Such certificate shall state the date and place of birth of the child, if known, and describe the color of the hair and eyes, the height and weight, and any distinguishing facial marks of such child, and that, in the opinion of the officer issuing such certificate, such child is upwards of fourteen years of age, and is physically able to perform the work which he intends to do.

Sec. 73. The school record required by this article shall be signed by the principal or chief executive officer of the school which such child has attended, and shall be furnished, on demand, to a child entitled thereto, or to the board, department, or commissioner of health. It shall contain a statement certifying that the child has regularly attended the public schools, or schools equivalent thereto, or parochial schools, for not less than one hundred and thirty days during the twelve months next preceding his fourteenth birthday, or during the twelve months next preceding his application for such school record, and is able to read and write simple sentences in the English language, and has received during such period instruction in reading, spelling, writing, English grammar, and geography, and is familiar with the fundamental operations of arithmetic up to and including

tractions. Such school record shall also give the date of birth and residence of the child, as shown on the records of the school, and the name of its parent or guardian or custodian.

Sec. 76. Each person owning or operating a factory, and employing children therein, shall keep or cause to be kept in the office of such factory, a register, in which shall be recorded the name, birthplace, age, and place of residence of all children so employed under the age of sixteen years.

Sec. 81. No male person under eighteen years, or woman under twenty-one years of age, shall be permitted or directed to clean machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machines of any kind. (Laws 1897, chap. 415, as amended by Laws 1899, chap. 192.)

Sec. 93. No child under the age of sixteen years shall be employed or permitted to work in operating or assisting in operating any of the following machines: Circular or band saws, wood shapers, wood jointers, planers, sandpaper or wood-polishing machinery; picker machines or machines used in picking wool, cotton, hair, or any upholstery material; paper lace machines; burnishing machines in any tannery or leather manufactory; job or cylinder printing presses having motive power other than foot; woodturning or boring machinery; stamping machines used in sheet metal and tinware manufacturing, or in washer and nut factories; machines used in making corrugating rolls; steam boilers; dough brakes or cracker machinery of any description; wire or iron straightening machinery; rolling-mill machinery, power punches or shears; washing, grinding, or mixing machinery, calender rolls in rubber manufacturing, or laundering machinery.

No child under the age of sixteen years shall be employed or permitted to work at adjusting or assisting in adjusting any belt to any machinery; oiling or assisting in oiling, wiping, or cleaning machinery; or in any capacity in preparing any composition in which dangerous or poisonous acids are used; or in the manufacture or packing of paints, dry colors, or red or white lead; or in dipping, dyeing, or packing matches; or in the manufacture, packing, or storing of powder, dynamite, nitroglycerin compounds, fuses, or other explosives; or in or about any distillery, brewery, or any other establishment where malt or alcoholic liquors are manufactured, packed, wrapped, or bottled; and no female under the age of sixteen shall be employed or permitted to work in any capacity where such employment compels her to remain standing constantly. No child under the age of sixteen years shall be employed or permitted to have the care, custody, or management of or to operate an elevator, either for freight or passengers. No person under the age of eighteen years shall be employed or permitted to have the care, custody, or management of or to operate an elevator, either for freight or passengers, running at a speed of over 200 feet a minute. No male person under eighteen years or woman under twenty-one years of age shall be permitted or directed to clean machinery while in motion. No male child under the age of eighteen years, nor any female, shall be employed in any factory in this state in operating or using any emery, tripoli, rouge, corundum, stone, carborundum, or any abrasive, or emery polishing or buffing wheel, where articles of the baser metals or of iridium are manufactured. (Thus amended by Laws 1909, chap. 299) (this provision supersedes the provisions in labor law 1897, § 79 [children under fifteen not to operate elevators], and § 81 [machinery

in motion not to be cleaned by males under eighteen nor females under twenty-one]).

Sec. 162 (as amended, Laws 1911, chap. 866). No child under the age of fourteen years shall be employed or permitted to work in or in connection with any mercantile or other business or establishment. No child under the age of sixteen shall be so employed or permitted to work without the procurement of an employment certificate.

Secs. 163 (employment certificate), 164 (contents of certificate), 165 (school record), 167 (registry). These provisions resemble the corresponding ones which relate to the employment of children in factories.

Sec. 171. Children shall not be employed or directed in work in the basement of a mercantile establishment, unless permitted by the health authorities.

Sec. 220. No male child under ten and no girl under sixteen shall, in any city of the first or second class, sell newspapers, etc., in any street or public place.

Penal Code, § 292. A person who employs or causes to be employed, or who exhibits, uses, or has in custody, or trains for the purpose of the exhibition, use, or employment of, any child actually or apparently under the age of sixteen years, . . . either (1) as a rope or wire walker, gymnast, wrestler, contortionist, rider, or acrobat; or upon any bicycle or similar mechanical vehicle or contrivance; or, (2) in any mendicant occupation; or in gathering or picking rags, or collecting cigar stumps, bones, or refuse from markets; or in peddling; or (3) in singing; or dancing; or playing upon a musical instrument; or in a theatrical exhibition; or in any wandering occupation; or (4) in any illegal, indecent, or immoral exhibition or practice; or in the exhibition of any such child when insane, idiotic, or when presenting the appearance of any deformity or unnatural physical formation or development; or (5) in any practice or exhibition or place dangerous or injurious to the life, limb, health, or morals of the child,—is guilty of a misdemeanor. But this section does not apply to the employment of any child as a singer or musician in a church, school, or academy; or in teaching or learning the science or practice of music; or as a musician in any concert or in a theatrical exhibition, with the written consent of the mayor of the city, or the president of the board of trustees of the village where such concert or exhibition takes place.³

The above section of the Penal Code has been held to have repealed by implication the earlier enactment in *pari materia*, Laws 1876, chap. 122, §§ 1, 2, as amended by Laws 1884, chap. 48.⁴

Sec. 292a. Penalty for sending messenger boys to certain places—a corporation or person employing messenger boys who: 1. Knowingly places or permits to remain in a disorderly house, or in an unlicensed saloon, inn, tavern, or other unlicensed place where malt or spirituous liquors or wines are sold, any instrument or device by which communication may be had between such disorderly house, saloon, inn, tavern, or unlicensed place, and any office or place of business of such corporation or person; or, 2. Knowingly sends or permits any person to send any

³ Pronounced constitutional in *People v. Ewer* (1894) 141 N. Y. 129, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4, affirming (1893) 70 Hun, 239, 24 N. Y. Supp. 500.

⁴ *Ryan v. Buchanan* (1885) 37 Hun,

425. The court relied both upon the ground that the two provisions were inconsistent, and that the more recent formed a part of a body of laws designed to regulate completely the subject-matter with which it dealt.

messenger boy to any disorderly house, unlicensed saloon, inn, tavern, or other unlicensed place where malt or spirituous liquors or wines are sold, on any errand or business whatsoever, except to deliver telegrams at the door of such house, is guilty of a misdemeanor, and incurs a penalty of \$50, to be recovered by the district attorney. Added Laws 1893, chap. 692; takes effect October 1, 1893.

Laws 1903, chap. 459, § 4. Education act. It shall be unlawful for any person, firm, or corporation to employ any child under fourteen years of age in any business or service whatever during any part of the term during which the public schools are in session.⁵

Sec. 5. Persons and corporations are forbidden to employ children under fourteen years of age during the school term, unless it is shown by an official certificate that they have satisfied certain educational conditions and requirements.

North Carolina.—Pell's Revisal 1908, § 1981a (Laws 1907, chap. 463, § 1). After January 1, 1908, no child under twelve years of age shall be employed or work in any factory or manufacturing establishment within the state.

Sec. 1981b (§ 1). After the same date no child between the ages of twelve and thirteen years shall be employed in a factory except in apprenticeship capacity, and then after having attended school four months in the preceding year.

Sec. 1981d (§ 3). Parents are required, upon hiring their children to any factory or manufacturing establishment, to furnish a written statement of the age of the child.

Sec. 1918e (§ 4). No boy or girl under fourteen years of age shall work in a factory between the hours of 8 P. M. and 5 A. M.

Sec. 3364 (§ 3). If any parent or person standing in the relation of parent, upon hiring his children to any factory or manufacturing establishment, shall fail to furnish such establishment a written statement of the age of such child or children so being hired, and if any such parent or person standing in the relation of parent to such child or children shall in such written statement misstate the age of such child or children being so employed, he shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court.

Sec. 3362 (Acts 1903, chap. 473, § 1; Revisal 1905, § 3362). If any mill owner, superintendent, or other person acting in behalf of a factory or manufacturing establishment, shall knowingly and wilfully employ any child under twelve years of age to work in any factory or manufacturing establishment, except in oyster canning and packing manufactories where said canning and packing manufactories pay for opening or shucking oysters by the gallon or bushel, he shall be guilty of a misdemeanor.

Sec. 4931 (Laws 1897, chap. 252, § 7). No minor under twelve years of age shall be allowed to work in any mine.

North Dakota.—Laws 1909, chap. 153, § 1. No child under fourteen years of age shall be employed, permitted, or suffered to work in or in connection with any mine, factory, work shop, mercantile establishment, store, business office, telegraph office, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages. It shall be unlawful for any person, firm,

⁵ Pronounced constitutional in *New N. Y.*, 1904) 43 Misc. 266, 88 N. Y. *York v. Chelsea Jute Mills* (Mun. Ct. Supp. 1085).

or corporation to employ any child under fourteen years of age in any business or service whatever, during any part of the term during which the public schools of the district in which the child resides are in session.

Sec. 2. Employers of children between fourteen and sixteen are required to procure an employment certificate, and to keep lists of such children employed.

Sec. 9. Employment. No child under the age of sixteen years shall be employed at sewing belts, or to assist in sewing belts, in any capacity whatever; nor shall any child adjust any belt to any machinery; they shall not oil or assist in oiling, wiping, or cleaning machinery; they shall not operate or assist in operating circular or hand saws, wood shapers, wood joiners, planers, sandpaper or wood-polishing machinery, emery or polishing wheels used for polishing metal, wood-turning or boring machinery, stamping machines in sheet metal and tinware manufacturing, stamping machines in washer and nut factories, operating corrugating rolls, such as are used in roofing factories, nor shall they be employed in operating any steam boiler, steam machinery, or other steam generating apparatus, or as pin boys in any bowling alleys; they shall not operate or assist in operating dough brakes, or cracker machinery of any description; wire or iron straightening machinery; nor shall they operate or assist in operating rolling-mill machinery, punches or shears, washing, grinding, or mixing mill or calender rolls in rubber manufacturing; nor shall they operate or assist in operating laundry machinery; nor shall children be employed in any capacity in preparing any composition in which dangerous or poisonous acids are used, and they shall not be employed in any capacity in the manufacture of paints, colors, or white lead; nor shall they be employed in any capacity whatever in operating or assisting to operate any passenger or freight elevator; nor shall they be employed in any capacity whatever in the manufacture of goods for immoral purposes, or any other employment that may be considered dangerous to their lives or limbs, or where their health may be injured or morals depraved; nor in any theater, concert hall, or place of amusement wherein intoxicating liquors are sold; nor shall females under sixteen years of age be employed in any capacity where such employment compels them to remain standing constantly.

Sec. 10. Violators of act declared to be guilty of misdemeanor.

For the earlier statutes as to child labor, see N. D. Rev. Codes 1905, §§ 897-899.

Ohio.—Gen. Code 1910, § 929 (§ 302). Mine agent to keep record of minors employed.

Sec. 928 (Bates's Anno. Stat. 1902, § 302, as amended, Laws 1900, p. 181). No child under fourteen shall be allowed to work in a mine; nor any child under fifteen during the school year.

Sec. 7765 (Bates's Anno. Stat. § 4022-2). No child under sixteen years of age shall be in the employment of any person during the school term, unless he presents to such person an age and school certificate.

Sec. 12,968 (Bates's Anno. Stat. 1902 [Everett's ed.] § 6984. Employment of children for the purpose of certain public exhibitions and performances, or in any vocation injurious to their lives or health or morals, is forbidden. This provision is similar in character to the New York enactment on the same subject.

Sec. 12,972. Children under sixteen years of age shall not be employed in occupations dangerous to life or limb of the child, or injurious to its health, or depraving to its morals.

Sec. 12,976. Children between the ages of fourteen and sixteen years of age who cannot read and write the English language are not to be employed during such time as the public or parochial school is in session in the school district in which said minor resides.

Secs. 12,993 *et seq.* (Laws 1908, p. 30, § 1). No person, firm, company, or corporation operating a factory, workshop, business office, telephone, or telegraph office, restaurant, bakery, hotel, apartment house, mercantile or other establishment shall at any time employ, permit, or suffer a child under the age of fourteen years to work in or in connection with any of the aforesaid establishments, now in the distribution or transmission of merchandise or messages; nor shall a child between fourteen and sixteen years of age be employed, permitted, or suffered to work in or in connection with any of the aforesaid establishments, now in the distribution or transmission of merchandise or messages, without first procuring from the proper authority the age and schooling certificate prescribed by law. In case of doubt as to the physical fitness of a boy under sixteen or a girl under eighteen, the inspector shall require a certificate signed by the medical officer of the board of health, certifying that the child is in sound health and physically capable of the work he is required to do. This provision supersedes Bates's Anno. Stat. 1902, § 6986-7.

This certificate is to be kept on file for production upon request of a factory inspector.

Sec. 13,001. Provisions relative to the employment of children under sixteen, of the same general tenor as those set out in the Illinois statute above.

Sec. 13,002. Whoever employs or permits a child under sixteen years of age to work in any capacity in the preparation of a compound in which dangerous or poisonous acids are used; in the manufacturing of paints, colors, or white lead; in the manufacturing, packing, or storing of powder, dynamite, nitroglycerin compounds, fuses, or other explosives; or in dipping, dyeing, or packing matches, shall be fined not less than \$25, nor more than \$50. (99 v. 31, 32, §§ 2, 3.)

Sec. 13,003. Whoever employs or permits a child under sixteen years of age to work at the manufacture of goods for immoral purposes, or in or about a distillery, brewery, or other establishment where malt or alcoholic liquor is manufactured, packed, wrapped, or bottled, or in a hotel, theater, concert hall, drug store, saloon, or place of amusement where intoxicating liquor is sold, or in assorting, manufacturing, or packing tobacco, or as a pin boy in a bowling alley, shall be fined not less than \$25 nor more than \$50. (99 v. 31, 32, §§ 2, 3.)

Sec. 13,005. Females under sixteen years of age not to be employed in any capacity where such employment compels them to remain constantly standing (Laws 1908, p. 30, § 2.)

Oklahoma.—Comp. Laws 1909, § 629 (act of March 2, 1909). Children under fourteen prohibited from working in any factory, factory workshop, theater, bowling alley, pool room, steam laundry, or any occupation injurious to health or morals, or especially hazardous to life or limb.

Sec. 630. No child under the age of sixteen years shall be employed, permitted, or suffered to work at any of the following occupations: Oiling or assisting in oiling, operating, wiping, or cleaning any dangerous machinery, or adjusting any belt to any such machinery, while in motion; operating, or assisting in operating, circular or band saws; steam boilers, steam machinery, or other steam generating

apparatus; rolling-mill machinery, punches, or shears; washing, grinding, or mixing mills; passenger or freight elevators; preparing any composition in which dangerous or poisonous acids are used; manufacture of paints, colors, or white lead; where there are acids, dyes, lyes, gases, glass dust or other dust or lint in such quantities as to be injurious to health; dipping, dyeing, or packing matches; manufacturing, packing, or storing powder, dynamite, nitroglycerin compounds, fuses, or other explosives; manufacture of goods for immoral purposes; nor shall females under the age of sixteen years be employed in any capacity where such employment compels them to remain standing constantly.

Sec. 631. No child under the age of sixteen shall be employed or permitted or suffered to work underground in any mine.

Sec. 632. No girl under the age of sixteen years shall in any city sell newspapers, magazines, or periodicals in any street or out-of-doors public place.

Sec. 633. No child under the age of sixteen shall be permitted to work in any of the occupations specified in § 629, unless such child is able to read and write simple sentences in English, or shall have attended school during the preceding year for the time that attendance is compulsory.

Sec. 635. No boy under sixteen and no girl under eighteen shall be permitted to work in any of the occupations mentioned in § 629 between the hours of 6 P. M. and 7 A. M.

Secs. 636-640. Provide for the procurement of schooling certificates for children under sixteen years of age.

Sec. 634. Seats must be prepared for children under sixteen, so far as the occupation allows.

Sec. 4025 (Laws of 1907-8, p. 507). Employers of children required to keep registers thereof.

Sec. 4030 (Laws of 1907-8, p. 509). No child under the age of fifteen years shall be permitted to have the care or management or operate an elevator in a factory or in any other institution where a freight elevator is operated.

Sec. 4402. Boys under the age of sixteen years shall not be employed underground in the operation of mines.

Oregon.—Gen. Laws 1910, § 5023 (Laws 1905, chap. 208, § 2). No child under fourteen years of age shall be employed in any factory, store, workshop, in or about any mine, or in the telegraph, telephone, or public messenger service.

Sec. 5024 (§ 3). No child under the age of fourteen years shall be employed in any work, or labor of any form, for wages or other compensation, to whomsoever payable, during the hours when the public schools of the town, district, or city in which he or she resides are in session.

Sec. 5025 (§ 4). Attendance at school shall be compulsory upon all children between the ages of eight and fourteen years in all cities, towns, and villages of the state of Oregon, during the whole of the school term in the city, town, or village in which the child resides, and upon all children, in such cities, towns, and villages, between the ages of fourteen and sixteen years, who are not employed in some lawful work.

Sec. 5027 (§ 6). Schooling certificate to be kept by the employer.

Sec. 5062. No person, firm, or corporation shall employ or allow any person under the age of eighteen (18) years to run, operate, or have charge of, any elevator used for the purpose of carrying either persons or property. (Laws 1909, chap. 54, p. 103, § 1.)

Pennsylvania.—Purdon's Dig. p. 1875, infants' act, §§ 12 *et seq.*; Laws 1879, P. L. 142, §§ 3 *et seq.*; Laws 1901, No. 163. Provisions relating to the employment of children in occupations harmful to morals, or hazardous to their life or limb, of the same general tenor as those of New York Penal Code, § 292.

Purdon's Dig. Supp. 1905-1909, p. 5482, factory act, § 2; Acts 1905, P. L. 352, § 2. No child under the age of fourteen years shall be employed in any establishment. This enactment superseded the act of 1901, P. L. 322, § 2, whereby it was provided that no child under thirteen years of age shall be employed in any factory, manufacturing, or mercantile industry, laundry, workshop, renovating works, or printing office; for still earlier enactments, see Laws 1893, No. 244, and Laws 1897, No. 26.

P. 5483, § 6; Laws 1905, P. L. 352, § 5. No minor under sixteen years of age shall be permitted to clean or oil machinery while in motion, or to operate or otherwise have care or custody of any elevator or lift.

A similar provision was contained in Acts 1901, P. L. 322, § 8; for earlier provision, see Laws 1893, chap. 83, § 1 (age limit fourteen).

P. 5483, § 7; Laws 1905, P. L. 352, § 5). Employers in factories of children between fourteen and sixteen years of age must procure employment certificates.

This and the succeeding section supersede § 3 of the act of May 29, 1901.

P. 5483, § 9; § 6. The certificate of employment is not to be issued until the person authorized to issue it obtains from the parent, guardian, or custodian of the child an affidavit stating the age and date and place of birth of the child, and also a certificate of the child's birth as recorded by any public authority, or ascertained from other specified sources of information.

P. 5605, infants law, § 14; Laws 1909, P. L. 283, § 1. Minors under eighteen years of age are prohibited from being employed, except as provided in the article, in or about or for any factory, work-shop, rolling mill, sawmill, quarry, laundry, store, mercantile, printing or binding establishment, dock, wharf, vessel, or boat engaged in lake or river navigation or commerce, railroad, in the erection and repair of electric wires, business office, telegraph office, telephone office, stable, garage, hotel, restaurant, bootblack stand, or the transmission of newspapers, messages, or merchandise.

P. 5605, § 15. Minors under eighteen are absolutely prohibited from being employed in or about blast furnaces, tanneries, docks, wharves, quarries; in the outside erection and repair of electric wires; in the running or management of elevators, lifts, or hoisting machines; in oiling hazardous or dangerous machinery in motion; at switch tending, gate tending, track repairing; as brakeman, fireman, engineer, motorman, conductor, upon railroads; as pilots, fireman, or engineers upon boats or vessels engaged in the transportation of passengers or merchandise; in or about establishments where nitroglycerin and other high or dangerous explosives are manufactured, compounded, or stored.

P. 5605, § 16; § 3. Minors over the age of sixteen years may be employed in establishments for the manufacture or preparation of white lead, red lead, paints, phosphorus, phosphorus matches, poisonous acids, or for the manufacture or stripping of tobacco and cigars.

P. 5606, § 17; § 4. Minors over the age of fourteen years who can read and write English may be employed in mercantile establishments, store; telegraph, telephone, or other business offices; hotels, restaurants; or in any factory, work-

shop, rolling mill, having proper ventilation and in which power machinery is not used; or, if used, together with all other dangerous appliances, is kept securely and properly safeguarded.

P. 5675, mines act, § 14; Laws 1905, P. L. 344, § 1. Children under sixteen years of age shall not be employed in any anthracite mine, and children under the age of fourteen years in any anthracite coal breaker or colliery, or around the outside workings of any anthracite mine. For earlier enactment, see Acts June 2, 1891, art. 9, § 1.

P. 5676, § 16; Acts of 1905, P. L. 345, § 3. A person employing any minor child in or about any coal mine must procure an employment certificate.

P. 5678, § 34; Laws 1909, P. L. 375, § 1. No minor under the age of fourteen years shall be employed, permitted, or suffered to work in or about or for any bituminous coal mine or anthracite colliery or breaker. Earlier enactment, act of May 15, 1893, P. L. 52.

Purdon's Dig. p. 2570, mines act, § 133; Acts 1891, P. L. 76, art. 5, § 8. No person under fifteen years of age shall be employed in an anthracite mine, and no person shall oil dangerous machinery while it is in motion.⁶

Rhode Island.—Laws 1910, chap. 533, § 1. No child under fourteen permitted to work in any factory, manufacturing, or business establishment in the state. No child under sixteen shall be allowed to work in any such place between the hours of 9 P. M. and 6 A. M. No child under sixteen to be employed without school certificate. (Prior enactment, see Gen. Laws 1909, chap. 78, § 1.)

Gen. Laws 1909, chap. 78, § 2. Every person, firm, or corporation doing business within this state, employing five or more persons, or employing any child under sixteen years of age, shall be subject to the provisions of this chapter, whatever shall be the business conducted by said person, firm, or corporation: Provided, however, that the provisions of this act shall not apply to children employed in household services or in agricultural pursuits. (Amending Laws 1902, No. 158, § 2.)

Sec. 6. No minor under sixteen shall clean machinery in motion.

Laws 1910, chap. 549, § 1. No person under the age of eighteen years shall take charge of or operate any passenger elevator.

South Carolina.—Code 1912, § 870. Wherever children under fourteen years of age are employed, notice shall be posted that such children are forbidden to clean any machinery while in motion by aid of steam, water, electricity, or other mechanical power, and no employer or his agent shall knowingly or wilfully permit or consent to children cleaning such machinery.

Sec. 871. Employers of children under fourteen shall keep a record of the same.

South Dakota.—Comp. Laws 1910, § 145. No child under fourteen to be permitted to work in mines (Laws 1890, chap. 112, § 11).

Tennessee.—Laws 1901, chap. 34, § 1 (amending Laws, 1893, chap. 159, §1). It shall be unlawful for a proprietor, foreman, owner, or other person to employ a child less than fourteen years of age in any workshop, factory, or mine. Unless the said proprietor, etc., shall know the age of the child, it shall be his duty to require the parent or guardian to furnish a sworn statement of its age.

⁶ Pronounced constitutional in *Lena-han v. Pittston Coal Min. Co.* (1907) Am. St. Rep. 885, 67 Atl. 642.

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[The provision in the last sentence is an addition to the earlier enactments by which the limit of age was specified as twelve years. Laws 1881, chap. 170, § 10; Laws 1893, chap. 159, § 1; Shannon's Code, §§ 4434, 4436.]

Utah.—Comp. Laws 1907, § 1338 (Laws 1896, chap. 28). No person under fourteen years of age shall be employed in a mine or smelter.

Vermont.—Pub. Stat. 1906, § 1044, as amended Laws 1910, act 69. A child under sixteen years of age, who has not completed the course of study of nine years, prepared for the elementary schools by the superintendent of education, shall not, unless excused in writing by the town or union superintendent of schools, or by the chairman of the prudential committee, in the case of an incorporated district, be employed in work connected with railroading, mining, manufacturing, or quarrying, or be employed in a hotel or bowling alley, or in delivering messages, except during vacations and before and after school, unless said child deposits with his employer a certificate from said superintendent, or chairman of the prudential committee, to the effect that he is eligible to employment in accordance with the provisions of this chapter; and no child under sixteen years of age shall be employed after 8 o'clock at night in any of the occupations or industries herein enumerated. In case said child has been in attendance upon a private or parochial school, such superintendent or chairman of the prudential committee may examine said child for the purpose of determining his eligibility to employment in accordance with this section.

Sec. 1046, as amended Laws 1910, act 70, § 1. No child under fourteen years of age shall be employed, permitted, or suffered to work for any railroad company, or in, about, or in connection with, any mill, factory, quarry, or workshop wherein are employed exceeding ten persons. No child under the age of twelve years shall be employed by or permitted to work in, about, or in connection with any mill, factory, quarry, workshop, or in delivering messages for a corporation or company, or in any mercantile establishment, store, business office, restaurant, bakery, or hotel.

Sec. 2. Employment of children prohibited in designated occupations; provisions of same general tenor as Illinois statute set out above.

Sec. 5130. No person under the age of twenty-one years shall be employed in a barroom.

Virginia.—Laws 1908, chap. 301, § 1. No child under fourteen years of age shall be employed, permitted, or suffered to work in any factory, workshop, mercantile establishment, or mine; provided that this act shall not exclude any child over the age of twelve who is an orphan, or who, for any other reason, is dependent on his own labor for support, or who has a parent dependent upon him for support; in any of which cases a judicial certificate stating the necessity, and authorizing the employment, may be obtained. [This provision supersedes Code 1904, § 3657bb (Laws 1902, p. 233), under which the limit of age was twelve years.]

Washington.—Rem. & Bal. Codes & Stats. § 2446 (Laws 1909, p. 948, § 194). Provisions of the same general tenor as §§ 292 and 292a of the New York Penal Code. Age limit fixed at eighteen.

Sec. 2447 (Sess. Laws 1909, p. 948, § 195). Every person who shall employ, and every parent, guardian, or other person having the care, custody, or control of such child, who shall permit to be employed, by another, any male child under the age of fourteen years, or any female child under the age of sixteen years, at

any labor whatever, in or in connection with any store, shop, factory, mine, or any inside employment not connected with farm or housework, without the written permit thereto of a judge of a superior court of the county wherein such child may live, shall be guilty of a misdemeanor.

Sec. 4715 (Sess. Laws 1909, p. 365, § 2). No child under the age of fifteen years shall be employed for any purpose by any corporation, person, or association of persons in this state, during the hours when the public schools of the district in which such child resides are in session, unless the said child shall present a certificate from a school superintendent, as provided for in § 4714, excusing the said child from attendance in the public schools, and setting forth the reason for such excuse, the residence and age of the child, and the time for which such excuse is given. Every owner, superintendent, or overseer of any establishment, corporation, company, or person employing any such child shall keep such certificate on file so long as such child is employed by him, her, or it. The form of such certificate shall be furnished by the superintendent of public instruction. Proof that any child under fifteen years of age is employed during any part of the period in which public schools of the district are in session shall be deemed prima facie evidence of a violation of this section.

Sec. 6570 (Laws 1907, p. 238, § 1). No person under the age of nineteen years shall be employed as a public messenger by any person, telegraph company, telephone company, or messenger company in any city of the first class in this state, nor shall any child of either sex under the age of fourteen years be hired out to labor in any factory, mill, workshop, or store at any time; Provided, that any superior court judge may issue a permit for the employment of any child between the ages of twelve and fourteen years at any occupation, not in his judgment dangerous or injurious to the health or morals of such child, upon evidence satisfactory to him that the labor of such child is necessary for its support or for the assistance of any parent; and provided further that the judge of the juvenile court may issue permits for the employment of any male child over fourteen years of age, as messenger by telegraph, telephone, and messenger companies, subject to such limitations and conditions as may be imposed by said court. All permits herein provided for shall be issued for a definite time, and shall be revocable at the discretion of the judge by whom issued.

Sec. 7287 (Sess. Laws 1903, chap. 136, § 1). No female person under eighteen years of age shall be employed as public messenger by any person, telegraph company, telephone company, or messenger company in this state, nor shall any child of either sex, under the age of fourteen years, be hired out to labor in any factory, mill, workshop, or store at any time; Provided that any superior court judge living within the residence district of any such child may issue a permit for the employment of any child between the ages of twelve and fourteen years at any occupation not, in his judgment, dangerous or injurious to the health or morals of such child, upon evidence, satisfactory to him, that the labor of such child is necessary for its support or for the assistance of any invalid parent. Such permits shall be issued for a definite time, but shall be revocable at the discretion of the judge by whom they are issued.

Sec. 7388 (3172*). No boy under the age of sixteen years and no female of any age shall be employed or permitted to be in any mine for the purpose of employment therein, nor shall a boy under the age of fourteen years be em-

ployed or permitted to be in or about the outside structures or workings of the colliery for the purpose of employment: Provided, that this prohibition shall not affect the employment of boys of suitable age in an office or in the performance of clerical work at the colliery. When an employer is in doubt as to the age of any boy applying for employment in or about a mine or colliery, he shall demand and receive proof of the age of such boy by certificate from the parents or guardian of such boy before he shall be employed.

West Virginia.—Code 1906, § 412. No minor under fourteen years of age, nor female person of any age, shall be permitted to work in any coal mine. (Limit of age in Laws 1891, chap. 15, was twelve years.)

Sec. 442; Acts 1901, chap. 19. No minor shall be permitted to clean any mill gearing or machinery while the same is in motion.

Sec. 455 (Acts 1887, chap. 11; Acts 1891, chap. 15; Acts 1905, chap. 75). No minor under twelve shall be employed in any mine, factory, mercantile or manufacturing establishment where goods or wares are made or sold; and no minor under the age of fourteen years shall be employed during the free school term of the district in which he resides.

Secs. 4219-4221; Acts 1901, chap. 14. Provisions of the same general tenor as New York Penal Code, § 292, but the age limit is fixed at fifteen.

Wisconsin.—Sanborn & S. Stat. Supp. 1906, § 1728a. No child between the ages of fourteen and sixteen years shall be employed at any time in any factory or workshop, bowling alley, barroom, beer garden, in or about any mine, store, office, hotel, mercantile establishment, laundry, telegraph, telephone, public messenger service, or work for wages at any gainful occupation at any place, unless there is first obtained from the commissioner of labor, state factory inspector, any assistant factory inspector, or from the judge of the county court or municipal court, or from the judge of a juvenile court where such child resides, a written permit. (Laws 1899, chap. 274; Laws 1901, chap. 182; Laws 1903, chap. 349.)

No child under fourteen years of age shall be employed at any time in any factory or workshop, bowling alley, barroom, beer garden, or in or about any mine. (Laws 1891, chap. 109, § 1.)

No child under fourteen years shall be employed, required, or suffered to work for wages at any gainful occupation at any time except that during the vacation of the public school in the town, district, or city where any child between the ages of twelve and fourteen years resides. It may be employed in any store, office, hotel, mercantile establishment, laundry, telegraph, telephone, or public messenger service in the town, district, or city where it resides, and not elsewhere, provided, that there is first obtained from the commissioner of labor, state factory inspector, and assistant factory inspector, county judge, municipal judge, or from the judge of a juvenile court where such child resides, a written permit.

The said commissioner of labor, etc., shall keep a record, stating the name, date, and place of birth and place of school attended by any such child.

Sec. 1728b. It shall be the duty of every person, firm, or corporation, agent or manager of any firm, or corporation employing miners in any mine, factory, or workshop, bowling alley, barroom, beer garden, store, office, hotel, mercantile establishment, laundry, telegraph, telephone, or public messenger service within this state, to keep a register in the place where such minor is employed, and subject at all times to the inspection of any factory inspector, or assistant factory

inspector, in which register shall be recorded the name, age, and date of birth, place of residence, of every child employed, permitted, or suffered to work therein, under the age of sixteen years; and it shall be unlawful for any person, firm, or corporation, agent, or manager of any firm or corporation, to hire or employ, permit or suffer to work in any mine, mercantile establishment, factory, or workshop, bowling alley, barroom, beer garden, store, office, hotel, laundry, telegraph, telephone, or public messenger service, any child under sixteen years of age unless there is first provided and placed on file in such mine, mercantile establishment, factory, or workshop, bowling alley, barroom, beer garden, store, office, hotel, laundry, telegraph, telephone, or public messenger, a permit granted by either the commissioner of labor, state factory inspector, any assistant factory inspector, county judge, municipal judge, or judge of a juvenile court of the county where such child resides.

Sec. 1728f. No firm, person, or corporation shall employ or permit any child under sixteen years of age to have the care, custody, management, or operation of any elevator.

Sec. 1728k; Laws 1903, chap. 402. No female under the age of eighteen years shall be employed as a messenger.

Sec. 1728o; Laws 1899, chap. 330, §§ 3, 4. Children under fifteen are not to be employed in any theatrical exhibition or public show as acrobats, etc., when, in the opinion of the public licensing officers, such children are employed so as to corrupt their morals or impair their physical health.

Wyoming.—Laws 1890-91, chap. 20, § 5 (Comp. Stat. 1910, § 3107). No boy under the age of fourteen years shall be employed in any mines or underground works, or dangerous place.

Laws 1895, chap. 46, §§ 1, 2 (§§ 3101, 3102). Restriction of employment of children under fourteen years of age. Provision similar to that of New York Penal Code, § 292.

Ontario.—Factories act (Ont. Rev. Stat. chap. 256), §§ 3, 5. No child (*i. e.*, person under fourteen years of age) is to be employed in any factory except during the summer months in preparing fruit, etc., for canning purposes.

Sec. 6, subsec. 1; § 2, subsec. 1; § 15, subsec. 4. The employment of a child to work an elevator for the uses of a manufacturing concern is forbidden.

Shop regulation act (Ont. Rev. Stat. 1897, chap. 257, § 6, as amended by 8 Edw. VII. chap. 58). No person under twelve years of age shall be employed in any shop school unless the said child shall have furnished to the employer a certificate issued in accordance with the provision of the truancy act.

Mines act 1906 (chap. 11, § 192). No boy under the age of fifteen years shall be employed below ground (same provision in mines act 1892, Rev. Stat. Ont. 1897, chap. 36.)

Sec. 194. The owner of a mine is required to keep a register of boys and young male persons who are employed below ground.

Quebec.—Industrial establishments act (57 Vict. chap. 30, § 3023 [1]). In establishments classified by the lieutenant governor in council as dangerous, unwholesome, or inconvenient, the age of the employee shall not be under sixteen years for girls or women.

Sec. 3023 (2). In all other establishments, the age of the employees shall not be less than twelve years for boys, and fourteen for girls.

Sec. 3023 (3). Employer of child or young girl shall, if required, exhibit to the inspector an age certificate.

Factories act (48 Vict. chap. 32, Rev. Stat. § 3020). It is not permitted to keep a factory so that the life of any person therein is endangered, or so that the health of any person employed therein is likely to be permanently injured.

Sec. 3026 (1). No boy aged less than twelve years, and no girl less than fourteen years, can be employed in any factory.

Sec. 3026 (2). Children between the ages of twelve and fourteen years shall not be employed in any factory unless the employer has in his possession an age certificate.

Nova Scotia.—Metalliferous mines regulation act (Rev. Stat. 1900, chap. 20, § 5). No boy under the age of twelve years shall be employed in or about any mine, above or below ground.

Coal mines regulation act (Rev. Stat. 1900, chap. 19, § 18). No boy of or above the age of twelve years, and under the age of sixteen years, shall be permitted to work in or about any mine above or below ground unless he is able to read and write, and is familiar with the rules of arithmetic as far as division, and furnishes a certificate to that effect from a duly licensed teacher.

Sec. 44 (22). Person employed to work hoisting machinery shall be a male person, not less than eighteen years of age.

British Columbia.—Mines (metalliferous) inspection act (Rev. Stat. 1897, chap. 134, § 12). No boy under the age of twelve years shall be employed below ground in any mine to which the act applies.

There is a similar provision in the coal mines regulation act (B. C. Rev. Stat. 1897, chap. 138), § 4.

New South Wales.—Coal mines regulation act 1902, § 34. No boy under fourteen years of age shall be employed in or about a mine.

Factories and shops act 1896, § 35. No child shall, unless by special permission of the Minister of State, invested with the control of this department of industry, be employed in any factory; and that no such special permission shall be given in respect to a child under thirteen years.

Victoria.—Factories and shops act 1905 (No. 1975), § 36. Similar to provision as to wet spinning in § 76 of the English factory and workshop act 1901.

Sec. 37. No child (*i. e.*, person under thirteen years) shall be employed in a factory.

Sec. 39. Similar to provision concerning certain unhealthy kinds of work, in § 77 of the English factory and workshop act 1901, except as regards the ages of the employees designated.

Mines act 1890, § 353. Boys under fourteen years of age not to be employed below ground in any mine.

Queensland.—Mining act 1898, § 212. No boy under the age of fourteen shall be employed under ground in any mine.

New Zealand.—Mining acts compilation act 1906, § 241. Except in clerical employments, no female person of any age, and no male person under the age of fourteen years, shall be employed by him in any capacity in or about a mine.

1899. Construction and operation of these enactments. Generally.—

The question whether the enactments discussed in this section should be strictly or liberally construed is discussed in § 1641a, *ante*. As to the circumstances under which the violation of a statute forbidding the employment of children under a certain age is deemed to be the proximate cause of an injury received by a minor, see § 1571, *ante*, and notes 10, 11, *infra*. Upon the question whether a violation of these statutes constitutes negligence *per se* or not, see §§ 1906 *et seq. post*. Statutes for the protection of the lives and limbs of children are held to create a liability for damages due to their infraction, whether provided for in so many words in the statutes or not;¹ and the mere fact that failure to obey such statutes is made a criminal offense does not mean that the child has not a right of action as for a civil injury.² See § 1905, *post*.

It is generally held that these statutes prohibiting the employment of children under certain ages and in specified employments take

¹ *Strafford v. Republic Iron & Steel Co.* (1909) 238 Ill. 371, 20 L.R.A. (N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358; *Casteel v. Pittsburg Vitrified Paving & Bldg. Brick Co.* (1910) 83 Kan. 533, 112 Pac. 145; *Beauchamp v. Sturges & B. Mfg. Co.* (1911) 250 Ill. 303, 95 N. E. 204; *Froerer v. Baker* (1907) 137 Ill. App. 588.

The injured boy has a right of action if his unlawful employment is the proximate cause of the injury. *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863; *Hankins v. Reimers* (1910) 86 Neb. 307, 125 N. W. 516.

² *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572.

In *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912 B, 797, the court, in referring to the Massachusetts statute prohibiting the employment of children under fourteen years of age, said: "This statute was passed in the exercise of the police power as a humanitarian measure, and in the interest of the physical well-being of the race. It prevents children of immature judgment and undeveloped bodies from working under conditions likely to endanger their health, life, or limb. While these considerations are important for society, they are also significant for the child. This statute imposes a duty upon every employer with reference to children under fourteen years of age. It is a

general rule of statutory interpretation that a violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action upon the injured person. A difficulty often arises to determine whether a private right arises for breach of the statutory duty imposed, or whether the only consequence is to subject the violator to punishment. It is not enough for a plaintiff to prove a violation of a statute concurrent with his injury, but he must go further and show that a condition to which the statute directly relates has a causal connection with his injury. . . . This statute is a declaration of legislative policy that parents and guardians of children undertaking to act in their own behalf shall no longer be permitted to bargain at all as to the work of children of tender years in specified employments. It relates to a class who are least able to protect themselves by appreciating and avoiding danger, or to request instructions as to matters beyond their understanding, or to arrange by contract for their protection, or to resist any compulsion arising from their own necessities or other circumstances. There would be difficulty in discovering instances of failure to comply with the law, arising from the tendency of both parties to such failure to conceal the wrongdoing. The statute has to do

from the employer the defense of assumption of risk.³ As to the question whether the defense of contributory negligence is abolished by these statutes, the courts are not in harmony.⁴

It is broadly stated in some of the cases that no recovery can be had for injuries to a minor employed in violation of a statute, if the breach of a statute is not the proximate cause of the injury.⁵ But if the injury occurs in the course of the employment, the violation of the statute is held to be the proximate cause of the injury.⁶

with the protection of childhood. It pertains to a subject of universal interest, fundamentally vital in its broader bearings to the future of mankind. These considerations require the inference that the remedy intended by the legislature against the delinquent employer was not confined to the criminal one. The right of civil action in addition may well have been regarded as a more efficacious means of compelling observance of the law. Therefore, while the public purposes of this act are important, any member of the public so situated with reference to its subject-matter as to suffer special damage by its infraction has a right of action against the violator of the statute."

³ See § 1647a, c, ante.

⁴ See § 1649, notes 4 et seq., ante.

⁵ *Nickey v. Steuder* (1905) 164 Ind. 189, 73 N. E. 117.

The master is not chargeable as a matter of law with all injuries resulting during the unlawful employment, but only for such injury as the statute intended to guard against. *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A. (N.S.) 504, 69 S. E. 857.

Injury to a boy standing on a turntable, due to its being moved by one of the master's servants, is not occasioned by the employment of the boy as a messenger to work in and about the yards. *Revis v. Toledo, St. L. & W. R. Co.* (1909) 147 Ill. App. 116.

⁶ *Casteel v. Pittsburg Vitriified Pav. & Bldg. Brick Co.* (1910) 83 Kan. 533, 112 Pac. 145; *Casperson v. Michaels* (1911) 142 Ky. 314, 134 S. W. 200; *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A. (N.S.) 504, 69 S. E. 857.

In *Sharon v. Winnebago Furniture Mfg. Co.* (1910) 141 Wis. 185, 124 N. W. 299, it is said: "It is undisputed that the plaintiff's injury was the immediate

result of physical contact with the prohibited saw while he was at work. Two of the elements of proximate causation are therefore shown without dispute: First, that the defendant was guilty of a negligent act; second, that as a result of that act, the plaintiff suffered injury. The only other element necessary to complete the claim of proximate causation is the fact that some injury to the boy should have been reasonably anticipated by the defendant as the natural and probable result of setting him at work at the saw. This latter necessary element must be held to be conclusively established by the law itself. The prohibition of the employment of boys about such machines as are dangerous to life and limb amounts to a declaration that such employment is likely to result in physical injury to the boy, and an employer must in all reason be held to know what the legislation has thus declared. The element of anticipation of injury as a natural and probable result of the violation of the law is therefore supplied. . . . But when, as here, the law forbids the employment of a minor at a certain definite machine, and in violation of the law the defendant employs a minor at that machine, and that machine, during the employment, inflicts injury on the minor, the chain of proximate causation from the negligent act to the injury is complete as matter of law."

The employment of a thirteen-year-old boy to open furnace doors was held to be the proximate cause of an injury due to the boy dropping asleep from overwork, and letting one of his legs fall across a car track, so that the leg was crushed by an ore car running at an unusual time. *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, transferred from the appellate court (1908) 42 Ind. App. 629, 86 N. E. 503. The court said:

In New York it has been held that where the plaintiff relies in support of his action on the failure of the master to file the certificate

"A causal connection between the unlawful employment and the injury of which complaint is made must be shown. If the child should die of some organic disease, or be injured by a stroke of lightning or other intervening act beyond the master's control, and not reasonably to be foreseen and anticipated, the master could not be held liable. . . . The state has said in positive terms that employers must not take children under fourteen years of age into the service of their factories, and subject them to the danger of being mangled or killed by machines propelled by the powerful agencies of steam or electricity. This mandate, it is alleged, appellant disobeyed, and appellee was injured in the mill, and by the agencies against which the law sought to protect him. The connection between the unlawful employment and the injury in this case is as direct as cause and effect, and brings appellant within the operation of the statute, and a cause of action is stated, unless the statute itself is invalid."

In *Perry v. Tozer* (1903) 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, the court rejected the contention of counsel that as the statutes which prohibited the employment of children under a certain age contained certain provisions of which the immediate object was to secure educational advantages for children, the violation thereof could not be regarded as the proximate cause of a personal injury received in the course of the employment. The opinion was expressed that such statutes are intended not only to diminish ignorance and immorality, but to prevent children from participating in occupations dangerous to life and limb.

But it has been held that where the prohibitions of the statute were imposed to force children to attend school, the violation of the statute is not the proximate cause of injury to a child employed in violation of its provisions. *Steel Car Forge Co. v. Chec* (1911) 107 C. C. A. 192, 184 Fed. 868. The court said: "With respect to that portion of the statute which has regard for children between the ages of fourteen and sixteen years, the situation is very different from that part which prohibits

the employment of children under the age of fourteen years. It is apparent that it was the policy of the state of Indiana to prohibit the employment of children under the age of fourteen years, and it is equally apparent that the prohibition did not run against the employment of children between the ages of fourteen and sixteen years. We must determine, therefore, why the legislature prohibited children under fourteen from working under any circumstances, and permitted children between the ages of fourteen and sixteen to work under some circumstances. To interpret this statute properly, we must look to the evil aimed against. It is clear from the wording of the statute that children between the ages of fourteen and sixteen years could work, provided they were able to read and write simple English sentences, and provided, further, that the public schools in the place where the child lived were not in session during the employment. The language is clear and simple, and indicates that the legislature intended to force attendance in the public schools of all children under the age of sixteen years. The mental advancement, and not the physical protection, of the child, is the undoubted purpose of this provision. That this is true follows necessarily from the fact that during the vacation period in the public schools children between the ages of fourteen and sixteen years might work, and during that time no discrimination is made between children of advanced mental capacity and those more ignorant. Certainly a minor over fourteen years of age who cannot read and write simple sentences in the English language is just as likely to be injured during the vacation period of the public schools as he would be if the schools were in session. The fact of the schools being open would in no measure increase the liability to accident, and the fact that it was vacation would not protect children from injury. In addition to this, a minor who is blind is exempt from the prohibition of the statute. It would seem that the legislature intended to force minors to acquire a rudimentary education in the English language by barring them from employment until they acquired it, and

the question of their safety or ability to guard against injury was not under consideration. A blind child certainly would need more protection than one who could see. Education generally, however, is not required; only the ability to read and write simple sentences in the English language. Education consists not so much in the communication of knowledge as in the discipline of the intellect. It does not depend upon the medium one uses to do his thinking or to express his ideas. If the minor were a Pole and highly educated, he would be just as capable of guarding against injury as if his medium of communication were English. It is not at all uncommon to find boys of foreign birth of unusual intelligence and training, who are unable to read and write simple sentences in the English language. . . . Inasmuch as children between the ages of fourteen and sixteen years are permitted to work, providing school is not in session, it is difficult to see what causal connection exists between the unlawful employment and the accident, where the child is employed during school time. There was no relation of cause and effect between the omission on the part of the plaintiff in error to observe the provisions of this statute and infliction of the injury upon the defendant in error in this case. In no way can it be said that the failure to observe the statutory requirements had a tendency to bring about the accident complained of."

But in *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 492, 95 N. E. 876, Ann. Cas. 1912 B, 797, an action under the Massachusetts statute (Stat. 1909, chap. 514, §§ 56, 61), evidence that at the time of the injury the plaintiff had been in this country about seven weeks, of which four weeks had been spent in the employ of the defendant; that he never before had worked in a factory or mill; that he could not speak or read the English language; that while waiting for his work, which was about spinning mules, he had stood with his back toward some gears covered by a guard or shield, on which one of his hands rested; that in some way that hand got beyond or under the guard and was injured, and that no instruction or warning as to such a danger had been given to him, was held to support a finding that the violation of the

statute was the proximate cause of the injury.

Failure to require the production of an age and school certificate, as called for by the Illinois child labor act, it has been held, may be regarded as the proximate cause of an injury resulting therefrom. *Proyer v. Baker* (1907) 137 Ill. App. 588, 591.

And in Minnesota it is held that failure to procure a certificate from the school superintendent or school board, as required by statute, and failure to guard machinery at which a minor under sixteen years of age is hurt, make out a prima facie case of damages against the master. *Fitzgerald v. International Flax Twine Co.* (1908) 104 Minn. 138, 116 N. W. 475.

But in construing the Georgia statute it was held that if the child employed is above the designated age, failure on his employer's part to take and file the affidavit prescribed by § 5 of that act, though criminal, is not such an act of negligence, relative to the child, as to make the employer liable as a matter of law for his injuries. *Platt v. Southern Photo Material Co.* (1908) 4 Ga. App. 159, 60 S. E. 1068. The court said: "In determining whether the violation of a statute is such negligence as to support an alleged cause of action, the court is called upon to examine the law in respect to its purposes; for if it appears that, notwithstanding the violation, none of the things contemplated and sought to be guarded against have ensued, or that the plaintiff is not the person or does not belong to the class to whose benefit or for whose protection the enactment was made, the court will not declare that there is a case of negligence *per se* as to that cause of action or that plaintiff. The child-labor law, by specifically providing that the employment of children under a designated age in certain occupations shall be absolutely unlawful, has in nowise limited the general law in regard to putting immature persons of tender years to work at or near dangerous machinery. In a case not covered by the statute, the question of the defendant's negligence in employing the young person at the particular occupation is usually one for the jury."

And in New York it is held that where the certificate has been obtained, the mere failure to file it does not enlarge the master's liability. *Lowry v. Ander-*

required by the labor law, the burden is upon him to establish that fact.⁷ But in Illinois it has been held that if a boy under fourteen years of age testifies that he produced no age affidavit, he is not required, in the first instance, to prove that no one else did, since the statute provides that the minor shall produce the affidavit.⁸

In Indiana it has been held that the burden of proving that machinery is dangerous and capable of being guarded, as required by statute, is on the plaintiff.⁹

There appears to be nothing to differentiate the rules of pleading under statutes here discussed from those pertaining to rights arising

son Co. (1904) 96 App. Div. 466, 89 N. Y. Supp. 107.

In *Schmidt v. Bruen* (1907) 56 Misc. 130, 106 N. Y. Supp. 443, it is said: "Having obtained the written sanction of the board of health, as provided by § 70, the fifteen-year-old plaintiff could legally work in a factory. If no certificate had been obtained, it could be said that perhaps the plaintiff could not get one; that the board of health might have found him wanting in the requisites and have refused to certify to his qualifications, and thus his employment in a factory might have been prevented, and the accident never have happened. In this way there is a connection between the failure to obtain and file the proper consent and the injury occurring in factory work. But when the plaintiff has passed the examination provided, and is of certified capacity, having obtained the health board's written approval, he can legally work in any factory; the filing of the certificate being a detail required for other purposes than to legalize his employment. As the filing would and could not have prevented the employment, the failure to file cannot be connected with the accident, so as to be evidence of negligence."

⁷ *Sitts v. Waiontha Knitting Co.* (1904) 94 App. Div. 38, 87 N. Y. Supp. 911. The court said: "The statute changed rules and rights prevailing before its passage. It created an entirely new ground of liability. It was passed in the public interests and for the salutary purpose of preserving young and inexperienced children from the dangers and risks to which the greed of employers or even parents might expose them. Its provisions are doubtless to

be liberally construed, as they already have been for the purpose of accomplishing the ends and benefits intended. We think, however, that in order to secure the advantages and protections and increased rights thereby conferred, a plaintiff should bring himself fairly within the provisions of the statute as a whole; and that when he relies upon the failure to file a proper certificate in the case of a child aged more than fourteen years, it is not unreasonable to hold that the burden should rest upon him of showing that the certificate was not filed, rather than upon the person whom he seeks to charge of showing that it was so filed. The employment of a child of the age specified without the certificate in question constitutes a criminal offense (see Penal Code, § 3841), and the rule has become elementary that courts will not be forward in indulging presumptions which entail the conclusion of criminal guilt. In this case the plaintiff had peculiar knowledge whether the certificate had been made. It could not have been done without her knowledge. She was upon the witness stand. A single question by her counsel would have developed the violation of the law if it in fact existed. And it seems to us more reasonable to hold that she should have so testified that the certificate had not been filed rather than that we should presume, in the absence of affirmative evidence that it had been filed, that the defendant had been guilty of a crime in illegally employing the plaintiff."

⁸ *Marquette Third Vein Coal Co. v. Dielie* (1904) 208 Ill. 116, 70 N. E. 17, affirming (1903) 110 Ill. App. 684.

⁹ *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277.

under other statutes.¹⁰ The prohibitions of various acts with reference to the employment of children under certain ages have been held to be absolute, but there appears to be some conflict of opinion on this question.¹¹

¹⁰ A petition which does not state in so many words what kind of an establishment defendants operate, or what the motive power was which drove the machine at which the minor was hurt, but which states facts which show the nature of the establishment and the power used, is sufficient. *Peters v. Gille Mfg. Co.* (1908) 133 Mo. App. 412, 113 S. W. 706.

An indictment need not strictly follow the words of the statute. *State v. Hall* (1909) 141 Wis. 30, 123 N. W. 251.

A complaint that the defendant employed plaintiff, and made no inquiry as to his age, putting him to work in a dangerous place, is not sufficient to show a violation of the Indiana factory act (§ 7087 b, Burns's Anno. Stat. 1901, Acts 1899, p. 231, § 2), requiring that certain employers shall take age affidavits and keep a register thereof. *Laporte Carriage Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277. The court said that "the general rule, which has been repeatedly affirmed . . . [in Indiana] is that, where a party seeks to maintain an action under a statute, he must state or allege specifically and fully every fact requisite to bring his cause of action within the provisions of the statute upon which he relies. No omission in this respect can be supplied by intendment."

An allegation that the defendant, with notice that plaintiff was under age, "wrongfully and unlawfully employed plaintiff, and permitted him to work in its mine, contrary to the statute," is a sufficient averment of wilful violation of the statute, after verdict. *Marquette Third Vein Coal Co. v. Dielie* (1904) 208 Ill. 116, 70 N. E. 17.

Provisos and exceptions need not be negatived. *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863; *State v. Hall* (1909) 141 Wis. 30, 123 N. W. 251.

An allegation that the plaintiff, being between the ages of fourteen and sixteen years, was employed by the defendant in violation of the labor law, will not be stricken out as irrelevant. *Dra-*

gotto v. Plunkett (1906) 113 App. Div. 648, 99 N. Y. Supp. 361. The contention of the defendant was that, as a minor between the ages of fourteen and sixteen years might be employed in case the proper certificate was issued and filed, the mere failure to obtain the certificate could not have had anything to do with the injury.

A complaint for damages for injuries received on account of an "emery belt," under the Indiana act (§ 7087b, Burns's Anno. Stat. 1901, Acts 1899, p. 231, § 2) is bad, where it fails to show that such belt is of the character of "vats, pans, saws," etc., specifically mentioned in such act. *Laporte Carriage Co. v. Sullender*, *supra*.

Where employment of a child in violation of statute is relied on as a ground of recovery, it is necessary to aver an employment such as the statute prohibits. *Van Wyck v. Dickinson* (1907) 148 Mich. 418, 111 N. W. 1033.

Counts for negligence at common law, and for a wilful violation of the provisions of the mines and miners' act, may be joined in the declaration. *Marquette Third Vein Coal Co. v. Dielie* (1904) 208 Ill. 116, 70 N. E. 17.

¹¹ *Casperson v. Michaels* (1911) 142 Ky. 314, 134 S. W. 200; *Sharon v. Winnebago Furniture Mfg. Co.* (1910) 141 Wis. 185, 124 N. W. 299.

The fact that the employer may have been advised by a deputy factory inspector that, the child having been employed before the passage of the Pennsylvania act, it was not within its terms, is immaterial. *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. 348, 133 Am. St. Rep. 884, 74 Atl. 215.

A provision declaring it to be unlawful to employ a young person under a specified age without procuring from his parent or guardian an affidavit stating his age imposes an absolute duty, the nonperformance of which an employer cannot excuse on the ground that the parent or guardian knew of the employment of the young person in question, and did not give the employer information regarding his age. *La Porte*

It has been held that if the covering of a machine is unnecessarily removed without the fault or knowledge of the employer, through the negligence of one of the employees, the employer is not liable for a resulting injury to a boy.¹²

The questions of wilful violation of the statute and proximate cause of injury are questions of fact, upon which the judgment of the appellate court has been held conclusive if there is evidence supporting the judgment.¹³ Whether a particular employment is extrahaz-

Carriage Co. v. Sullender (1904) — Ind. App. —, 71 N. E. 922.

In *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857, 860, the court said: "The employer must ascertain the age of the boy. He must not be negligent in this particular. Unless he actually knows the age, so that he may safely rely on the fact before a jury, he must do what the statute directs,—he must secure the affidavit of the parent or guardian. The statute requires him to get this affidavit 'in all cases of doubt.' If there is not certainty, there must be doubt. If he does not actually know the age, so that he may safely rely on the knowledge he has obtained in that regard, he is only uncertainly informed and it is a case of doubt. We think the statute virtually says that the employer must clear up all uncertainty that exists by securing the affidavit. Only that affidavit or absolute proof that the boy is over fourteen years will protect him. He 'knowingly' violates the statute when he does not settle all doubt in advance of the employment. Representations, appearances, and good faith cannot take the place of the affidavit or unfailing proof which the statute requires. The purpose of the act, and the very spirit which it discloses through its words, sanction this construction."

But in *Schmidt v. Bruen* (1907) 56 Misc. 130, 106 N. Y. Supp. 443, it is said: "As the *Marino Case*, 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, holds the master to be liable in damages only for his negligence in employing a child under the specified age, statements of parents, affidavits, advertisements, and careful and painstaking investigations showing the child to be over sixteen may be given in evidence to meet and rebut the presumptions of negligence arising from the mere employment.

. . . The fact, therefore, that the employer, taking a young child into his factory, did not require some certificate of birth if the child was alleged to be over sixteen, or did not make inquiry beyond the statements of parents, pressed, perhaps, by circumstances, to falsify, may always be shown as bearing on the master's negligence. But, whatever may be proved for or against him, the liability is not absolute by the mere employment of a child under age. His negligence in employing the child is a question for the jury."

It must be shown before a wilful violation of the statute can be made out that the employer knew that the child was under age, or that his appearance would put the employer on inquiry, and thus show negligence; and the mere fact that the child was a few months under sixteen years does not alone permit the jury to draw the inference that the employer knew or should have known that the child was within the prohibited age. *Stenson v. J. H. Flick Constr. Co.* (1911) 146 App. Div. 66, 130 N. Y. Supp. 555.

A master cannot be charged with negligence in employing a minor to work on dangerous machinery, in violation of the terms of a statute, if, in the exercise of proper caution, he was led to believe that the servant was over the statutory age. *Koester v. Rochester Candy Works* (1909) 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589.

¹² *Honor v. Albrighton* (1880) 93 Pa. 475, 11 Mor. Min. Rep. 6.

¹³ *Marquette Third Vein Coal Co. v. Dietie* (1904) 203 Ill. 116, 70 N. E. 17.

In *Martin v. Walker-W. Mfg. Co.* (1910) 198 N. Y. 324, 91 N. E. 798, reversing (1908) 128 App. Div. 733, 113 N. Y. Supp. 78, it is said: "We thus have it established by the verdict that the plaintiff was not guilty of contributory negligence; that he was a

ardous within the meaning of a statute has been held not the subject of expert testimony.¹⁴

The New York labor law with reference to the employment of children under certain ages is held to be a police regulation for the protection of the public health.¹⁵ It does not apply to a child who,

young boy, but sixteen years of age, who, prior to his arrival at that age, was absolutely prohibited by the statute from being employed or permitted to operate or assist in the operation of a dangerous machine of any kind; that he was directed by the superintendent in charge to take waste to defendant's machine while it was in motion, and before the bell had rung for its stopping, so that he could proceed with the cleaning of the machine as soon as the bell rung and the machine stopped; and that as soon as he did approach the machine and stepped upon the platform, his foot slipped, on account of the oil that had dripped thereon, causing him to fall forward and thrust his hand on to the lickerin; that the machine was a dangerous machine, and that it was practicable to cover it, and that it was the duty of the defendant so to do; and had the defendant performed its duty in this respect the injury would not have occurred. These are the facts that the jury are deemed to have determined by their verdict, and these are the facts which the appellate division is deemed to have approved by the order which it has entered. Such being the case, we are of the opinion that the facts justified a recovery. It is quite true that accidents do happen which are so extraordinary that a careful, prudent person could not anticipate they were liable to occur. In such cases the court may be justified in disposing of them as presenting only questions of law; but ordinarily they present questions of fact, or mixed questions of fact and law, and in our judgment the case under consideration falls under the latter cases. In the case of *Cobb v. Welcher* (1894) 75 Hun, 283, 26 N. Y. Supp. 1068, the accident was deemed most extraordinary,—one which a careful, prudent person could not perceive or anticipate as liable to occur. The master had guarded the shafting at the end of the table, so that no person could slip, fall, or

come in contact with it. But one of the women employees having long hair, went to the end of the table, took her hair down, straightened it out, and then bent over, throwing her hair around her head, in the act of coiling, and in doing so the end flew around underneath the table, behind the guard, and caught upon the revolving shaft. But that case was disposed of in the general term upon both the law and the facts."

So, under a statute requiring machinery to be guarded, the question whether a particular piece of machinery could be so guarded as to prevent injury has been held for the jury. *La-Porte Carriage Co. v. Sullender* (1904) — Ind. App. —, 71 N. E. 922.

Whether employment of a fourteen-year-old-boy at a wringer is "extra-hazardous" is a question for the jury, depending upon the condition of the wringer and the surroundings. *Swift & Co. v. Miller* (1908) 139 Ill. App. 192.

The question whether the employment was within the provisions of § 3, act No. 113, Michigan Pub. Acts 1901, was held to be for the jury. *Braasch v. Michigan Stove Co.* (1907) 147 Mich. 676, 111 N. W. 197, following *Sterling v. Union Carbide Co.* 142 Mich. 284, 105 N. W. 755.

¹⁴ *Swift & Co. v. Miller* (1908) 139 Ill. App. 192.

But though it was incompetent to call an expert to prove that an electric freight elevator was a place of danger to life and limb, the error in doing so was held harmless in a case where a boy of fourteen lost his foot by placing it over the edge of the floor of the elevator, since the court will judicially notice that a freight elevator is a place of danger to life and limb in the hands of such a boy. *Braasch v. Michigan Stove Co.* (1908) 153 Mich. 652, 20 L.R.A.(N.S.) 500, 118 N. W. 366.

¹⁵ *People v. Taylor* (1908) 192 N. Y. 398, 85 N. E. 759.

at the time of his injury, has passed the age limit.¹⁶ Under the Massachusetts act, a child illegally employed is not himself guilty of a violation of the law.¹⁷

Under a statute authorizing any court or magistrate to commit to an asylum, etc., any child engaged or used in violation of the act, it was held that the recorder of a city had power to commit such a child to the care of the New York S. P. C. C.¹⁸ The words "after due notice," in the Michigan statute prohibiting the employment of children under fourteen years of age without the written permission of the parent or guardian, mean after notice by the inspector mentioned in the preceding section; and until such notice is given the statutory liability does not exist.¹⁹

The provision in the Pennsylvania act, that all machinery where boys work shall be properly "fenced off," has been held to mean properly protected; and that the act has been complied with where rollers are covered with a box, upon the top of which is an opening covered with a plank.²⁰

Whether two different establishments operated by the same person are separate in such a sense as to render it obligatory on his part to procure a new affidavit when he is transferred from one to the other is a question to be determined from the particular facts disclosed by the evidence.²¹

¹⁶ *Fortune v. Hall* (1907) 122 App. Div. 250, 106 N. Y. Supp. 787.

¹⁷ *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912 B, 797.

¹⁸ Sec. 3, chap. 22, New York Laws of 1876, repealed. See *Ryan v. Buchanan* (1885) 37 Hun, 425; *Re Donohue* (1876) 1 Abb. N. C. 1.

¹⁹ *Borck v. Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254.

²⁰ *Honor v. Albrighton* (1880) 93 Pa. 475, 11 Mor. Min. Rep. 6.

²¹ *Miller v. National Enameling & Stamping Co.* (1904) 116 Ill. App. 99. The defendant was engaged in the manufacture of granite ware, and for that purpose occupied two separate buildings called, "The stamping works" and "The rolling mill," which were about four blocks apart, both being used as part of one plant in the business of the defendant. The plaintiff was engaged originally at the stamping works, first in one department and then in another. About a year after his

first employment he was transferred to the rolling mills, in which he was injured while operating a motor by which the rolls used in the manufacture of sheet steel were controlled. Discussing the contention that, when transferring the plaintiff from the stamping mills to the rolling mills the defendant should have procured an additional affidavit, the court said: "We cannot so construe the statute. The mere fact that the separate departments of the same business were not under the same roof may not be held to require that another and additional affidavit must be furnished when minor employees are transferred from one department of the works to another. There is nothing in the spirit or purpose of the statute to support plaintiff's contention. A different question might arise if the several departments or shops were located wide apart, and in different towns or communities; but where, as in this case, they are parts of one enterprise, under one general management and operation, and where the rights and interests of

1900. Persons subject to the statutory duties imposed.—In the absence of some express declaration to that effect, these statutes are not construed in such a sense as to render them applicable to any person except the immediate employer of the child.¹

1901. What constitutes an "employment" within the meaning of the statutory restrictions.—In one case the provisions in §§ 6, 47, of the English elementary education act, by which parents are forbidden to employ children who are not exempted from school attendance, "in any labor exercised by way of trade, or for purposes of gain," was held not to be contravened by a father who had kept his daughter at home to do housework, so that his wife could go out and earn money.¹ Under the English employment of children act of 1903, it has been decided that in order to hold the master responsible, the employment when by the master's agent, must purport to have been in behalf of the master.²

the minor employee and parent are fully protected in manner contemplated by the statute, an additional affidavit was not required."

¹ *Fitton v. Wood* (1875) 32 L. T. N. S. 554 (contractor who made bricks at a specified price per thousand had employed a child without the certificate of attendance on a school required by the repealed English workshop regulation act 1867).

In *People v. Taylor* (1908) 192 N. Y. 398, 85 N. E. 759, it was held that the general superintendent of a corporation was not individually liable for the employment, for the corporation, of a child in violation of the New York labor law, where the child was employed by a department foreman without the knowledge of the superintendent and contrary to his direct orders.

¹ *Mather v. Lawrence* [1899] 1 Q. B. 1000, 68 L. J. Q. B. N. S. 714, 63 J. P. 455, 47 Week. Rep. 559, 80 L. T. N. S. 600, 15 Times L. R. 347, 19 Cox, C. C. 300. The *ratio decidendi* was that the phrase "for the purposes of gain" imputed an employment for the purpose of "direct" gain. This phrase has been similarly construed in two cases involving the meaning of the expression "factory" in the English factory and workshop act. *Nash v. Hollinshead* [1901] 1 K. B. 700, 70 L. J. K. B. N. S. 571, 75 J. P. 357, 49 Week. Rep. 424, 84 L. T. N. S. 483, 17 Times L. R. 352; *Curtis v. Shinner* [1906] 95 L. T. N. S.

31, 70 J. P. 272, 22 Times L. R. 448, 21 Cox, C. C. 210.

² *Robinson v. Hill* [1910] 1 K. B. 94.

The court said: "The employment of children act 1903 contemplates that there shall be an employment by the master. That employment might either be brought about by a direct contract between the master and the child, in which case the master would come within the provisions of the act, or the employment might be brought about by an agent of the master, and although the agent had wrongfully and without authority purported to employ the child on behalf of the master, I think, as at present advised, that the case would be within the section. In that case there would be a taking of the child into employment by the master in contravention of the act. That is why § 6, subs. 3, was enacted. But, in my judgment, in order to bring the case within the statute there must purport to be some employment by or on behalf of the master. On behalf of the appellant it was contended that that is negated by the opening words of § 6, subs. 3. No doubt those words afford some ground for the contention that the mere bringing of a charge alleging that the child was employed by the master would be enough to impose a duty on the employer to bring the actual defendant before the court. But that prima facie view of the meaning of the subsection is negated by the subse-

1902. Descriptions of employment to which the restrictive provisions apply.—An occupation has been said to be dangerous whenever there is reason to anticipate injury to persons engaged in it.¹ So work in and about moving machinery is considered to be hazardous to life and limb.² General cleaning work has been declared not to be the

quent words, 'after the commission of the offense has been proved.' There must purport to exist on the facts a contract of employment between the child and the employer. In this case, upon the facts, it is obvious that there is nothing of the kind. The master had no knowledge of any employment of the child in contravention of the section. All he knew was that the child was being employed during permitted hours. There is, therefore, no evidence of a contract of employment of the child by or on behalf of the master during prohibited hours, and the decision of the justices was right."

¹ This is so whether the danger arises from the inherent character of the work, or the manner in which it is carried on, though the danger may be eliminated by due care by the employee. *Casteel v. Pittsburg Vittrified Paving & Bldg. Brick Co.* (1910) 83 Kan. 533, 112 Pac. 145.

In *Hankins v. Reimers* (1910) 86 Neb. 307, 125 N. W. 516, the court said: "The legislature may either designate such employments by name, or it may prohibit child labor in dangerous work. In the latter event it is a question of fact, in each case to be ascertained from a consideration of the evidence, if not admitted in the answer, whether the work is dangerous. Proof that the child was injured would not in itself establish that the work was dangerous within the meaning of the law. To bring a case within the statute, we think the work must have been inherently dangerous to life or limb as a matter of common knowledge, or dangerous to life or limb because of the manner in which the master directed its performance, or because he negligently failed to properly instruct his servant, or to superintend such work. If an infant is injured as the proximate result of engaging at his master's request in a vocation which the legislature has forbidden an infant of that age to follow, the master is liable."

² The feeding of a big meat grinding

machine with revolving knives operated by steam power is within the words of a statute, "or other employment that may be considered dangerous to their lives or limbs." *Swift & Co. v. Rennard* (1905) 119 Ill. App. 173.

Employment of a boy to take up broken paper coming from paper-mill rollers is dangerous within the meaning of the Michigan statute. *Dalm v. Bryant Paper Co.* (1909) 157 Mich. 550, 122 N. W. 257.

It cannot be said, as a matter of law, that a conveyor operated by mechanical power, and consisting of an endless chain carrying, at intervals, metallic pans upon which tools were placed and from which they were taken through openings in a shaft at each floor, the conveyor moving at the rate of one foot a second, passing the openings in four seconds, is not a dangerous machine, within the meaning of the New York labor law. *Gallenkamp v. Garvin Mach. Co.* (1904) 91 App. Div. 141, 86 N. Y. Supp. 378. The court said: "I think it cannot be said, as matter of law, that this was not a dangerous machine within the contemplation of the statute. It was a mechanical contrivance in constant motion, and propelled by practically irresistible mechanical power. The plaintiff was obliged to remove the tools from a pan while it was passing this opening of less than 4 feet, which would take only about four seconds, and likewise he was obliged to load a pan while it was passing the same distance. Although the conveyor did not move with great rapidity, yet it is manifest that the work was attended with danger, and the safety of the operator required that he should be of sufficiently mature judgment to keep his mind constantly upon the work. In the case of *Hindle v. Birtwistle* [1897] 1 Q. B. 192, in sustaining a conviction for a violation of the factory and workshop act of England for neglect to properly guard dangerous machinery, where the question arose as to whether the machinery was dangerous, the court

said, 'Machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection.' I am also of the opinion that the plaintiff was assisting in the operation of this machine. Strictly speaking, perhaps the person who applied the power to set the machinery in motion was the operator; but the mere operation of the machine without the agency of the employees upon the different floors would have been fruitless. It was intended as a time-saving device, and to render its operation effectual required the assistance of employees upon the different floors. Those thus engaged were clearly, I think,—assisting, at least, in operating the machine, within the fair intent and meaning of the statute."

A tow picker is a dangerous machine. *Thomas Madden, Son & Co. v. Wilcox* (1910) 174 Ind. 657, 91 N. E. 933. The court said: "The court judicially knows that a machine consisting of a cylinder equipped with steel knives or teeth, revolving rapidly, is a more dangerous instrument for an inexperienced boy to operate than is a tack hammer. It appears that this machine was equipped with belt pulley, cogwheels, and gearing; and the statutes of this state, in classifying manufacturing establishments as hazardous places for the employment of children, have specifically named "cogs, gearing, and belting" as dangerous machinery. It was not required that appellee allege in terms that a tow picker of the description given in use in a factory was a dangerous machine to a youthful and inexperienced operative. It is manifest that by the transfer to the tow picker appellee was required to encounter greater risks and perils than those surrounding him in his usual employment."

The question whether the employment of a sixteen-year-old child as off bearer from a veneer saw is dangerous within the meaning of the Ohio statute depends upon whether the employment, considering the inevitable wear and tear, or the strain of the position, and the indifference to danger that would naturally follow from childish curiosity and inexperience, rendered the position dangerous. *Frank Unnewehr Co. v. Standard Life & Acci. Ins. Co.* (1910) 99 C. C. A. 490, 176 Fed. 16. In this

case it was held that the employment of such a child for such a purpose at a saw 68 inches in diameter, weighing 1,000 pounds, and extending 45 inches above the floor, was dangerous, although it was no part of the child's duty to start or stop the saw.

The operation of a freight elevator has been held dangerous for a child under sixteen years of age, within the meaning of the Michigan statute. *Braasch v. Michigan Stove Co.* (1908) 153 Mich. 652, 20 L.R.A. (N.S.) 500, 118 N. W. 366.

But it has been held that the fact that a child under sixteen years of age had to ride on an elevator once or twice a day did not, as a matter of law, make his employment dangerous within the meaning of the Illinois act. *Portier v. The Fair* (1910) 153 Ill. App. 200.

The employment of a child under twelve to work on an elevator for the uses of a manufacturing concern being made illegal by the factories act of Ontario (Ont. Rev. Stat. chap. 208, § 6, subsec. 1; § 2, subsec. 1; § 15, subsec. 4), it is held that the employer, besides being subject to the penalty provided, has to exercise more than ordinary precautions for the well being and safeguarding of minors who have been taken into factory work contrary to the provision of the legislature. *O'Brien v. Sanford* (1892) 22 Ont. Rep. 137, per Boyd, Ch. The conclusion of the court was that the case should not be withdrawn from the jury, as there was evidence tending to show that the injured person,—a child under the statutory age of employment,—was not competent to manage an elevator, the construction of which was unusual if not dangerous.

Riding on a dumping cart drawn by a horse over a rough and curving track running close to a steep bank of shale, the cart often jumping the track, the box, the top of which was 5 feet from the ground, emptying on either side, and having a lateral play of several inches, the car having to be kept in balance by shifting the positions of the rider, has been held dangerous for a boy under sixteen years of age, within the meaning of the Kansas statute. *Casteel v. Pittsburg Vitrified Paving & Bldg. Brick Co.* (1910) 83 Kan. 533, 112 Pac. 145. In this case a wheel of the car struck a lump of shale near the track, and the boy was thrown off, breaking his arm.

operation of machinery within the meaning of the New York statute.³

Where a statute prohibits the employment of women and minors in cleaning or working between the fixed or traversing parts of a machine while the same is in motion or being operated, it is of no consequence, so far as a minor's right of recovery is concerned, that the machine at which the injury was received was not actually in motion at the time, and was only in actual motion when plaintiff put his foot on a pedal.⁴

The employment of children in a business where machinery is used

Work at a steam power machine is an employment dangerous to the lives of children, within the meaning of the Illinois act. *Swift & Co. v. Rennard* (1905) 119 Ill. App. 173.

But employment in the manufacture of soda ash and its products, requiring the handling of limestone and the cleaning out of a still, and helping an assistant foreman and others to close the heavy door of a still, has been declared not dangerous labor for a boy under sixteen years of age. *Antosik v. Michigan Alkali Co.* (1911) 166 Mich. 415, 132 N. W. 80.

³ An employer did not violate the provisions of the labor law, which forbids the employment of minors less than sixteen years of age to operate machinery, where the minor in question was employed to do general cleaning work, although at the time of the injury he was engaged, by order of his foreman, in assisting to repair a belt that was hanging on a revolving shaft. *Scialo v. Steffens* (1905) 105 App. Div. 592, 94 N. Y. Supp. 305.

⁴ *Peters v. Gille Mfg. Co.* (1908) 133 Mo. App. 412, 113 S. W. 706.

The cleaning of a sausage machine, while in motion, however, has been held not to be within the prohibition of the statute. *Stegmann v. Gerber* (1909) 146 Mo. App. 104, 123 S. W. 1041. The court said: "The statute interdicts requiring a minor to work between the fixed or traversing parts of any machine. It is clear that in the operation of the sausage mill the plaintiff was not working between the fixed or traversing parts of any machine as contemplated by the statute. Indeed, he was standing at the side of the machine. The machine, it is true, was affixed to a table; however, he was not required to

work between the fixed portions of a machine, but was working alongside of a machine which was affixed or fastened to a table. The traversing parts of a machine, referred to in the statute, we understand to be the moving parts thereof, and it is clear plaintiff was not required to work between the moving parts of a machine within the contemplation of the lawmakers."

In construing this statute the court in *National Candy Co. v. Miller* (1908) 87 C. C. A. 207, 160 Fed. 51, said: "It must be conceded that this statute is not perspicuous. Precisely what is meant by the 'fixed' or 'traversing' parts of the machine is difficult to define. Under the title 'Construction of Statutes,' § 4160, 1 Rev. Stat. (Mo.) 1899 (Ann. Stat. 1906, p. 2252), it is declared that: 'words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.' The word 'fixed,' as ordinarily used, and as defined primarily by the dictionary, means 'securely placed, or fastened; settled, immovable; unalterable.' The verb 'traverse' primarily means 'to lay in a cross direction, to cross;' while the participle 'traversing' implies 'adjustable laterally, having a lateral motion, or swinging motion.' This statute would be more comprehensible and susceptible of practical application if it read, 'between the fixed and traversing parts of any machine'; because it may be easily perceived that it was the conception of the legislature that women and minors were assumed to be less observant of cautiousness and concentrated consideration, and would be exposed to a more special danger

has been held lawful, however, if such employment is wholly disconnected from the machinery.⁵

The question sometimes arises whether the particular employment comes within the descriptive words of the statute.⁶ If it does, it has

when working between the parts of a machine fixed with traversing motion, crossing, or laterally adjusted. In short, that they would be liable to be caught and injured when engaged about such constructed parts of a machine than if working in a different position. Be this as it may, it is to be kept in mind that the statute does not interdict the employment of women or minors to work at or about any machine, but it is directed only against requiring them to work between the designated parts of the machine."

The Indiana statute forbids the cleaning of parts of machinery intended to remain stationary, while the parts designed to move are in motion. *Brower v. Locke* (1903) 31 Ind. App. 353, 67 N. E. 1015. The court said: "The part upon which appellee was at work was not in motion, and appellants claim that appellee was not cleaning machinery when in motion. By the Century and by the Standard Dictionaries, machinery is defined as parts of a machine considered collectively; any construction of mechanical means designed to work together so as to effect a given end. When appellants were operating the machinery, lint and dust were flying through the air. The covers were an important, if not an essential, part of each machine. A machine is in motion when performing the function for which it is designed. All of the various parts may not change position, some were intended to be and remain stationary, but because they are not intended to move they are none the less a part of it. The working parts of the carding machine—the parts designed to move—were in motion when appellee received his injury. The purpose of the legislature in the enactment of the statute was the protection of the young, and, presumably, inexperienced, by keeping them out of danger they were otherwise likely to encounter. We do not believe that the legislature intended to forbid the cleaning, by infants, only revolving cylinders, pulleys, wheels, planes, or saws. The case at bar demonstrates the reasonableness, in view of

the object of the law, of giving the statute a construction which does not limit its application to the cleaning of machinery that is itself a warning of danger, and which is rarely, if ever, attempted to be cleaned by an ordinarily prudent person when it is in motion."

Section 9 of the English factory and workshop act of 1878, which provided that "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion," was held to prohibit the cleaning of the fixed parts of a machine in motion. *Pearson v. Belgian Mills Co.* [1896] 1 Q. B. 244, 65 L. J. Mag. Cas. N. S. 48, 74 L. T. N. S. 101, 44 Week. Rep. 334, 18 Cox, C. C. 241, 60 J. P. 151.

⁵ *Peters v. Gille Mfg. Co.* (1908) 133 Mo. App. 412, 113 S. W. 706.

The proprietors of a planing and saw mill are not prohibited from employing a child under fourteen years of age to work in the lumber yard from which the lumber for the mill is supplied, under N. Y. laws 1889, chap. 560, providing that no child under fourteen years of age shall be employed in any manufacturing establishment, and N. Y. Laws 1892, chap. 673, defining "manufacturing establishments" to mean any mill, factory, or workshop where one or more persons are employed at labor. *Murphy v. Bennett* (1896) 11 App. Div. 298, 42 N. Y. Supp. 61.

⁶ The court cannot say that a saloon is not a "mercantile institution," that a barber shop is not a "workshop," nor that ferries and railroads are not engaged in the "distribution and transmission of merchandise or messages" within the meaning of the California child labor act (Stat. 1905, pp. 11, 14). *Re Spencer* (1906) 149 Cal. 396, 117 Am. St. Rep. 137, 86 Pac. 896, 9 Ann. Cas. 1105.

In a case which turned upon the effect of the provision in the repealed English factory and workshop act 1878, (§ 38 and schedule 1), which now appears as § 77, subs. 3, of the act of 1901, bricks after being baked were taken to dipping-sheds, and after being placed in a preparing solution were

been held that the master is liable for the injury of a child although the child was working at the place at which he was hurt without any direction to work there, or even in disobedience of orders.⁷

dipped in glaze, and scraped and knifed. They were then stacked, and ultimately baked with a view to setting the glaze, after which they were polished and stacked until wanted for sale. It was held that this constituted the "finishing of bricks." *Squire v. Stanley Bros.* (1901) 84 L. T. N. S. 535, 65 J. P. 467, 17 Times L. R. 438, 19 Cox, C. C. 695.

A meat hasher is not "steam machinery" within the meaning of the Illinois child labor act, forbidding the employment of children to operate "steam machinery." *Swift & Co. v. Rennard* (1906) 128 Ill. App. 181.

It has been held that an employee in a laundry, engaged in removing a muslin surface cloth on rollers constituting a part of an ironing machine, and putting on a new one to avoid soiling the collars and cuffs being ironed, is employed in cleaning machinery within Iowa Code Supp. 1902, § 4999b, providing that no female under eighteen years of age shall be directed to clean machinery while in motion. *Bromberg v. Evans Laundry Co.* (1907) 134 Iowa, 38, 111 N. W. 417, 13 Ann. Cas. 33.

The provisions of the New York labor law prohibiting a child under the age of fifteen years from operating "an elevator in a factory," or a child under the age of sixteen years from operating, or assisting in operating, dangerous machinery of any kind, do not apply to mercantile establishments. *Lowry v. Anderson Co.* (1904) 96 App. Div. 466, 89 N. Y. Supp. 107.

It has been held that the word "work," used in the Louisiana statute, covered performances in a theater. *State v. Rose* (1910) 125 La. 462, 26 L.R.A. (N.S.) 821, 51 So. 496.

And a beer garden has been declared to be a place where intoxicating liquors are made, given away, or sold, within the meaning of the Wisconsin statute forbidding the employment of children under fifteen years of age in such places. *State v. Hall* (1909) 141 Wis. 30, 123 N. W. 251.

But a newspaper stall consisting of a board laid on trestles, at a country railway station, at which a boy is employed

for a few hours daily, his principal place of employment being at the book-stall of the railway junction 2 miles distant, is not a "shop" within the English shop hours act of 1892, and the notice required by § 4 of that act need not be exhibited upon it. *W. H. Smith & Son v. Kyle* [1902] 1 K. B. 286, 71 L. J. K. B. N. S. 16, 85 L. T. N. S. 428, 18 Times L. R. 32, 66 J. P. 101.

Employment on premises where bleaching, dyeing and finishing is performed has been held employment in an "incidental printing process," within the meaning of the 2d section of 8 & 9 Vict., chap. 29, forming part of "the establishment where the chief process of printing was carried on," within the meaning of that statute, so that the master is not, in so employing a child, liable for an offense against the bleaching works act, 23 & 24 Vict. chap. 78, in employing him without a schoolmaster's certificate. *Hoyle v. Oram* (1862) 12 C. B. N. S. 124, 31 L. J. Mag. Cas. N. S. 213, 8 Jur. N. S. 1154.

⁷ *Strafford v. Republic Iron & Steel Co.* (1909) 238 Ill. 371, 20 L.R.A. (N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358. The court said: "There may be, and doubtless are, positions in the industries in which children under fourteen years of age are forbidden by the statute to be employed, where there would be little or no hazard to life or limb if the child confined himself exclusively to the duties of such position, but the childish inclination to experiment and do something he has seen others do is so well known as to make it dangerous to permit his employment in establishments, especially where machinery is used, and the legislature has therefore seen fit to prohibit his employment in any capacity in such establishments; and we are of opinion that to hold that a child who is employed in violation of the statute, and directed to perform a certain line of work, but who temporarily abandons it and attempts to do something else in the master's business, whereby he is injured, is precluded from recovering if his negligence contributed to his injury, would seriously affect the purposes sought to

be accomplished by the statute. Nor in such case can it reasonably be said that there is no causal connection between the employment and the injury."

To the same effect, *Stehle v. Jaeger Automatic Mach. Co.* (1909) 225 Pa. 348, 133 Am. St. Rep. 884, 74 Atl. 215. The court said: "The plaintiff is within a class of persons whom the law seeks to protect in the matter of their employment because as a rule they are not able to adequately protect themselves. There can be no doubt that one of the chief purposes of the law in forbidding their employment in industrial establishments was to prevent their exposure to the danger of personal injury from the machinery used therein. If the danger in their case were only such as the adult is exposed to, there would be little justification for the law. It contemplates a special danger to the persons of this class in connection with such employment, because of the characteristics incident to the immaturity of youth,—imprudence, lack of judgment, heedless curiosity, and playfulness,—and so it makes their employment unlawful. When a child has been employed in violation of law, and is injured in the place where he is employed, to allow the employer to escape liability because the injury resulted from the imprudence or negligence of the child, would be to defeat the purpose of the law and render it absolutely futile. It was because a child under fourteen years of age is likely to be imprudent and negligent, and is therefore exposed to greater danger to himself and others as well, that his employment in industrial establishments is forbidden. So it is never a question of risk of employment or of contributory negligence. The fact of plaintiff's employment in an industrial establishment was in itself sufficient evidence to warrant an inference of the defendant's negligence, regardless of the nature and character of the work assigned him. With the defendant's negligence established, but one question remained—Was this negligence of the defendant the proximate cause of the plaintiff's injury? It was, if incidental to the employment in a way that showed causal connection. Clearly the accident would not have happened but for plaintiff's illegal employment. If it happened immediately and directly because the boy did something in a negligent manner which he was not ordered to do,

such circumstance cannot be considered the proximate cause, since it was the danger of just such occurrences through indiscretion that moved the legislature to forbid the employment of children, and the defendant was bound to have respect to this danger, and not set the law at defiance. If the negligent act of the defendant in employing the plaintiff induced or offered opportunity for the subsequent act of the latter, and if his act was of a character common to youthful indiscretion, not only would causal connection be shown, but the law would refer the injury to the original wrong as its natural and probable cause, notwithstanding the intervening agency between that wrong and the injury. It is the settled doctrine of our cases, that where the circumstance or event which concurs with the negligent act in causing the injury might reasonably have been foreseen as likely to occur under the circumstances, the person guilty of such negligent act is liable for the resulting injury."

The occupiers of a spinning mill are liable to a fine under the English factory and workshop act of 1878, § 83, providing therefor where a young person is employed contrary to its provisions, where a young person in their employ during the time allowed for a meal oils part of the machinery, notwithstanding he does so contrary to orders for his own amusement. *Prior v. Slaitthwaite Spinning Co.* [1898] 1 Q. B. 881, 78 L. T. N. S. 532, 67 L. J. Q. B. N. S. 615, 46 Week. Rep. 488, 62 J. P. 358. The position was that the servant, in doing what he would have done if he had been acting under orders, was "working" at a forbidden time, within the meaning of the act.

The owner of a factory is guilty of negligence in putting a girl whom he employs as a "full-timer," in contravention of the same act (§§ 11, 12, 96), to do such dangerous work as keeping a carding machine free from tow, and must respond in damages if she is injured in attempting to clean it while in motion, although she has been expressly directed not to do this. *Sharp v. Pathhead Spinning Co.* (1885) 12 Sc. Sess. Cas. 4th series, 574.

The same position was taken in *Casperson v. Michaels* (1911) 142 Ky. 314, 134 S. W. 200, where a child was injured before beginning work, while warming her hands over the revolving

cylinder of a laundry mangle. The court said: "It is earnestly insisted, however, that appellee was not injured by virtue of her employment in violation of the statute. In this connection it is argued that appellant had the right to employ appellee in the laundry, just so she was not put to work at any of the machinery therein used; that as she was injured at a part of the machinery where she was not employed to work, and at a time when she was not actually engaged in work, the case is just the same as if she had been employed to mark towels, an employment attended by no danger, and had gone into the machinery room and been injured in the same manner; that if that be true, her right to recover does not depend upon the statute, and her case should be considered from a standpoint entirely independent of the statute; and when so considered, her own evidence shows that the danger of placing her hand on or near the drum was so obvious and apparent that even a child of much tenderer years ought to have known and appreciated the danger. While we appreciate fully the force of appellant's contention, we think the difference between the supposed case and that at bar consists in this: In the supposed case there would be no violation of the statute, and therefore, no right of action could be predicated on the statute; in the case at bar, however, appellee was employed and put to work at the mangle in violation of the statute. She was actually injured by the mangle at which she had been put to work. It is immaterial that she was injured by that part of the mangle at which she was not expected to work, or that she was injured while not being actually engaged in her customary duties. The purpose of the statute was to protect children not only from the danger necessarily incident to their employment in and around machinery of certain kinds, but from injuries which might result from their own thoughtlessness and childish acts. In other words, the purpose of the statute was to prevent their being exposed to danger. Here appellee was on hand, waiting to be summoned to work. She was near the mangle at which she was employed to work. Yielding to her childish instincts she followed the example of a boy who had put his hand near the cylinder for the purpose of warming it,

and attempted to do the same thing. It is evident that the statute was designed to protect her under just such circumstances. Knowing that a child under sixteen years of age might be injured while actually employed at work on dangerous machinery, or that he might, in a spirit of play or because of heedlessness that is characteristic of children, touch or come in contact with the machinery in some way, the legislature made it unlawful to employ children under sixteen years of age to work at such machinery. As appellee was, by virtue of her employment, exposed to the danger which resulted in the injuries complained of, we conclude that the proximate cause of her injuries was her employment at the mangle in violation of the statute. That being true, the court did not err in refusing to instruct the jury as if the case were one where no violation of the statute had taken place."

So the master was held liable, although the injuries to the child were sustained while he was playing with iron panels, which fell on him, causing the injury, and not while engaged in work for defendant or his agents. *Ornamental Iron & Wire Co. v Green* (1901) 108 Tenn. 161, 65 S. W. 399. The court said: "The wisdom of this legislation is strongly illustrated by the present case, whichever of the two theories is adopted. If it be true, as claimed by the minor, that the pile of iron panels was so carelessly placed against the post that it was dislodged by a slight blow from his foot, and fell upon him while he was engaged in the service of his master, or if the truth be in the theory of the defendant below, that the injury resulted from the heedlessness of the boy in making playthings of these heavy panels—in either case the propriety, if not the necessity, of excluding minors from the dangers and temptations of such places, is made clear. If the theory of the plaintiff below was correct, then, after making all proper allowances for such contributory negligence as might be attributed to a youth of his tender years, the employer would unquestionably be liable for the injury sustained. We think the same result follows upon the theory propounded by the defendant company. It had no right to employ this minor. While in its employment, on its premises, and foolishly playing with panels,

So far as industrial occupations are concerned, the decisions turning upon the question whether the work in which a child was engaged was, in respect either of quality or place, within the legislative prohibition, merely illustrate points of verbal construction.⁸

the property of the company, too heavy for his strength to hold, yet with boyish heedlessness disregarding this fact, this injury is inflicted upon him. Had he not been employed by this company, there is no reason to suppose he would have been on its premises, where the temptation occurred to him to prank with these panels, to his serious hurt. In each of the propositions presented by the respective parties to the suit we think there is causal connection between the employment and the injury."

Where a child under fourteen years of age is employed in a mine in violation of statute, he may recover for resulting injuries, whether the injury occurred when he was at his place in the mine, or going or coming to work. *Smith v. National Coal & I. Co.* (1909) 135 Ky. 671, 117 S. W. 280.

But it has been held that the provisions of the New York labor law as to permitting minors to operate elevators are not applicable to a boy who was not employed to run the elevator, but was injured while attempting so to do. *Young v. Eugene Dietzgen Co.* (1902) 72 App. Div. 618, 76 N. Y. Supp. 123, affirmed in (1903) 176 N. Y. 590, 68 N. E. 1126. But the more reasonable view of this case, under the facts, seems to be that taken in the dissenting opinion: "Although the plaintiff was not expressly employed to run the elevator, he and other boys had been accustomed to operate it to the knowledge of the defendant company. If he was permitted by the defendant to operate the lift or elevator, although not so directed, this was a violation of the labor law (Laws 1897, chap. 415, § 79), and affords a cause of action in the absence of contributory negligence. It cannot be held, as matter of law, that this boy was guilty of negligence in starting the lift and riding thereon, as had been the custom, when, according to his evidence, it does not appear that he knew of any other way of performing the duty of getting this heavy bulky package to the express office in time to catch the five-thirty P. M. express wagon, which was enjoined upon

him on pain of losing his situation. According to his testimony, this was the common way of operating the lift, and he was not aware of any other way of starting it up. For these reasons I think the case should have been submitted to the jury."

⁸ In *Hardcastle v. Jones* (1862) 3 Best & S. 153, 32 L. J. Mag. Cas. N. S. 499, 9 Jur. N. S. 19, 7 L. T. N. S. 322, 11 Week. Rep. 36, it was held that a child employed in "finishing" goods in a shed communicating with "buildings in which printing was carried on" was "employed in a print work" within the meaning of a provision requiring the obtaining of a surgeon's certificate of health for children thus employed. Regulation of the health of children in printworks, 8 & 9 Vict. chap. 29, now repealed.

Premises where unbleached cloth is "finished" have been held not to be within the prohibition of an act forbidding the employment of children under thirteen without a school-master's certificate, on premises where "any process previous to packing is carried on in the occupation of bleaching, dyeing, or finishing of any yarn or cloth." *Howarth v. Coles* (1862) 12 C. B. N. S. 139, 31 L. J. Mag. Cas. N. S. 262, 9 Jur. N. S. 251, 6 L. T. N. S. 785 (construing the repealed bleaching and dyeing works act, 23 & 24 Vict. chap. 78).

A building where bleaching, dyeing, and finishing was carried on, 7 miles distant from the place where the cloth was printed, but part of the same commercial establishment, was held to be within the provision of the same act, which excepted from its operation any building used solely for incidental printing processes carried on within buildings "lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing is carried on." *Hoyle v. Oran* (1862) 12 C. B. N. S. 124, 31 L. J. Mag. Cas. N. S. 213, 8 Jur. N. S. 1154.

In one of the repealed English factory acts, 7 & 8 Vict. chap. 13, the restrictive provisions as to the employment of children were qualified by a clause excepting "any part of a factory-

used solely for the manufacture of goods made entirely of any other material than those enumerated." Among the goods enumerated was cotton, but not leather. A child was employed in a room of the defendant's factory, in preparing pieces of leather to be used in making the "webbing" an article composed of cotton and wool to be used with pieces of leather, to make up the braces and horse girths which the defendant manufactured. Held, that the place where the work was done was not within the exceptive clause. *Taylor v. Hickes* (1862) 12 C. B. N. S. 152, 31 L. J. Mag. Cas. N. S. 242, 9 Jur. N. S. 21, 6 L. T. N. S. 784.

In the repealed workshop regulation act. 30 & 31 Vict. chap. 146 § 4, the employment of children under eight years of age in any handicraft was prohibited. The word "employed" was defined as meaning "occupied in any handicraft, whether for wages or not," and the word "handicraft" as "any manual labor incidental to the making, etc." of certain articles. Held, that the object of the statute was to prevent children from working under any pretense, and that the prohibition was consequently applicable to a child engaged in plaiting straw furnished by its mother, who sold the braid for her own benefit, under the supervision of a person whom its mother paid for the teaching, in his workshop. *Beadon v. Parrott* (1871) 40 L. J. Mag. Cas. N. S. 200, L. R. 6 Q. B. 718, 19 Week. Rep. 1144.

By § 73 of the factory act, 7 & 8 Vict. chap. 15, premises used solely for the manufacture of paper were excluded from the operation of the factory acts.

In *Coles v. Dickinson* (1864) 16 C. B. N. S. 604, 33 L. J. Mag. Cas. N. S. 235, 10 Jur. N. S. 802, 10 L. T. N. S. 616, 12 Week. Rep. 918, where the defendant was charged with a breach of the section requiring him to register the names of young persons employed by him, it was held that a mill in which cotton waste and rags were reduced to pulp, which was manufactured into paper at another mill belonging to the same owners, was within this exception, both concerns being deemed to be parts of one and the same establishment.

With reference to N. Y. Laws 1892, chap. 673, (now repealed), defining a "manufacturing establishment" as any mill, factory, or workshop where one or more persons are employed at labor, it

was held in *Murphy v. Bennett* (1896) 11 App. Div. 298, 42 N. Y. Supp. 61, that the provision in N. Y. Laws 1889, chap. 560, forbidding the employment of a child under fourteen years of age in such an establishment, was violated by the employment of a child to remove boards from a lumber pile a quarter of a mile from the mill.

In *Brower v. Locke* (1903) 31 Ind. App. 353, 67 N. E. 1015, it was held that, under the provision in the Indiana factory act 1899 (Burns's Rev. Stat. 7087i), which forbids the employment of children to clean machinery in motion, a child might recover for injuries received while he was performing such work, although a portion of the machinery was stationary at the time of the accident.

In *Sterling v. Union Carbide Co.* (1905) 142 Mich. 285, 105 N. W. 755, it was held to be a question for the jury, whether the operation of a corrugating machine was an employment whereby the child's "life or limb is endangered," within the meaning of Mich. Pub. Laws 1901, No. 113, § 3.

In *Miller v. National Enameling & Stamping Co.* (1904) 116 Ill. App. 99, the court thus discussed the question whether the defendant had, by setting the plaintiff to operate a motor in rolling mills, violated an enactment prohibiting the employment of children under sixteen years of age "at such hazardous employment whereby its life or limb is in danger, or its health is liable to be injured, or its morals depraved." "The plaintiff offered and the court excluded testimony tending to prove the danger and exposure incident to the use of machinery throughout the mill. The court, in ruling, limited the evidence to the machinery and conditions in that part of the mill where plaintiff worked. This was clearly right, for only the hazard of his employment, the work to which he is appointed, is contemplated by the statute,—the danger to which the employee may be exposed while in the line of his duty as such employee. Whether the work was extrahazardous, or not, ordinarily is a question of fact for the jury. Nevertheless, if from all that has been offered in proof it can be said that there is no evidence to warrant a verdict for the plaintiff, it is the duty of the court to take the case from the jury. It will not be seriously contended, certainly

The effect ascribed by the courts of New York to statutes by which the employment of children in certain occupations of a nonindustrial character is forbidden is indicated by the decisions cited below.⁹

the evidence does not show, that the operation of the motor, or the plaintiff's surroundings while in the line of duty, were in any sense extrahazardous. While it appears that on one or two occasions he was sent on errands to other parts of the mill, and may thus have been exposed to extrahazard, yet it is quite clear that this was no part of his duty under the employment. Had he suffered injury while in this service, a very different question would arise."

⁹ The clause in the earlier enactment (Laws 1876, chap. 122, §§ 1, 2, as amended by Laws 1884, chap. 48), which prohibited the employment of children "for or in any obscene, indecent, or immoral purpose, exhibition, or practice whatsoever, or for or in any business, exhibition, or vocation injurious to the health or dangerous to the life or limb of such child," was deemed to be applicable only to an employment either vicious in itself, or one which partakes of the character of an amusement. Productive industries, or occupations of a useful or necessary character, were held not to be within its purview. *Hickey v. Taaffe* (1885) 99 N. Y. 204, 52 Am. Rep. 19, 1 N. E. 685, reversing (1884) 32 Hun, 7. The decision in *Cooke v. Lalance Grosjean Mfg. Co.* (1884) 33 Hun, 351, which was rendered by the supreme court while the appeal in *Hickey v. Taaffe* was pending, was also overruled. The court of appeals thus stated its conclusions: "The scope of the act cannot be broader than its title: 'To Prevent and Punish Wrongs to Children.' To that end it prohibits, first, their employment in certain specified avocations intended for the amusement of the public, and which, however unprofitable to them and dangerous to the actor, are at least in themselves innocent; second, in the most general terms, 'any purpose, exhibition, or practice' which is either obscene or has an indecent or immoral purpose; and, third, their employment for or in any 'business, exhibition, or vocation injurious to the health' or 'dangerous to the life or limb of such child.' Here are three clauses, the first implying a service or exhibition

attractive to the spectator, because of personal skill or detextity of the performer; the second, practices which, tending to degrade and corrupt, are against good morals; the third, 'any business, exhibition, or vocation which is injurious or dangerous.' The word 'vocation' appears in the first clause, where its meaning is illustrated by an enumeration of pursuits literally within the mischief of the act; the word 'exhibition' fitly describes those pursuits, and, if they stood alone in the third clause, although preceded by the word 'any,' would, within well-settled rules of construction, embrace only things of the same kind or class as those with which they were first connected. The other word, 'business,' is, it is true, used for the first time. In general use it has a broader significance than either of the others and might include any affair, however serious or trivial, into which volition entered. But here it is used with the words of limited meaning, which have received in the same act a particular application, and, upon the same principles of construction, must be referred to things of the same kind as those specified, and to which the other words are referred. (*Wakefield v. Fargo* [1882] 90 N. Y. 218.)"

In *Ryan v. Buchanan* (1885) 37 Hun, 425, it was ruled by the supreme court that the provision in the Penal Code does not constitute a prohibition against the employment of children in a dangerous "business or vocation," but only against their employment in a dangerous "practice or exhibition."

The prohibition in the clause regarding the employment of children in "singing and dancing in a theatrical exhibition" is held to be absolute, and in no wise qualified by the exceptive provision at the end of the section with relation to singing with the consent of the mayor. *Re Stevens* (1893) 70 Hun, 243, 24 N. Y. Supp. 780; *People ex rel. Sanders v. Grant* (1893) 70 Hun, 233, 24 N. Y. Supp. 776.

In order to establish an offense under that clause it is only necessary to show that the exhibition was a theatrical performance, that the children were em-

1903. Misstatement concerning minor's age; effect of.—It is generally held that the right of action arising from a violation of these statutes is not affected by misstatements as to the minor's age. This might be put upon the ground that infants are not liable for torts connected with or growing out of their contracts, and that the doctrine of estoppel *in pais* is not applicable to them.¹

It might be possible to regard such cases as falling within the scope of the general rule that "an infant cannot take advantage of his own fraud."² In this point of view a minor would be precluded from recovering on the mere ground of his having been employed under the statutory age, unless it should appear that the employer was, either by his personal appearance or some other circumstance, put upon inquiry as to his real age. If this rule were treated as controlling in respect to all cases in which the minor has made a wilful misstatement, it would preclude him from recovering even where the employer has violated a provision which specifically declares that, before engaging a minor, he is to procure from the minor's parent or guardian a sworn statement concerning his age. The courts, however, have not been inclined to allow misstatement of age by a minor as a defense to his action.³

It has been held that misrepresentation of the child's age by its parents will not protect the master employing the child contrary to the provisions of the New York labor law.⁴ Even affidavits of the parents as to the child's age, it has been declared, will not avail the

ployed as dancers or singers, and that they were under the age of sixteen. It is not necessary to show that the exhibition was dangerous to the health or morals of the children, nor need any specific act of cruelty to the children be shown. *People v. Meade* (1890) 24 Abb. N. C. 357, 10 N. Y. Supp. 943.

The apprenticing of children under sixteen years of age to learn the trade of gymnasts and acrobats has been held within the prohibition of a statute forbidding the taking, reception, hire, employment, use, or exhibit of such children as gymnasts or acrobats. *Re Donohue* (1876) 1 Abb. N. C. 1. New York Laws 1876, chap. 122, repealed by implication § 292 of the Penal Code. See *Ryan v. Buchanan*, 37 Hun, 425.

¹ *Kirkham v. Wheeler-Osgood Co.* (1905) 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532.

² See Pollock, Torts, *48.

³ *Synseszewski v. Schmidt* (1908) 153

Mich. 438, 116 N. W. 1107; *Braasch v. Michigan Stove Co.* (1908) 153 Mich. 652, 20 L.R.A.(N.S.) 500, 118 N. W. 366; *American Car & Foundry Co. v. Armentraut* (1905) 214 Ill. 509, 73 N. E. 766; *Beauchamp v. Sturges & B. Mfg. Co.* (1911) 250 Ill. 303, 95 N. E. 204; *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857; *Blankenship v. Ethel Coal Co.* (1911) 69 W. Va. 74, 70 S. E. 863.

⁴ *Koester v. Rochester Candy Works* (1909) 194 N. Y. 92, 19 L.R.A.(N.S.) 783, 87 N. E. 77, 16 Ann. Cas. 589; *American Car & Foundry Co. v. Armentraut* (1905) 214 Ill. 509, 73 N. E. 766.

The master must ascertain upon his peril, whether the child is of the age required by Burns's Anno. Stat. 1908, § 8022 (Acts 1899, p. 232, chap. 142, § 2), prohibiting the employment of children under fourteen years of age in

master, unless all formalities of the statutes in connection therewith have been complied with.⁵ And it has been held that the erroneous belief of the master that a minor is above the statutory age will not remove the bar of the statute against his employment, where the minor at the time of his employment was not asked his age, and did not know that it had been misrepresented.⁶

1904. Parents' consent to illegal employment of minor child; effect of.—It has been held that the father of a minor who is injured after having been employed, while still under the age limited by a statute, cannot recover in an action for the loss of services caused by the injury, if it is shown that he himself consented to the illegal employment of his child.¹ But it has been held that consent of the mother to the illegal employment will not stand in the way of her recovery for the death of the child, caused by the negligence of the master.² And where the statutory affidavit has not been obtained, the fact that the parent knows of the employment will not excuse the master.³

As to the effect, at common law, of the employment of a minor without his parents' consent, see § 915, *ante*.

manufacturing establishments. *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, transferred from appellate court (1908) 42 Ind. App. 629, 86 N. E. 503.

Good faith in employing a child under fourteen years of age, in violation of the Washington statute, is not a defense to an action by the child for resulting injuries. *Glucina v. Goss Brick Co.* (1911) 63 Wash. 401, 42 L.R.A.(N.S.) 624, 115 Pac. 843.

⁵ *Bryant v. Mandel* (1907) 74 N. J. L. 305, 65 Atl. 867.

Under the New Jersey act relating to the employment of children (act of March 24, 1904, Pamph. L. P. 152), an affidavit of a parent of a child under fourteen years of age, that the child was over that age, without the certificates and papers required by the statute, is an insufficient defense to an action for a penalty thereunder. *Ibid*.

⁶ *Beghold v. Auto Body Co.* (1907) 149 Mich. 14, 29, 30, 14 L.R.A.(N.S.) 609, 112 N. W. 691.

¹ *Reaves v. Anniston Knitting Mills* (1908) 154 Ala. 565, 45 So. 702 (Ala. Gen. Acts 1903, p. 68). It was also held that, under the rule that a pleading must be construed against the pleader, it will be presumed in such an action that he did so consent, unless the contrary is averred. This decision was followed in *Swift & Co. v. Rennard* (1905) 119 Ill. App. 173. Illinois is one of the states in which the employer is specifically required to procure a certificate of the age of a minor employee. But this particular requirement was not relied upon, nor even adverted to, by the court. The report does not show whether it had in fact been complied with.

² *Stenson v. J. H. Flick Constr. Co.* (1911) 146 App. Div. 66, 130 N. Y. Supp. 555.

³ *La Porte Carriage Co. v. Sullender* (1904) — Ind. App. —, 71 N. E. 922.

CHAPTER LXXXIIA.

REMEDIES FOR THE VIOLATION OF SPECIFIC STATUTORY DUTIES.

A. CIVIL ACTION FOR DAMAGES.

- 1905. Right of action, how far affected by the appointment of a special public remedy.
- 1906. Doctrine that the breach of a statute constitutes negligence in point of law.
- 1907. Doctrine that the breach of a statute is presumptive evidence of actionable negligence.
- 1908. Doctrine that the breach of a statute merely constitutes evidence of actionable negligence.
- 1909. Conflicting doctrines discussed.
- 1910. Statutes expressly authorizing a civil remedy in actions for a violation of their provisions.
- 1911. Employer not rendered an insurer of his servant's safety by the imposition of a specific duty.
- 1912. Parties entitled to bring actions.
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B. PENAL LIABILITY OF DELINQUENT EMPLOYER, ENFORCEMENT OF.

- 1915. Generally.
- 1916. Persons liable.
- 1917. Pleading.
- 1918. Defenses to penal actions.
 - a. In general.
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A. CIVIL ACTION FOR DAMAGES.

1905. Right of action, how far affected by the appointment of a special public remedy.—As to the necessity of showing that the breach of duty alleged was the proximate cause of the injury, see chapter LXVII., *ante*.

Some of the statutes under which a breach of any of the duties imposed is a penal offense expressly provide that they shall not be

construed as prohibiting the institution of an action for damages;¹ or more simply, that such an action may be instituted by the servant.² The essence of other statutes is that an action shall not be maintained unless the employer is notified within a certain time regarding the circumstances under which the injury in question was received, and proceedings are commenced within a specified period after the occurrence from which the injury resulted.³

According to a standard treatise the general rule is that, when a duty or obligation exists at common law, independently of the statute, a new remedy given by the statute is simply cumulative, and does not preclude the ordinary common-law remedy by way of action, unless there are express words to that effect.⁴ In this instance, therefore, the determination of the question whether the common-law rights of the party suing have been superseded by the given statute "depends usually upon whether the statute is at variance with the common law, or is merely cumulative. The legislature could formulate a complete code of rules so particular and minute in their character as to cover all common-law rights with reference to any particular business, and in that event there would be a complete supersedure. But unless that is done, all common-law rights not at variance with some provision of the enactment would continue in force."⁵ There is high authority for the unqualified doctrine that,

¹ See, for example, Mass. Pub. Stat. chap. 104, § 22 (as to the fencing of machinery).

In Kentucky, a general statute (Ky. Stat. 1903, § 466) provides that a person injured by the violation of any statute may recover although the statute itself imposes a penalty or forfeiture.

² See Missouri mining act (Rev. Stat. 1889), applied in *Adams v. Kansas & T. Coal Co.* (1900) 85 Mo. App. 486. A similar clause is doubtless inserted in other enactments of this class.

³ See Rem. & Bal. Code, § 6595.

⁴ Addison, Torts, p. 75, citing Comyn's Digest, title, *Action upon Statute* (C); *Chapman v. Pickersgill* (1762) 2 Wils. 145.

⁵ *Consolidated Coal Co. v. Bokamp* (1898) 75 Ill. App. 605, affirmed in (1899) 181 Ill. 9, 54 N. E. 567. There it was held that the statutes of Illinois regulating coal mining, requiring owners of mines to keep on hand a supply of timbers, and to deliver the same to the workmen as required, to enable them to properly secure the workings

for their own safety, do not supersede the requirement of the common law that a master shall furnish his servant a reasonably safe place to work. An action was declared to be maintainable, on this ground, by a workman driving cars over tracks in a mine entry, who had nothing to do with the propping of the roofs, the evidence being that the mine owner had been notified of the unsafe condition of the roof of the entry, and had assumed to repair it.

By § 43 of the act of Congress of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam, and for Other Purposes" (16 Stat. at L. 453, chap. 100, U. S. Comp. Stat. 1901, p. 3058), it is provided that the master and owner of any vessel, or either of them, and the vessel itself, shall be liable to any passenger for any damage sustained by him or his baggage from explosion, fire, collision, or other cause, if it happens through any failure or neglect to comply with the provisions of the law; and

"where a new duty or prohibition is created by statute, and the same act gives a remedy for the breach, by penalty or otherwise, for the benefit of the party grieved, he has no other."⁶ But in a leading English case the rule is laid down in the more guarded form that the remedy prescribed by the statute is exclusive, where, upon the purview of the whole act, it appears that the remedy so given is intended to be a substitute for the right of action which would otherwise exist.⁷ The inference that it was the intention of the legislature that the particular remedy designated should be the only one available is, it would seem, peremptory and invariable wherever the statute in question stands outside the category of those which are enacted for the benefit or protection of a particular class of persons.⁸ But if the

also that any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any captain, mate, engineer, or pilot, or his neglect or refusal to obey the provisions of the law, may recover damages for such loss or injury from the captain, mate, engineer, or pilot causing such loss or injury. A shipowner sought to draw the inference from this section that a mariner on a vessel was precluded from a suit against the vessel for any injury done him, because an action against the vessel was given to passengers only for damage from fire, explosion, collision, or other cause arising from neglect or failure to comply with the law, and that he was remitted by the last clause of the section to an action against the captain, mate, or other officer who caused such injury. This argument did not prevail. The provisions of the act were considered to be cumulative, and not intended to interfere with the rights of sailors under the maritime law, or to deprive them of remedies given them by that law. *Brown v. The D. S. Cage* (1872) 1 Woods, 401, Fed. Cas. No. 2,002.

⁶ *Jones v. Stanstead, S. & C. R. Co.* (1872) L. R. 4 P. C. 98, 116, 41 L. J. P. C. N. S. 19, 26 L. T. N. S. 456, 20 Week. Rep. 417, 8 Moore P. C. C. N. S. 312 (infringement of statutory right to tolls). To the same effect see the remarks of Lord Campbell as quoted in note 11, *infra*.

⁷ *Groves v. Wimborne* [1898] 2 Q. B. 402, 412, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87, per Rigby, L. J.

⁸ In *Gorris v. Scott* (1874) L. R. 9

Exch. 125, it was held that the fact that plaintiff's sheep were washed overboard by reason of the failure of the shipowner to provide the pens prescribed by the English contagious diseases (animals) act of 1869 would not give him a right of action for the damage thus caused. Discussing the contention of counsel that, under certain circumstances, if special damage results to anyone from the breach or violation of the statutory duty, there is then also a remedy for such damage by way of action for such breach of duty, Kelly, C. B., said: "That is true; but in cases only where, by the act of Parliament whose provisions are thus violated, a benefit is conferred upon the individual who suffers from the breach of duty. And if the protection or the benefit of the individual owner of the animals were the object and intention of the act of Parliament, then undoubtedly this action might be maintained; but nothing can be more plain, on looking at the act, than that such was not the object or intention of the legislature in passing it, but that the providing these pens and footholds was entirely for the protection of the animals themselves from unnecessary suffering during the voyage, and that any private individual benefit was not within the intention of the act at all."

These remarks of the chief baron were referred to with approval by Smith, L. J., in *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (see note 10, *infra*).

No action lies against a local board for personal injuries caused by its fail-

statute is one which, like those under review in the preceding five chapters, belongs to that category, the mere fact that a penalty is imposed for the infringement of its provisions will not necessarily preclude a party who is specially injured by that infringement from maintaining an action for damages.⁹ Whether an indemnity can be recovered in such a proceeding is a question which is to be deter-

ure to keep a highway in proper repair in accordance with the provisions of the English public health act of 1875. *Cowley v. Newmarket Local Board* [1892] A. C. 345, 62 L. J. Q. B. N. S. 65, 67 L. T. N. S. 486, 56 J. P. 805, 12 Eng. Rul. Cas. 705.

See also the opinions of the lords justices in *Atkinson v. Newcastle & G. Waterworks Co.* [1877] L. R. 2 Exch. Div. 441, 46 L. J. Q. B. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794.

The following rule has been formulated by Mr. Addison (Torts, p. 74): 'Where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing from being done, under a penalty for doing it, an action for damages is not maintainable.'

⁹ *Klatt v. N. C. Foster Lumber Co.* (1897) 97 Wis. 641, 73 N. W. 563; *Narramore v. Cleveland, C. C. & St. L. R. Co.* (1899) 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; *New York, C. & St. L. R. Co. v. Lambright* (1891) 5 Ohio C. C. 433, 3 Ohio C. D. 213; *Freeman v. Glens Falls Paper Mill Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 857; *Messenger v. Pate* (1876) 42 Iowa, 443; *Queen v. Dayton Coal & I. Co.* (1895) 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Campbell v. Calderbank Steel & Coal Co.* (1898) 25 Sc. Sess. Cas. 4th series, 753, 35 Scot. L. R. 722 (explosives act); *Davis Coal Co. v. Pollard* (1902) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492 (mining act); *Stehle v. Jaeger Automatic Mach. Co.* (1908) 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122 (employment of minor under statutory age); *Westervelt v. Dives* (1911) 231 Pa. 548, 80 Atl. 1054 (no safety devices on elevators).

An operative in a factory, injured by a revolving shaft not fenced as required by the English statute, (7 & 8 Vict. chap. 15, § 21), with which he became,

without contributory negligence, entangled, may recover damages against the delinquent manufacturer in a common-law action, although the statute imposes specific penalties for its violation, and provides a special action besides. *Caswell v. Worth* (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116, 4 Week. Rep. 231.

Operatives injured by the omission of the owner of a building to provide fire escapes as required by the New York act of 1887 are entitled to recover from him the damages occasioned thereby. *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999.

An employee has a right of action for injuries caused by his master's failure to comply with his statutory duty to guard a circular saw, which failure is a misdemeanor, although the statute provides him no special remedy. *Monteith v. Kokomo Wood Enameling Co.* (1902) 159 Ind. 149, 58 L.R.A. 944, 64 N. E. 610.

A breach of a statute forbidding the employment of train hands for more than twenty-four hours continuously gives a cause of action to one injured because of its violation. *Pelin v. New York C. & H. R. R. Co.* (1905) 102 App. Div. 71, 92 N. Y. Supp. 468.

The violation of a statute providing that, if any person runs any threshing machine without having the two lengths of tumbling rods next the machine, together with the knuckles, joints, and jacks of the tumbling rods, safely boxed and secured while the machine is running, shall be deemed guilty of a misdemeanor and be punished, etc., affords a right of action to a person injured by the neglect to comply with such statute, notwithstanding the statute does not in terms give any right of action to an individual. *Messenger v. Pate* (1876) 42 Iowa, 443.

"The action of the employee is solely to recover compensation for actual damages. The payment of compensative

mined in each instance from a consideration of the words used in the provision which has been violated, and in any other parts of the stat-

damages is not punishment. The right of the state to recover a penalty and the right of an aggrieved party to recover compensation are not inconsistent." *Davis Coal Co. v. Polland* (1901) 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492.

"At common law, there was no duty imposed upon the employer to provide fire escapes, in anticipation of the burning of the building in which he employed his workmen. If his building was properly constructed for the purposes of its intended use, such extraordinary and unusual precautions were not demanded of him. The statute of 1887 (chap. 462) created the absolute duty, and its effect was to give a cause of action for its breach, in favor of anyone entitled to its observance, and injured by a breach." *Huda v. American Glucose Co.* (1897) 154 N. Y. 474, 40 L.R.A. 411, 48 N. E. 897.

In *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 341, 19 L. T. N. S. 30, 2 Paterson, Sc. App. Cas. 1597, 6 Macph. Sc. Sess. Cas. 84, 19 Eng. Rul. Cas. 132, Lord Chelmsford remarked that the scope of the decision in *Couch v. Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515, was merely that a person suffering damage from an omission of a duty is not deprived of his remedy because the legislature has attached a penalty to such omission.

In *Groves v. Wimborne* [1898] 2 Q. B. 402, Vaughan Williams, L. J., said with reference to the factory act: "I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive, or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to inure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration in

dealing with the question whether the legislature intended the statutory remedy to be the only remedy. But again, the fact that the legislature has provided that that remedy shall inure, or under some circumstances shall inure, for the benefit of the person injured, is not conclusive of the question, and, although it may be a cogent and weighty consideration, other matters also have to be considered."

In *Jetter v. New York & H. R. Co.* (1865) 2 Keyes, 154, the doctrine propounded in *Brown v. Buffalo & S. L. R. Co.* (1860) 22 N. Y. 191, that the penalty fixed by an ordinance as to running of cars was the only consequence which the law imposed for its violation was declared to stand upon grounds too doubtful to justify its application to cases not strictly within it. That doctrine was explicitly discarded in *Massoth v. Delaware & H. Canal Co.* (1876) 64 N. Y. 524.

Where the duties imposed by statute are merely ministerial, the general rule is that an action will lie at the suit of the party aggrieved by them. *Pickering v. James* (1873) L. R. 8 C. P. 489, 509, 42 L. J. C. P. N. S. 217, 21 Week. Rep. 786, 29 L. T. N. S. 210, per Brett, J.

See, generally, the cases cited in *Shearm. & Redf. Neg.* § 467.

It will be convenient to refer here to three other cases, although they involved the liability of employers in respect of a matter outside the scope of this chapter.

In *Handley v. Moffatt* (1873) Ir. Rep. 7 C. L. 104, 21 Week. Rep. 231, where an action was brought for improperly dismissing a servant without giving him a certificate of character, as prescribed by the statute referred to in § 2031, it was shown that the statute also provided that, if the master or mistress refused to give a discharge, the servant might procure a certificate from a justice of the peace or chief magistrate of the town, "to all intents and purposes as good as if the same had been given by the master or mistress." For this reason, it was held that the act which created the duty also gave the remedy for its violation, and that the party aggrieved had no other.

ute which throw light upon the intention of the legislature.¹⁰ In view of the decisions and expressions of judicial opinion in England,

In *Vallance v. Falle* (1884) L. R. 13 Q. B. Div. 109, 53 L. J. Q. B. N. S. 459, 51 L. T. N. S. 153, 32 Week. Rep. 769, 5 Asp. Mar. L. Cas. 280, 48 J. P. 519, it was held that the only remedy for a breach of the duty imposed by § 172 of the English merchant shipping act of 1854, which entitles seamen to a certificate of discharge, was by proceedings for the penalty specified.

In *Crall v. Toledo & O. C. R. Co.* (1893) 7 Ohio C. C. 132, 3 Ohio C. D. 696, a similar decision was rendered with respect to the statute of Ohio.

¹⁰ (a) *Action held maintainable.*—In *Groves v. Wimborne* [1898] 2 Q. B. (C. A.) 402, where a servant was allowed to recover for injuries caused by the defendant's noncompliance with the provisions of the English factory act with regard to the guarding of machinery, Smith, L. J., made the following remarks: "It is to be observed, in the first place, that under the provisions of § 82 not a penny of the fine necessarily goes to the person injured or his family. The provision is only that the whole or any part of it may be applied for the benefit of the injured person or his family, or otherwise, as a secretary of state determines. Again, if proceedings for the fine are taken before magistrates, upon what considerations are they to act in determining the amount of the fine? One matter to be considered, clearly, would be the character of the neglect to fence. This neglect would be either of a serious or of a venial character. Suppose that it was of the latter character, but a person was unfortunately killed or injured in consequence of it. What fine are the magistrates to impose? Are they to impose a fine of the same amount as if it were a flagrant case of neglect to fence? The first thing one would say that they would have to consider would be whether the offense was of a grave character or otherwise. It may be said that, in determining the amount of the fine, the character of the injury sustained by the workman would be considered, but I am not sure that that is the meaning of the section. It seems to me that the fine is inflicted by way of punishment of the employer for neglect of the duty imposed by the act, and must be proportionate to the

character of the offense. This consideration, and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family, lead me to the conclusion that it cannot have been the intention of the legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the prima facie right of the workman to be fully compensated for injury occasioned to him by that neglect. Another observation which makes the matter still clearer arises from the fact that, having regard to the provisions of § 87, it may not be the employer—presumably a person of means and capable of paying a substantial fine—who would have to pay the fine. Under that section the employer may be exempted from the penalty, and the fine may be imposed upon the actual offender, who may be a workman employed at weekly wages; and yet it is said that a fine payable by such a person is the only remedy given by the statute to the injured workman for breach by the occupier of the imperative statutory duty. I cannot read this statute in the manner in which it is sought to be read by the defendant." Rigby, L. J., summed up his conclusions as follows: "Looking at the whole purview of the act, is it one of those acts by which the legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty, in the general interests of the public at large, but does not intend that an individual shall have a private right of action for injury occasioned to him by breach of its provisions? Or is it one of those acts in which the legislature, having created a new duty in the interests of a certain class of persons, and having provided a statutory remedy for breach of that duty, intends that that remedy shall be the only one available? It is, in my opinion, neither one nor the other."

See also the extract in note 9, *supra*, from the opinion of Vaughan Williams, L. J.

That there is a right of action for injuries caused by a breach of the provisions of the English factory act was taken for granted in the cases cited in chapter LXXVIII, *ante*.

it seems to be impossible to state the situation more favorably than this for the servant, although one much discussed case has been sup-

That the American doctrine is to the same effect with regard to all statutes enacted for the protection of servants is shown by the decisions cited in the last note, as well as by many of those collected in chapter LXXVIII. See especially those relating to mines. In none of them does it seem to have been seriously contended, much less decided, that the infliction of a penalty had the effect of precluding the injured servant from recovering damages in an action for a breach of the statutory duty.

In *Freeman v. Glens Falls Paper Mill Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 657, it was taken for granted that a servant had a right of action for injuries caused by the failure of his master to comply with an ordinance which imposed a penalty for the omission to have automatically closing doors to elevator shafts.

As to the case of *Couch v. Steel*, see the following note.

(b) *Action held not maintainable.*—The statute of 23 & 24 Vict. chap. 151, for the regulation and inspection of mines, specifies (§ 10) several rules to be observed by persons operating coal mines; one of these provisions being that an adequate amount of ventilation shall be constantly produced to such an extent that the pits, etc., shall be in a fit state for working. By § 22 a penalty is imposed for a violation of any of these rules. According to Lord Chelmsford—the other law lords declined to express an opinion on this point—this statute does not give a miner a right of action which he would not have had without it. *Wilson v. Merry* (1868) L. R. 1 H. L. Sc. App. Cas. 326, 341, 19 Eng. Rul. Cas. 132, “The statutable duty,” he remarked, “is, no doubt, created absolutely for the purposes of the act; but it is a duty which, if unperformed, can only be enforced by the penalty, and this, for the protection of the public, is to be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable.” The reasoning of the court

of exchequer chamber in *Gray v. Pullen* (1864) 5 Best & S. 970, 34 L. J. Q. B. N. S. 265, 11 L. T. N. S. 569, 13 Week. Rep. 257, where an action was sustained against a house owner whose omission of a statutory duty for the non-performance of which a penalty was imposed caused an injury to a member of the public, was considered by him to be unsatisfactory.

As article 3053 of the Quebec factories act, formerly in force, expressly declares that its provisions in nowise modify the responsibility of an employer to his employees under the civil laws of the province, those provisions are to be treated as police regulations, which merely subject employers to fine and imprisonment. See *Montreal Rolling Mills Co. v. Corcoran* (1896) 26 Can. S. C. 595.

A local building act required fire escapes on buildings where more than a certain number of operatives were employed, and imposed a penalty for a violation of the law, and also provided for an injunction. Held, that an operative employed in such a building having no fire escape could not maintain an action against the owner for an injury sustained because he was compelled to jump from the building. *Grant v. Slater Mill & Power Co.* (1884) 14 R. I. 380.

The doctrine embodied in several Ontario cases is that the provisions of the factories acts of that province (Ont. Rev. Stat. 1887, chap. 141; Ont. Rev. Stat. 1897, chap. 208) are penal merely, and do not confer any civil right of action. The theory propounded was that a person who is injured by a violation of the statutory provisions, and wishes to bring suit for damages, is relegated to his common-law rights of action, and cannot avail himself of those provisions, except to the extent of adducing the defendant's failure to comply with them as a circumstance which tends to prove negligence on his part (§ 1908, *post*). See *Finlay v. Miscampbell* (1890) 20 Ont. Rep. 29; *Headford v. McClary Mfg. Co.* (1893) 23 Ont. Rep. 335; *McCloherly v. Gale Mfg. Co.* (1892) 19 Ont. App. Rep. 117; *Rodgers v. Hamilton Cotton Co.* (1893) 23 Ont. Rep. 425. The ruling of the English court of ap-

posed to embody the broad general proposition "that, wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed."¹¹

peal in *Groves v. Wimborne* [1898] 2 Q. B. 402, 67 L. J. Q. B. N. S. 862, 79 L. T. N. S. 284, 47 Week. Rep. 87 (note 7, *supra*), would seem to have overthrown the authority of these decisions. That ruling virtually determines that a factory act framed on the same lines as the English one is not within the purview of the principle relied upon in the first named of the Ontario cases, *viz.*, that "where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing being done under a penalty for doing it, an action for damages is not maintainable." Addison, Torts, 6th ed. 40.

¹¹ This was the construction put by Lord Cairns in *Atkinson v. Newcastle & G. Waterworks Co.* (1877) L. R. 2 Exch. Div. (C. A.) 441, 46 L. J. Q. B. N. S. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794, upon the language used by the court of Queen's bench in *Couch v. Steel* (1854) 3 El. & Bl. 402, 2 C. L. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515. Both he and the other lords justices had grave doubts about the correctness of the proposition thus enunciated. Those doubts were afterwards reiterated by Lord Herschell in *Cowley v. Newmarket Local Board* [1892] A. C. 345, 62 L. J. Q. B. N. S. 65, 67 L. T. N. S. 486, 56 J. P. 805, 12 Eng. Rul. Cas. 705.

In *Couch v. Steel*, *supra*, it was held that a seaman who suffered injury by reason of the failure of his employer to furnish the supply of medicines prescribed by the English shipping act could recover damages, although a penalty was also imposed for non-performance of the statutory duty. Lord Campbell, whose views were adopted by the rest of the court, expressed the opinion, in the first place, that the statutory provision in question was enacted for the benefit of individuals, and that, under these circumstances, the case fell within the scope of the general principle laid down in Comyn's Digest, title *Action upon Statute* (F), that, "in every case

where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." He also relied upon the statute of Westm. 2 (1 Stat. 13th ed. 1) chap. 50, which gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2 Coke's Inst. 486. He then proceeded as follows: "Therefore, the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action in the same manner as if the obligation had been imposed by the common law, or had been expressly included in the ship's articles. However, § 18 of Stat. 7 & 8 Vict. chap. 112, which creates the duty, also makes the party who ought to perform it liable to a penalty for non-performance, to be recovered at the suit of any person, and to be applied in part to the informer, and the residue to the Seaman's Hospital Society. The penalty being annexed to the offense in the very clause of the act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the act. As far as the public wrong is concerned, there is no remedy but that prescribed by the act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable; and the question is whether the penalty annexed to the offense concludes the plaintiff, who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by act of Parliament is enforced

It has been held that in an action for damages for injuries caused by the non-performance of duties imposed by statute the plaintiff is

by a penalty recoverable by the party aggrieved by the non-performance, there is no other remedy than that given by the act, either for the public or the private wrong; but by the penalty given in the act now in question (Stats. 7 & 8 Vict. chap. 112), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common-law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty recoverable by a common informer being annexed as a punishment for the non-performance of the public duty. . . . The case of *Stevens v. Jeacocke* (1848) 11 Q. B. 731, 17 L. J. Q. B. N. S. 163, 12 Jur. 477, is clearly distinguishable from the present. No duty was, by the statute in that case, imposed upon the defendant; he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the act, but to forbear to do that which but for the act he might have done. . . . In the case of *Rowling v. Goodchild* (1773) 2 W. Bl. 906, 3 Wils. 413, an action upon the case was held to be maintainable against a deputy postmaster for a breach of duty in not delivering a post letter as required by Stat. 9 Anne, chap. 10, though he was, by the same statute, liable to a penalty for detaining letters. The objection was taken, but overruled, the court being of opinion that, though the duty was created by statute, the action lay at common law. In that case, as in this, the penalty was recoverable by a common informer, and not by the party grieved. In the present case, if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of

the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted; but Stat. 7 & 8 Vict. chap. 112, has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the act; nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damages arising from the breach of a public duty; the penalty given by the statute being applicable only to the public wrong, and not the private damage. . . . Upon principle, then, as well as upon authority, as far as we have been able to find any upon the point, we think the second count is maintainable, and that the plaintiff's right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty, is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it, though no actual damage be sustained by anyone."

Besides intimating their disagreement, as already stated, with the general proposition mentioned in the text, the lords justices in the *Atkinson Case* (1877) L. R. 2 Exch. Div. (C. A.) 441, cited above, expressed their inability to accept Lord Campbell's theory, that the act under discussion was passed for the benefit of individuals. Brett, L. J., also said that he entertained the strongest doubt as to the correctness of the rule enunciated in the passage quoted above, that, "where a new duty is created by statute, and a penalty is imposed for its breach, which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the legislature that there should be no action by such person for damages, but that, where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action."

not required to prove such non-performance beyond a reasonable doubt, although the statute imposes a penalty.¹²

For a more complete discussion of the extent of the right of an aggrieved individual to sue for damages resulting from the infringement of a statute, in cases where a penalty is imposed for a breach, the reader is referred to general treatises on the law of negligence. See also the exhaustive note to *Wolf v. Smith*, 9 L.R.A.(N.S.) 338, particularly at page 385.

1906. Doctrine that the breach of a statute constitutes negligence in point of law.— The doctrine that an employee who has been injured by reason of his employer's breach of a statutory duty is entitled, as a matter of law, to recover damages, has been adopted in England and in many of the American states. But the juristic standpoint in the two countries is somewhat different. That of the English judges is indicated by a passage in the judgment delivered by Vaughan Williams, L. J., in a case decided by the court of appeal: "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie* and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."¹ The following remarks of Rigby, L. J., may also be quoted, as they will

¹² *Davis v. Illinois Collieries Co.* (1908) 232 Ill. 284, 83 N. E. 836.

¹ *Groves v. Wimborne* [1898] 2 Q. B. (C. A.) 402, 415, per Vaughan Williams, L. J. To the same effect see *Stainer v. Hall Mines* [1899] 6 B. C. 579.

For a Scotch case in which it was intimated, but not expressly decided, that a mine owner is liable if the plaintiff was injured by doing the incautious thing which the statutory rules forbid, and it appears that the rules had not been published as directed by the statute, see *Gray v. Lawson* (1860) 22 Sc. Sess. Cas. 2d series, 710.

In *Wilson v. Lincoln Paper Mfg. Co.* (1899) 9 Ont. L. Rep. (C. A.) 119, an employee in a paper mill received injuries from a defective and unguarded elevator, which subsequently caused his death. At the trial of an action by the administrator of his estate against the owners of the mill, it was shewn that the approach to the elevator shaft was

unguarded, and that the elevator was defectively constructed, in that it had no safety catch, or other safeguard, as required by the factories act, Rev. Stat. (Ont.) 1897, chap. 256, § 20 (c) (d). Held, that the defendant company was liable, notwithstanding that there was no direct evidence of how the deceased was injured. The court of appeals affirmed without any comment the decision of MacMahon, J., who, relying upon *Groves v. Wimborne*, *supra*, laid it down that the breach of a statutory duty constitutes a "*prima facie*" cause of action,—that is to say, a cause of action entitling the servant to recover in the absence of some specific defense. This case destroys the authority of several earlier ones which proceeded upon the theory discussed in the following section; *viz.*, the master's breach of a duty imposed by a penal statute is merely evidence to be submitted to the jury upon the issue of negligence.

serve to define more precisely the position of the court: "Where an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there can be negligence or not, he is responsible, *quacunqve via*, for non-performance of the duty."

The American courts proceed upon the narrower theory that the violation of a statutory duty constitutes negligence *per se* in respect of any individual member of the class of employees for whose benefit it was imposed upon the employer.² Many of the cases in which this doctrine has been explicitly enunciated had reference to the violation of general enactments, not restricted in their scope to employees of a particular age or sex.³ It has also been frequently af-

² "Any act in violation of law from which injury results to another is a breach of duty, and by the courts termed negligence for which a civil action for damages will lie. The illegal act being proved, negligence will be presumed." *American Car & Foundry Co. v. Armentrout* (1905) 214 Ill. 509, 73 N. E. 766, affirming (1904) 116 Ill. App. 121.

Where a statute is designed to protect a particular class of persons against a particular class of injuries, a violation of the statute constitutes negligence *per se* whenever one of the protected class is injured from a cause against which the statute was designed to protect him. *Campbell v. Spokane & I. E. R. Co.* (1911) 188 Fed. 516 (statute as to drawbars not designed to protect employees against collision).

³ *Cincinnati, H. & D. R. Co. v. Van Horne* (1895) 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139 (blocking of frogs); *Schlaff v. Louisville & N. R. Co.* (1893) 100 Ala. 377, 14 So. 105 (telltales on railways); *Smith v. Woolf* (1909) 160 Ala. 644, 49 So. 395 (failure to provide medical supplies at mine); *Philadelphia & R. R. Co. v. Winkler* (1903) 4 Penn. (Del.) 387, 56 Atl. 112 (failure to equip car with automatic couplers); *Winship Mach. Co. v. Burger* (1900) 110 Ga. 296, 35 S. E. 120 (failure to furnish machinery reasonably safe for operators); *N. S. Huey Co. v. Johnston* (1905) 164 Ind. 489, 73 N. E. 996 (unguarded knives); *Davis v. Mercer Lumber Co.* (1904) 164 Ind. 413, 73 N. E. 899 (failure to guard machinery); *Balzer v. Warring* (1911) — Ind. —, — L.R.A.(N.S.) —, 95 N. E. 257 (unguarded shaft); *Antioch Coal Co. v.*

Rockey (1907) 169 Ind. 247, 82 N. E. 76 (mining act); *Hochstettler v. Mosier Coal & Min. Co.* (1893) 8 Ind. App. 442, 35 N. E. 927 (mining act); *Bodell v. Brazil Block Coal Co.* (1900) 25 Ind. App. 654, 58 N. E. 856 (mining act); *Evansville Hoop & Stave Co. v. Bailey* (1908) 43 Ind. App. 153, 84 N. E. 549 (unguarded machinery); *Paul Mfg. Co. v. Racine* (1909) 43 Ind. App. 695, 88 N. E. 529 (failure to guard machinery); *Brown v. American Steel & Wire Co.* (1909) 43 Ind. App. 560, 88 N. E. 80 (failure to guard machinery); *Cook v. Ormsby* (1909) 45 Ind. App. 352, 89 N. E. 525 (unguarded saw); *King v. Laycock Power House Co.* (1910) 46 Ind. App. 420, 92 N. E. 741 (unguarded opening); *Hohenstein-Harmetz Furniture Co. v. Matthews* (1910) 46 Ind. App. 616, 92 N. E. 196 (unguarded machinery); *Messenger v. Pate* (1876) 42 Iowa, 443 (fencing of machinery); *O'Connell v. F. Smith & Son* (1908) 141 Iowa, 1, 118 N. W. 266 (unguarded saw); *Obenchain v. Harris & C. Bros.* (1910) 148 Iowa, 86, 126 N. W. 960 (failure to provide rip saw with "divider"); *Stephenson v. Sheffield Brick & Tile Co.* (1911) 151 Iowa, 371, 130 N. W. 586 (unguarded machinery); *Andrious v. Pineville Coal Co.* (1906) 121 Ky. 724, 90 S. W. 233 (mining act); *Moseley v. Black Diamond Coal & Min. Co.* (1908) 33 Ky. L. Rep. 110, 109 S. W. 306 (failure to protect mouth of shaft); *Sterns Coal Co. v. Evans* (1908) 33 Ky. L. Rep. 755, 111 S. W. 308 (mines act); *Van Doorn v. Heap* (1910) 160 Mich. 199, 125 N. W. 11 (failure to protect saw); *Davidson v. Flour City Ornamental Iron Works* (1909) 107

firmed in cases involving the right of recovery for injuries received by children employed while under the age limited by the legislature.⁴

Minn. 17, 28 L.R.A. (N.S.) 332, 131 Am. St. Rep. 433, 119 N. W. 483; *Glockner v. Hardwood Mfg. Co.* (1909) 109 Minn. 35, 122 N. W. 465, 123 N. W. 807, 18 Ann. Cas. 130 (unguarded machinery); *Shaver v. J. Neils Lumber Co.* (1909) 109 Minn. 376, 123 N. W. 1076 (unguarded machinery); *Healy v. Hoy* (1910) 112 Minn. 138, 127 N. W. 482 (unguarded opening); *Brown v. Douglas Lumber Co.* (1910) 113 Minn. 67, 129 N. W. 161 (unguarded machinery); *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678 (guarding of machinery); *Wendler v. People's House Furnishing Co.* (1901) 165 Mo. 527, 65 S. W. 737 (failure to guard hatchway); *Irmer v. St. Louis Brewing Co.* (1896) 69 Mo. App. 17 (unguarded trapdoor to hoistway); *Colliott v. American Mfg. Co.* (1897) 71 Mo. App. 163; *Stafford v. Adams* (1905) 113 Mo. App. 717, 88 S. W. 1130 (unguarded machinery); *Monson v. La France Copper Co.* (1909) 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243 (mining act); *Dia v. Union Ice Co.* (1908) 76 N. J. L. 178, 68 Atl. 1101 (failure to guard hot water vat); *Greenlee v. Southern R. Co.* (1898) 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115 (self-couplers on railway cars); *Elmore v. Seaboard Air Line R. Co.* (1903) 132 N. C. 865, 44 S. E. 620 (failure to provide automatic couplers); *Trowler v. Southern R. Co.* (1899) 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550 (failure to furnish automatic car couplers); *Hairston v. United States Leather Co.* (1906) 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698 (failure to provide automatic couplers); *Blackburn v. Cherokee Lumber Co.* (1910) 152 N. C. 361, 67 S. E. 915 (failure to furnish automatic couplers); *Krause v. Morgan* (1895) 53 Ohio St. 26, 40 N. E. 886 (violation of statute compelling mine owners to adopt safety appliances for their employees); *Craig v. Lake Erie & W. R. Co.* (1896) 35 Ohio L. J. 15 (blocking of frogs); *Kilpatrick v. Grand Trunk R. Co.* (1902) 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531 (side ladder on freight car); *Graham v. Newburg Orrel Coal & Coke Co.* (1893) 38 W. Va. 273, 18 S. E. 584 (ventilation of mines); *Hoveland v. Hall Bros. Marine*

R. & Shipbuilding Co. (1905) 41 Wash. 164, 82 Pac. 1090 (unguarded shaft); *Erickson v. E. J. McNeeley & Co.* (1906) 41 Wash. 509, 84 Pac. 3 (unguarded saw); *Delaski v. Northwestern Improv. Co.* (1910) 61 Wash. 255, 112 Pac. 341 (mining act); *Kreymborg v. Thurston* (1911) 63 Wash. 219, 115 Pac. 77 (failure to guard saw); *Young v. Aloha Lumber Co.* (1911) 63 Wash. 600, 116 Pac. 4 (unguarded saw); *Kucera v. Merrill Lumber Co.* (1895) 91 Wis. 637, 65 N. W. 374 (fencing of machinery); *Kutchera v. Goodwillie* (1896) 93 Wis. 448, 67 N. W. 729 (fencing of machinery).

"The statute requires the owner or operator of a coal mine to adopt certain methods for the safety of his employees. One operating such a mine now assumes to his employees that he will do so, and his failure is a breach of the implied undertaking, and is *per se* an act of negligence toward the employee, although before the statute it may or may not have been deemed negligence of itself. One effect of the statute is the erection of a legislative standard of duty or care, in addition to that imposed previously by the common law. A breach of one is as clearly and as necessarily a violation of the laborer's rights as would be a breach of the other." *Andrius v. Pineville Coal Co.* (1906) 121 Ky. 724, 90 S. W. 233.

In *Peterson v. Standard Oil Co.* (1910) 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625, it was held that where the laws of the state, for the protection of the public, have prescribed that certain precautions shall be observed, that such requirements constitute a legislative declaration of the minimum of care necessary under the circumstances, and that a less degree is negligence as a matter of law.

⁴ *Scally v. W. T. Garratt & Co.* (1909) 11 Cal. App. 138, 104 Pac. 325; *Platt v. Southern Photo Material Co.* (1908) 4 Ga. App. 159, 60 S. E. 1068; *Morris v. Stanfield* (1898) 81 Ill. App. 264; *Nickey v. Steuder* (1905) 164 Ind. 189, 73 N. E. 117; *Brower v. Locke* (1903) 31 Ind. App. 353, 67 N. E. 1015; *Buehner Chair Co. v. Feulner* (1902) 28 Ind. App. 479, 63 N. E. 239; *Bromberg v. Evans Laundry Co.* (1907) 134 Iowa,

38, 111 N. W. 417, 13 Ann. Cas. 33; *Nairn v. National Biscuit Co.* (1906) 120 Mo. App. 144, 96 S. W. 679; *Stehle v. Jaeger Automatic Mach. Co.* (1908) 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; *Queen v. Dayton Coal & I. Co.* (1895) 95 Tenn. 462, 30 L.R.A. 83, 49 Am. St. Rep. 935, 32 S. W. 460; *Ornamental Iron & Wire Co. v. Green* (1901) 108 Tenn. 164, 65 S. W. 399; *Finley v. Acme Kitchen Furniture Co.* (1907) 119 Tenn. 698, 109 S. W. 504 (declaration averring that the plaintiff was under the age limited, and was injured while working in the defendant's factory, held to show a good cause of action); *Burke v. Big Sandy Coal & Coke Co.* (1911) 68 W. Va. 421, 69 S. E. 992; *Norman v. Virginia-Pocahontas Coal Co.* (1910) 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857; *Sharon v. Winnebago Furniture Mfg. Co.* (1910) 141 Wis. 185, 124 N. W. 299.

In *Inland Steel Co. v. Yedinak* (1909) 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229, the court said: "The second paragraph of complaint . . . charges that appellant employed and caused appellee to work in its factory when he was under fourteen years of age, in violation of a statute forbidding such employment. This legislative interdiction in effect declares that children within the prohibited age are not possessed of that judgment, discretion, and care requisite and necessary for their own safety while engaged in a hazardous vocation. Appellant is chargeable with knowledge of the legal disabilities of children to engage in its service, and must ascertain at its peril that a boy employed in the operations of its factory, which has been classified by the legislature as dangerous, is of the required age. The doing of a thing prohibited, or the failure to do an act commanded, by statute, constitutes negligence *per se*, the natural consequence of which the master cannot escape on the ground that the employee knew of such disobedience and assumed the risk of injury. This rule of law has been declared most frequently in considering claims for injury resulting from the master's use of some appliance forbidden, or failure to use some safety device required, by statute, where the injured servant was lawfully employed. The employment in this case was wholly unlawful, and appellant, by employing and retaining appellee in its business

while within the prohibited age, did so at his own risk, and it appearing from the facts alleged that appellee was injured while engaged in the performance of forbidden duties in the line of his employment, appellant must be held liable for the injuries thus sustained. The employer of a child in violation of a specific statute cannot screen itself from liability for an injury sustained by the child in its service because the injury was occasioned through such negligence, imprudence, or childlike traits as gave rise to the statute."

The language used by the court in *Borck v. Michigan Bolt & Nut Works* (1896) 111 Mich. 129, 69 N. W. 254, seems to betoken an adoption of the same doctrine; but the case went off on the question of proximate cause. In the later case of *Sterling v. Union Carbide Co.* (1905) 142 Mich. 285, 105 N. W. 755, the same court proceeded explicitly upon the ground that if it should be found as a matter of fact, that the work at which the child had been engaged was "dangerous to life and limb" within the meaning of the given statute (Pub. Laws 1901, No. 113, § 2), the conclusion that the employment constituted negligence would follow as a matter of law. The same doctrine was applied in *Synszewski v. Schmidt* (1908) 153 Mich. 438, 116 N. W. 1107.

In *Rolin v. R. J. Reynolds Tobacco Co.* (1906) 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 A. & E. Ann. Cas. 638, the actual point decided was merely that it was error to nonsuit the child. But the supreme court of North Carolina has since declared explicitly in favor of the doctrine applied in the above cases. *Leathers v. Blackwell Durham Tobacco Co.* (1907) 144 N. C. 330, 9 L.R.A.(N.S.) 349, 57 S. E. 11; *Starnes v. Albion Mfg. Co.* (1908) 147 N. C. 556, 17 L.R.A.(N.S.) 602, 61 S. E. 525, 15 Ann. Cas. 470.

In *Woolf v. Nauman Co.* (1905) 128 Iowa, 261, 103 N. W. 785, although the decision took the form of a mere refusal to disturb a verdict in favor of a child who had been employed in violation of a provision (factory act, § 2) forbidding employers to allow children under sixteen years of age to operate dangerous machinery, it seems reasonably clear that this doctrine was taken for granted by the court. The special contention of defendant's counsel, which was negated, was, that the provision in § 4 of the

The doctrine that actionable negligence is, as a matter of law, predicable in respect to the infringement of a municipal statute, has been applied for the benefit of servants in a number of cases.⁵

Both of the above theories obviously involve the corollary that the only ground upon which an employer who is proved to have violated a statutory duty imposed for the benefit of the injured employee can be held liable is that the violation was not the proximate cause of the injury complained of.⁶ It is not competent for him to introduce, for the purposes of exculpation, evidence that the arrangements prescribed would be dangerous and apt to cause accidents.⁷ Nor can a witness be asked what was, in his opinion, a safe manner of affording the protection contemplated by the statute, and whether the method

act, to the effect that an employer who failed to fulfil the requirements of the act within ninety days after receiving a notification in that regard by one of the specified officials should be subject to a penalty, was to be construed as importing an intention on the part of the legislature that he was to incur no liability until he should have been thus notified. The court explicitly refers to this contention as having been put forward in avoidance of that submitted on the part of the plaintiff, that the employment was negligence *per se*.

⁵ *Thompson v. Citizens' Street R. Co.* (1899) 152 Ind. 461, 53 N. E. 462; *Cincinnati, I. St. L. & C. R. Co. v. Long* (1887) 112 Ind. 166, 13 N. E. 659 (operation of trains); *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1898) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290 (operation of trains); *Baltimore & O. S. W. R. Co. v. Peterson* (1901) 156 Ind. 364, 59 N. E. 1044 (complaint held not demurrable which charged that injuries to a railroad employee were caused by the violation of a valid city ordinance making it the duty of persons in charge of a moving locomotive to ring a bell attached thereto, and providing that no train shall be run backward without a watchman on the rear thereof); *Central R. & Bkg. Co. v. Brantley* (1893) 93 Ga. 259, 20 S. E. 98 (ordinance limiting speed of locomotives in a railroad yard); *Tobey v. Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761 (kicking cars at forbidden speed).

⁶ In *Queen v. Dayton Coal & I. Co.* (1895) 95 Tenn. 464, 30 L.R.A. 83, 49

Am. St. Rep. 935, 32 S. W. 460, where a minor under the statutory age had been employed, the court said: "Of course, we do not hold that, if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment."

It is a well-established rule of law that the violation of a statute by a railroad company in the operation of its road and trains constitutes an act of negligence for which a liability becomes fixed upon the company when injury to a person results as the proximate consequence of such negligence. *Kansas City, M. & B. R. Co. v. Flipppo* (1903) 138 Ala. 487, 35 So. 457.

As in other cases where proximity of cause is involved, the question whether the injury was due to the violation of the statute is primarily one of fact, for the jury to determine under proper instructions. See § 1572, *ante*.

An employer is liable to any employee injured by the breach of the statute, although he could not reasonably have anticipated that the accident would happen in the precise manner in which it actually did happen. *Christianson v. Northwestern Compo-Board Co.* (1901) 83 Minn. 25, 85 N. W. 826.

⁷ *State v. Anaconda Copper Min. Co.* (1900) 23 Mont. 498, 59 Pac. 854.

actually adopted by the defendant was prudent. The sole question to be determined is whether the duty created by the statute has been performed.⁸

In at least one state (Pennsylvania) there is a statutory provision that a violation of the statute shall constitute negligence *per se*.⁹

1907. Doctrine that the breach of a statute is presumptive evidence of actionable negligence.—As to the effect of § 18 of the New York labor law (see § 1892, *ante*) to render the master prima facie liable for injuries caused by defects in a scaffold, see § 1892a. See also § 1601, note 10, *ante*. In a Minnesota case it was laid down that the fact of the illegal employment is prima facie evidence of negligence, which entitles the injured child to have a verdict directed in his favor, unless other testimony is introduced to contradict it.¹ This statement would seem to import the adoption of a doctrine intermediate between those discussed in § 1906, *ante*, and § 1908, *post*. But the precise position of the court is not defined with as much precision as might be desired.² A similar doctrine

⁸ *Spiva v. Osage Coal & Min. Co.* (1885) 88 Mo. 68.

⁹ Act of June 2, 1901, P. L. 176, art. 11, § 3. Failure of operator of anthracite mine to furnish timber for underground works in anthracite mines is declared to be negligence *per se*.

¹ *Perry v. Tozer* (1903) 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137, where an exposed gearing had injured the foot of a child whom the defendant had employed under the age of sixteen years without obtaining from the school authorities a certificate permitting such employment. (Minn. factory act, §§ 7, 8.)

² At p. 437 of the opinion we find the following remarks: "*Unless we can say that the statute has no effect in a suit for damages where the law had been violated, we are required to hold that the employment which the legislature positively forbids furnishes evidence tending to show at least presumptively that one of the causes of the injury in this case was the violation of the statute, in analogy to the well-known doctrine that ordinances regulating the hitching of horses, the speed of trains in cities, or other subjects of municipal control, are held to be evidence to sustain the charge of negligence.*" A comparison of the passages italicized would seem to indicate that

the court has failed to appreciate clearly the difference between evidence which merely tends to establish a certain conclusion, and may therefore be disregarded by a jury, if they think proper, and evidence which raises a presumption which legally involves a certain conclusion unless it is rebutted by other testimony. As a qualifying clause, the words, "at least presumptively," are curiously out of place. Manifestly, evidence which creates a presumption is probatively of a *higher* grade than evidence which merely "tends to show" something. In a subsequent part of the opinion, we find the following passage: "From the investigation we have made of the reasons for the statute upon which the instruction of the trial court was based, we have reached the conclusion that the certificate which the school authorities are to give upon their examination of an infant was intended to secure educational advantages to the subjects of legal solicitude, and likewise to vest in the school officials the power to determine, in the exercise of wise judgment, whether, from the intelligence and capacity of such infant, it would be reasonably safe for him to engage in dangerous occupations. The failure to obtain this certificate was a violation of the statute, and entitled the plaintiff to a remedy for the negligent acts

seems to have been adopted in some cases decided in some other states.³

of defendant. Hence it was proper to give effect to the conceded disregard of the law, and where an injury is within the mischief of the statute, it is not easy to see how less weight could be given to the statute than was expressed by the instruction of the trial court, which makes the violation of the law, with consequent injury from the dangerous machinery in use in defendant's mill, *prima facie*, but not conclusive, evidence of plaintiff's right to recover." This may be regarded as an explicit doctrinal statement in the sense specified in the text. But in the passage leading to that statement it is somewhat strange to find cited as authorities the three cases, *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572; *Morris v. Stanfield* (1898) 81 Ill. App. 264, and *Queen v. Dayton Coal & I. Co.* (1895) 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460. The doctrine embodied in the first of these cases is directly antagonistic to that applied in the other two, and neither of the doctrines so propounded agrees with that adopted by the court (see § 1906, *ante*, and § 1908, *post*).

³ In Iowa the court, while holding that an instruction that the violation of the statute providing for ventilation of mines is negligence justifying a recovery was proper, in the absence of any exculpatory evidence, remarked that such an instruction would have been erroneous if evidence had been introduced which tended to show that the defendant was without fault. *Mosgrove v. Zimbleman Coal Co.* (1899) 110 Iowa, 169, 81 N. W. 227. See, however, *Tobey v. Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761, cited in note 5 to the preceding section.

In one Illinois case it was remarked that the "violation of a statute established for the protection of persons is *prima facie* evidence of negligence." *Jupiter Coal Min. Co. v. Mercer* (1899) 84 Ill. App. 96.

In another case the same rule was laid down with regard to the violation of a municipal ordinance which provided that every person owning or operating any freight elevator in any building within the city should employ a com-

petent person to take charge of and operate the same, and prescribed a fine for a failure to comply with the provisions. *H. Channon Co. v. Hahn* (1901) 189 Ill. 28, 59 N. E. 522, affirming (1900) 90 Ill. App. 256. And this seems to be the theory upon which the courts of this state proceeded in nearly all, if not all, the cases as to the mining act, which are cited in chapter LXXX., *ante*. See also *H. Channon Co. v. Hahn* (1901) 189 Ill. 28, 59 N. E. 522 (violation of city ordinance as to employing competent elevator operator).

Proof of the violation of a statutory duty of itself makes out, if not a case of negligence *per se*, a *prima facie* case of negligence sufficient to go to the jury, if it be also shown that the injury was caused by this failure of the company. *Neal v. St. Louis, I. M. & S. R. Co.* (1903) 71 Ark. 445, 78 S. W. 220. Similar language was used in *St. Louis, I. M. & S. R. Co. v. York* (1909) 92 Ark. 554, 123 S. W. 376.

"That the violation of a duty expressly imposed by a statute upon an owner or operator of machinery dangerous to employees or to the public is negligence which *prima facie* imposes liability for damages resulting therefrom is well-settled law." *Madison v. Clippinger* (1906) 74 Kan. 700, 88 Pac. 260. To the same effect, *Kansas Buff Brick & Mfg. Co. v. Stark* (1908) 77 Kan. 648, 95 Pac. 1047.

In *Scott v. Canadian P. R. Co.* (1909) 19 Manitoba L. Rep. (C. A.) 29, an action was brought for injuries received by a brakeman while attempting to uncouple a number of moving cars from an engine. There was evidence that the lever on the engine tender failed to work properly, that there was no lever on the end of the car next to the tender, and that the plaintiff had to reach between the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down. It was held that, in view of the statutory requirement as to the equipment of cars with apparatus to relieve a brakeman from going between cars to couple them, the plaintiff had made out a *prima facie* case of negligence, and that a non-suit entered at the trial should be set aside.

In several jurisdictions it is provided by statute that a violation of a statutory duty shall be deemed *prima facie* evidence of negligence.

In Ohio the statute (Bates's Anno. Stat. §§ 3365-21) provides that no railroad company shall knowingly or wilfully operate any defective car, and if an employee receives any injury by reason of any defect, the corporation shall be deemed to have had knowledge of the defect before and at the time when the injury was sustained, and the fact of the defect, when made to appear in an action for damages, shall be *prima facie* evidence of negligence.

By the Victoria mines act of 1890, § 352, it is provided that any accident occurring in a mine shall be *prima facie* evidence that such accident occurred through the negligence of the owner.

By § 211 of the Queensland mining act 1898, it is provided that the occurrence of any accident in a mine shall be *prima facie* evidence of neglect on the part of the owner and the manager.⁴

The Ohio statute has been construed by the courts a number of times.⁵

Failure to comply with N. Y. Laws 1886, chap. 409, § 8, as amended by 1892, chap. 673, § 8, requiring that all cogs, belting, shafting, etc., shall be "properly guarded," is *prima facie* evidence of negligence, in an action by an employee against his employer for injuries caused by coming in contact with cogs. *Havlin v. Krulish* (1898) 25 Misc. 402, 54 N. Y. Supp. 1093, reversed in (1899) 26 Misc. 381, 56 N. Y. Supp. 275, but merely on the special ground that evidence showing that the defendant had no control over the machinery in question had been improperly excluded. This decision, however, is not in harmony with the other New York cases cited in § 1908, *post*.

In *Kircher v. Iron Clad Mfg. Co.* (1909) 134 App. Div. 144, 118 N. Y. Supp. 823, the court said that the employment of a child under the statutory age in and of itself made out a *prima facie* case of negligence, but cites *Mario v. Lehmaier* (see § 1908, note 1, *post*) as authority for this proposition.

⁴In *Johnson v. Deep Level Gold Mines of Charters Towers* (1903) Queensl. St. Rep. 190, a judgment entered for the defendants on a special finding to the effect that the death of the intestate was caused by inevitable accident was sustained on the ground

that various inferences might be drawn from the evidence.

⁵The act applies to all railroad companies a part of whose line enters Ohio, whether the injury was or was not received within the state. *Pennsylvania Co. v. McCann* (1896) 54 Ohio St. 10, 31 L.R.A. 651, 56 Am. St. Rep. 695, 42 N. E. 768.

The operation of a car with grab irons not properly fastened is *prima facie* evidence of negligence. *Michigan C. R. Co. v. Butler* (1902) 23 Ohio C. C. 459.

The provision that defective machinery is *prima facie* evidence of negligence has been held not to be limited to defective construction, or something absent from the machinery, but to be applicable to machinery which has been allowed to become out of repair, or so dirty that it will not operate properly. *Hill v. Lake Shore & M. S. R. Co.* (1901) 22 Ohio C. C. 291, 12 Ohio C. D. 241.

In *O'Connell v. Pennsylvania Co.* (1902) 55 C. C. A. 483, 118 Fed. 989, the court said: "Under the Ohio statute it devolves upon a railroad employee suing for an injury due to a defective car, engine, or appliance, to show not only an injury, but that it was caused by such a defect. The oper-

1908. Doctrine that the breach of a statute merely constitutes evidence of actionable negligence.—The doctrine now established in New York is that, in an action brought to recover damages for an injury sustained by reason of the employer's failure to perform a statutory duty imposed upon him for the benefit of the class of employees to which the injured person belongs, the fact of the duty's not having been performed merely constitutes evidence which may be considered by the jury as bearing upon the question whether the employer is guilty of actionable negligence.¹

A similar doctrine has been applied in a Federal court sitting in

action of the statute is at this stage of the case to relieve such employee from the further duty, which at common law would rest upon him, of going on and showing that the company had knowledge of such defect at or before the injury, or, if diligent, ought to have had knowledge."

¹ In *Marino v. Lehmaier* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, affirming (1901) 62 App. Div. 43, 70 N. Y. Supp. 790, where the fingers of an errand boy who was under the legal age of employment were caught in a printing press which he was cleaning, a nonsuit was held to be erroneous. The doctrinal position of the court was thus explained by Parker, Ch. J.: "The legislature might have provided that an employer should respond in damages for all injuries sustained by a child under fourteen years of age, employed by him in violation of § 70 of the labor law; but instead, it provided that the violator should be guilty of a misdemeanor. It would seem, therefore, that the minority of the court is right in so far as it holds that defendant was not chargeable as matter of law with all injuries that might have resulted to plaintiff while in his employ. But, while the violation of the statute cannot, as matter of law, charge the offender in damages for all injuries that may come to one whom the statute forbids him to employ, may not the violation of the statute in the case of injuries which could not have happened but for its violation constitute evidence of negligence to be considered by the

triers of fact? This statute was the outcome of lessons taught by experience and emphasized by recent statistics, and its purpose is to save the life and keep the body whole of children of such tender years as not to be able to exercise good judgment in their own protection, and not to be trusted to take the same precautions to save themselves from harm that adults would. The statute amounts to a declaration by the state that the employment of children under fourteen years of age in a factory is so far neglectful of their lives and limbs as to make it the duty of the state, in the exercise of its police power, to forbid such employment, and enforce its command by penalties. Now, while the offense against the state is only punishable by it as a misdemeanor, the violation of the statute is, as against the child, whom the state deems incompetent to contract for such forbidden service, a wrongful and negligent act, which of itself furnishes some evidence of negligence in cases where the accident could not have happened but for an employment to work in a factory. . . . But the defendant disregarded the law, and employed and gave directions to one of the subjects of the state, in violation of the state's policy, and the outcome of it was an injury to the child which could not have happened had the law been observed. In such a case it would seem that the necessary and logical practice would be that the jury should be permitted to consider the violation of the statute, in connection with the other

facts, as evidence tending to show negligence on the part of defendant." The learned judge then reviewed several decisions of the court to the effect that the violation of certain statutes, while not conclusive, constituted some evidence of negligence.

O'Brien and Gray, JJ., were of opinion that the mere employment of the child did not constitute proof of actionable negligence, and that no recovery could be had unless some affirmative act of negligence was shown. The theory thus propounded is the same as applied in an earlier case in which it had been held that in order to entitle a child to recover damages for an injury, some independent evidence of negligence, apart from the fact that he had been employed under the age authorized by the legislature, must be adduced. *White v. Witteman Lithographic Co.* (1890) 58 Hun, 381, 12 N. Y. Supp. 188 (judgment on verdict for defendant sustained). This decision was affirmed without any opinion in (1892) 131 N. Y. 631, 30 N. E. 236. The authorities relied upon by the supreme court were some decisions of the court of appeals to the effect that proof of an ordinance regulating speed was inadmissible in regard to the question of negligence in maintaining a greater rate of speed than that allowed. The case of *Willy v. Mulledy* (1879) 78 N. Y. 310, 34 Am. Rep. 536, in which it was held that a breach of duty causing damage was actionable, was distinguished from the one under review, on the ground that the breach of duty in hiring the plaintiff to work on a dangerous machine did not, of itself, occasion the injury.

For later cases in which *Marino v. Lehmaier* was followed, see *Lee v. Sterling Silk Mfg. Co.* (1906) 115 App. Div. 589, 101 N. Y. Supp. 78, reversing (1905) 47 Misc. 182, 93 N. Y. Supp. 560; *Scialo v. Steffens* (1905) 105 App. Div. 592, 94 N. Y. Supp. 305; *Kiernan v. Eidlitz* (1905) 109 App. Div. 726, 96 N. Y. Supp. 387; *Dragotto v. Plunkett* (1906) 113 App. Div. 648, 99 N. Y. Supp. 361; *Kenyon v. W. P. Sanford*

Mfg. Co. (1907) 119 App. Div. 570, 103 N. Y. Supp. 1053; *Danaher v. American Mfg. Co.* (1908) 126 App. Div. 385, 110 N. Y. Supp. 617; *Valentino v. Garvin Mach. Co.* (1910) 139 App. Div. 141, 123 N. Y. Supp. 959; *Regling v. Lehmaier* (1906; Sup. Ct.) 50 Misc. 331, 98 N. Y. Supp. 642.

In the first-mentioned case the passage in which the doctrine adopted was criticized by the author in the first edition of this treatise (§ 799, now § 1909) was referred to; but no attempt was made to deal with the imposing array of authorities there cited, the court merely remarking that the decision in *Marino v. Lehmaier* must be taken to have settled the law, so far as New York was concerned.

"If it was necessary for the plaintiff to establish notice of the dangerous method it [the defendant] was using in the work of altering this structure, I think it was established, in view of the violation of the provisions of the labor law." *Flanagan v. F. W. Carlin Constr. Co.* (1909) 134 App. Div. 236, 118 N. Y. Supp. 953.

In declaring the right of a person to recover for injuries caused by the breach of a municipal ordinance, the court of appeals adverted in one case to "the axiomatic truth that every person while violating an express statute is a wrongdoer, and, as such, is *ex necessitate* negligent in the eye of the law; and that every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." *Jetter v. New York & H. R. Co.* (1865) 2 Keyes, 154. This sentence was quoted with approval in *Freeman v. Glens Falls Paper Mill Co.* (1891) 61 Hun, 125, 15 N. Y. Supp. 657. But the doctrine which it embodies is clearly inconsistent with that applied in the *Marino Case* (1903) 173 N. Y. 530, 61 L.R.A. 811, 66 N. E. 572, affirming (1901) 62 App. Div. 43, 70 N. Y. Supp. 790.

the Ohio district,² in Maine,³ in Massachusetts,⁴ in Michigan,⁵ in Ohio,⁶ and in Wisconsin.⁷ In Ontario, where it prevailed for a while, it has now been abandoned in deference to the authority of the English court of appeal.⁸

In a number of cases in which a judgment for the plaintiff was affirmed, the court has considered it sufficient to state that the violation of the statute furnished evidence to be considered by the jury; but the language used is such that it cannot be positively said that, had the case required it, the court would not have taken a more advanced position.⁹

² In *Evans v. American Iron & Tube Co.* (1890) 42 Fed. 519 (a decision with reference to the Ohio factory act), the court laid it down that, if it should appear that the employer had given the child employment in his factory at a safe and easy task, and in a position where he was not exposed to danger, the employment could not be treated either as constituting negligence, or as being the proximate cause of an injury received by the child while he was voluntarily going about a factory, and thus exposing himself to dangerous machinery the character of which he was old enough to appreciate. The distinction was taken that, where an injury is a direct consequence of the violation of a penal statute, the only prerequisite to a conviction in a criminal prosecution is the submission of satisfactory evidence that the statute had been violated; but that, in a civil action, involving questions of negligence on the part both of the employer and employed, proof of a violation of the statute is not necessarily enough to entitle the servant to damages.

³ In *Carrigan v. Stillwell* (1903) 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389, it was held that failure to perform a duty as to fire escapes, imposed by statute for the benefit of persons employed in the building, which is the proximate cause of the death of an employee, which death is the natural and ordinary consequence of the failure, is evidence of negligence to be submitted to the jury.

⁴ *Turner v. Boston & M. R. Co.* (1893) 158 Mass. 261, 33 N. E. 520 (unblocked frogs); *Berdos v. Tremont & S. Mills* (1911) 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912 B, 797.

"While the violation of a statute or

ordinance by a defendant is not conclusive proof of negligence on the part of the violator, it has been held that the fact of violation may be considered by the jury in passing upon the question." *Finnegan v. Winslow Skate Mfg. Co.* (1905) 189 Mass. 580, 76 N. E. 192. See also *Keenan v. Edison Electric Illuminating Co.* (1893) 159 Mass. 379, 34 N. E. 366 (automatic gates to elevator shafts).

⁵ *Sipes v. Michigan Starch Co.* (1904) 137 Mich. 258, 100 N. W. 447 (citing the *Lehmaier Case*).

⁶ See *Jacobs v. Fuller & H. Co.* (1902) 67 Ohio St. 70, 65 L.R.A. 833, 65 N. E. 617.

⁷ In *Kutchera v. Goodwillie* (1896) 93 Wis. 448, 67 N. W. 729, it was ruled that the fact of the employment of a child under the legal age was not sufficient of itself to sustain a verdict against the employer.

When a statute commands the doing of some act by one person for the personal safety of another, without prescribing any penalty for the benefit of the latter in case of his being injured by breach of such command, such breach is negligence *per se*, as matter of fact, of the grade of want of ordinary care, with incidental liability, but rebuttable by proof to the contrary, the same as in ordinary cases of negligent injury, in the absence of express language to the contrary. *Willette v. Rhinelander Paper Co.* (1911) 145 Wis. 537, 130 N. W. 853.

⁸ See preceding section, note 1. See also *Fahay v. Jephcott* (1901) 2 Ont. L. Rep. 449; *Thompson v. Wright* (1892) 22 Ont. Rep. 127.

⁹ "In some jurisdictions it is evidence of itself *per se* negligence; in some jurisdictions it raises a presumption of

1909. Conflicting doctrines discussed.— It is apparent from the cases cited in the three preceding sections that the theory under which the breach of a mandatory or prohibitory statute is treated as negligence *per se* in respect of an employee injured by reason of the breach is sustained by a decided preponderance of authority.¹ That this is the correct position can scarcely be doubted. It is submitted that doctrines the essential effect of which is that the quality of an act which the legislature has prescribed or forbidden becomes an open question, upon which juries are entitled to express an opinion, are highly anomalous. The command or prohibition of a legislative body which represents an entire community ought, in any reasonable view, to be regarded as equivalent to a final judgment upon the subject-matter, which renders it both unnecessary and improper that this question should be submitted to a jury.² A further objection to these doctrines is that their application in trial practice is likely to give rise to serious confusion and misunderstanding.³

negligence; in others the term *prima facie* case of negligence is used. But certainly it furnishes a scintilla of evidence upon which a case, so far as that feature is concerned, should go to the jury." *Bresewski v. Royal Brush & Broom Co.* (1905) 28 Ohio C. C. 752, affirmed in (1907) 76 Ohio St. 593, 81 N. E. 1194.

In *Stehle v. Jaeger Automatic Mach. Co.* (1908) 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122, the court said that for the purposes of the case it was sufficient to hold that the employment of a boy under fourteen years of age to do any kind of work prohibited by the statute, and his having been employed to clean or oil machinery while in motion, also prohibited, were both questions of fact to be submitted to the jury as evidence of negligence, and if the injury resulted by reason of the employment prohibited by law, there can and should be a recovery.

In *Smith v. Atlanta & C. Air Line R. Co.* (1903) 132 N. C. 819, 44 S. E. 663, the court, in affirming a judgment for the plaintiff, simply sustained an instruction to the effect that the violation of an ordinance was evidence of negligence.

¹ A similar remark is applicable to the whole body of decisions which bear upon the general question of the right of a private individual to sue for injuries caused by the violation of a stat-

utory or municipal regulation. See *Shearm. & Redf. Neg.* § 13.

² See the language used by the court in *Tobcy v. Burlington, C. R. & N. R. Co.* (1895) 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761.

The language of the text is quoted and approved in *Monson v. La France Copper Co.* (1909) 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.

³ In his dissenting opinion in the *Marino Case*, *supra*, O'Brien, J., indicates the dilemma which the doctrine adopted by the majority of the court involved: "It will not do to say that there was a question of fact, for there was none. There was no dispute about the violation of the statute, and its violation proved negligence or it did not. If it did, then the plaintiff was entitled to recover, as matter of law, and there was nothing for the jury to do except to assess the damages. If it did not prove negligence, then the action failed." The weak points of the position taken by the majority of the court in that case have also been subjected to a trenchant criticism by one of the judges of the supreme court (trial term) in *Lee v. Sterling Silk Mfg. Co.* (1905) 47 Misc. 182, 93 N. Y. Supp. 560, where it was ruled that the employment of a child in violation of the statute forbidding any child under the age of fourteen to be employed in any factory was negligence *per se* in case of injury to

the child. The court said that violation of the statute was either a breach of duty by employer to employee, or an act of negligence, as some would have it phrased, which makes the employer liable, or else it is not; that there can be no middle ground; that it cannot be left to the jury to find in one case that it does make him liable, and in the next that it does not; that the question is not one of fact, but of law. And, in referring to the language of Haight, J., in the *Marino Case*, to the effect that the violation of the statute raised at least a question of fact for the determination of the jury, and to the language of Parker, Ch. J., that the violation of the statute as against the child was a wrongful and negligent act which by itself furnished some evidence of negligence, said: "The dubious tone of these learned opinions leaves trial judges in doubt as to what to do. The violation of the statute is 'some' evidence of negligence, or 'at least' presents a question of fact, say these opinions; but a trial judge, in charging a jury, cannot be dubious or blow both hot and cold. He has to state the law explicitly. Where this phrase of 'some evidence' was first used on this head I do not know. . . . The truth is (as is apparent to our educated profession), that the violation of a duty created by a city ordinance or any other statute is no different to a violation of a duty created by a rule of the common law. Just the same in each case, if it injures another, the wrongdoer is liable to him as a matter of law. There is no distinction whatever. . . . Confused verbiage is not suffered in any science to obscure plain principles. Every piece of evidence is 'some evidence.' An ordinance is 'some evidence' in the general mass. But if A injure B by the violation of a duty to B, imposed by the ordinance, he is liable as matter of law; otherwise the ordinance has no weight or force in the case, and would only serve to mislead a jury the same as an inapplicable statute or common-law rule. To have instructed the jury in the present case that the violation of the statute was 'some evidence' of the defendant's violation of the duty he owed to the plaintiff under the statute, or of his negligence, if you prefer; and that it was for them to say whether it was enough to establish the fact of liability,—would have been quite absurd, it

seems to me, and only a puzzle to the jury. Is it possible that it may be left to a jury to say it is enough in one case, but not enough in the next case? It makes the defendant liable in every case, or else in none." In this case a new trial was ordered on the ground that in New York the rule applicable to the given circumstances had been settled by the *Marino Case*, *supra*, in a sense adverse to that contended for in the lower court. But the appellate division at the same time expressed its opinion that the doctrine of that case was correct.

The New York doctrine was also criticized by Gaynor, J., in his dissenting opinion delivered in the appellate division. He said: "The notion that the violation of a statutory duty or prohibition can only be 'some' evidence, but not sufficient evidence, of liability, arises out of inadvertence, and the seizing hold of expressions in opinions that were only applicable in that case. The violation of a statute duty or prohibition is not a whit less than the violation of a common-law duty or prohibition; and if the violation of a legal duty or prohibition, whether common law or statutory, causes an injury, it is not merely 'some' evidence of liability, but is an absolute ground of liability in and of itself. If the statute requiring a fire escape be ignored, and a person be burned up for lack of a fire escape, how would it sound to say to a jury that the failure to furnish the fire escape is only 'some' evidence of liability, and that it is for them to say if it be enough. The result would be a verdict for the plaintiff in one case and for the defendant in the next, according to the varying understanding, bias, or interests of jurors. Certainly this may not be so, but the fact causing liability being undisputed, the question would be one of law, and not of fact, and the jury would be left only to assess the damages. The liability would be absolute (*Willy v. Mulledy* [1879] 78 N. Y. 310, 34 Am. Rep. 536). And the same principle applies to a case like this. The injury is caused by the violation of the statute, and it cannot be left to the jury to overlook or condone it, or the contrary, as they see fit, and find for the defendant in one case and for the plaintiff in the next. There are ordinances the violation of which only furnishes 'some' evidence of whether the

1910. Statutes expressly authorizing a civil remedy in actions for a violation of their provisions.—Upon the question whether a private right of action can be founded upon the violation of a statute which does not expressly confer such right, the reader is referred to an exhaustive note to *Wolf v. Smith*, 9 L.R.A.(N.S.) 338, which is general in its scope, and is not confined to master and servant cases. In many of the statutes discussed in the preceding five chapters, a right of action is expressly granted in the terms of the statute. In respect to such statutes, of course, no question can arise.

In at least one jurisdiction (Kentucky) there is a general statute providing that the fact that the statute violated was a penal statute will not bar an action for personal injuries caused by such violation.

In a number of statutes, a right of action is given for a "wilful" violation of the statute. This phrase is confined mainly to the statutes relating to mining, and its meaning is discussed in § 1882c.

1911. Employer not rendered an insurer of his servant's safety by the imposition of a specific duty.—It has been laid down that statutes of the kind under discussion do not operate so as to render the employer an insurer of his servant's safety in respect to the performance of the duty imposed by the statute;¹ and that his liability for a breach

defendant's negligence was the cause of the injury; such as an ordinance limiting the speed of vehicles, forbidding that passengers be allowed on the front platform of a street car with the motorman, requiring unattended horses to be tied in the street, and the like. In such cases the accident might still have happened if the vehicles were going slower, if the motorman had no one to distract him, or the horse had been tied; so that the violation cannot be said as matter of law to have caused the accident, but is only a fact ('some' evidence) to be considered with the other evidence by the jury. But if the jury are able to say that the violation alone caused the accident, then it alone suffices to require a verdict for the plaintiff; and where the same may be ruled as matter of law, the jury have nothing to do except assess the damages. If this phrase 'some' evidence has been applied to cases not of this kind, it has been by inadvertence; and we have certainly arrived at a time when law should no longer be made by or rest upon inadvertences."

¹ *Antioch Coal Co. v. Rockey* (1907) 169 Ind. 247, 82 N. E. 76; *McDaniels*

v. Royle Min. Co. (1905) 110 Mo. App. 706, 712, 85 S. W. 679; *London & W. A. Exploration Co. v. Ricci* (1907) 4 Austr. C. L. R. 617; *Bourgo v. White* (1893) 159 Mass. 216, 34 N. E. 191; *Consolidated Coal Co. v. Scheller* (1891) 42 Ill. App. 619; *Colliott v. American Mfg. Co.* (1897) 71 Mo. App. 163. In the last-cited case the court, in discussing the Missouri provision with respect to the guarding of machinery, stated its conclusions as follows: "The guards required are safe and secure ones, such guards as will protect the employee from contact with the machinery by the use of ordinary prudence and caution on his part. We do not think the purpose of the legislature was to make the master an insurer of the safety of the servant, but it was its evident purpose to increase the degree of care required by the common law. The guards he is required to provide are such as will protect the employee using ordinary care against all dangers that can be foreseen by ordinary human foresight; but the master is not required to guard against the negligence of the employee, nor against such dan-

of such a duty is not absolute, but conditional upon his being chargeable with notice that the provisions of the statute have not been complied with.²

It has been said by one judge that the Michigan statute which prohibits the employment of any but competent and trustworthy engineers to operate hoisting machines in mines abrogates the common-law rule as to the exercise of ordinary care, and makes the mine owner in effect the insurer of such competency and trustworthiness.³ Although this view was expressed in the prevailing opinion, a majority of the court dissented from this proposition.

It is a general rule that the master is not liable for injuries to his servants, notwithstanding he has violated a statute, unless such violation is the proximate cause of the injury.⁴

gers or accidents as no human knowledge or experience could anticipate."

Under § 18 of the labor law a master is not an insurer of an employee while working on a scaffold. *Pettersen v. Raktjen's American Composition Co.* (1908) 127 App. Div. 32, 111 N. Y. Supp. 329.

A minor cannot recover in an action under N. Y. Laws 1876, chap. 122, "To Prevent and Punish Wrongs to Children," unless the master is guilty of some specific negligence. Hence, a master who hires a boy of fifteen to work at a stamping machine is not responsible for such personal injuries as he may receive after proper precautions have been taken and adequate instructions given. *Hayes v. Bush & D. Mfg. Co.* (1886) 102 N. Y. 648, 5 N. E. 784.

The existence of a chute leading into the basement of a building, almost under the lower end of a fire escape, so as to create danger that persons using the fire escape may fall into the basement, will not charge the owner of the building, on the ground of negligence, with liability for the death by fire of an employee, which was not in any respect caused by such chute. *Pauley v. Steam Gauge & Lantern Co.* (1892) 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999.

A manufacturer making use of elevators is not compelled, under Mass. Stat. 1882, chap. 208, amending Mass. Pub. Stat. chap. 104, § 14, providing that all elevators, cabs, or cars shall be provided with some suitable mechanical device, to be approved by the state inspector of factories and public buildings, whereby the cabs or cars will be

"securely held in the event of accident," to provide an arrangement that will surely and securely hold the car in every circumstance, but only some device, to be approved by the inspector, designed for the purpose of securely holding the cab in case of accident. *Bourgo v. White* (1893) 159 Mass. 216, 34 N. E. 191.

² *Mulhern v. Lehigh Valley Coal Co.* (1894) 161 Pa. 270, 28 Atl. 1087 (decision as to Pennsylvania mine law of 1885, requiring that a person employed at an engine shall be a sober and competent person).

See, however, the North Carolina cases cited in § 1599, note 5, *ante*.

³ *McAlvay, J., in Layzell v. J. H. Somers Coal Co.* (1909) 156 Mich. 268. 117 N. W. 179, 120 N. W. 996.

⁴ *Rosan v. Big Muddy Coal & Iron Co.* (1906) 128 Ill. App. 128; *Carterville & H. Coal Co. v. Moake* (1906) 128 Ill. App. 133; *Paietta v. Illinois Zinc Co.* (1910) 153 Ill. App. 506; *King v. Laycock Power House Co.* (1910) 46 Ind. App. 420, 92 N. E. 741; *Monson v. La France Copper Co.* (1909) 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Conroy v. Acken* (1906) 110 App. Div. 48, 96 N. Y. Supp. 530; *Genovesia v. Pelham Operating Co.* (1909) 130 App. Div. 200, 114 N. Y. Supp. 646; *Christner v. Cumberland & E. L. Coal Co.* (1892) 146 Pa. 67, 23 Atl. 221; *Davis v. Pennsylvania Coal Co.* (1904) 209 Pa. 153, 58 Atl. 271.

In order to render the employer liable to a civil action, it is incumbent on the plaintiff to make out the causal connection between the omission to pro-

1912. Parties entitled to bring actions.—Under the miners' act (Sandels & H. Dig. §§ 5051, 5058) which provides that "for any injury to persons or property occasioned by wilful violation of this act, a right of action shall accrue to the party injured for any direct damages sustained thereby," a cause of action does not survive in favor of the next of kin of an infant under the age of fourteen years, killed while employed in violation of the act.¹

The Illinois mines and mining act does not give a cause of action to the children of a miner killed because of the mine owner's violation of the act, while the widow is living,² nor does it give a cause of action to the administrator.³

The Indiana statute, Burns's 1901, § 7473 (Acts 1891, p. 57, § 13), gives a right of action to the widow, children, parents, and dependents of a miner killed in a coal mine because of the owner's violation of the mining laws; this act was not repealed by Acts 1899, p. 405, providing generally that the personal representatives of a person whose death was caused by a wrongful act may maintain an action therefor;⁴ and it has been held that no action lies in behalf of the personal representatives of a miner killed by a violation of such laws.⁵

Under the Kansas statute (Gen. Stat. 1909, §§ 4676–4683) a father cannot recover for injuries to his minor son, caused by the employer's violation of the statute requiring machinery to be guarded.⁶

Under Missouri Rev. Stat. 1899, § 8820, which gives a right of action to any person standing in any one of the following relations to the "person so killed," *i. e.*, that of widow, lineal heirs, adopted children, or dependent upon him for support, a mother who is depend-

vide the statutory safeguards and the injury complained of. *Carnahan v. Robert Simpson Co.* (1900) 32 Ont. Rep. 328.

No recovery can be had under the English factory act of 1873 for the death of a child, caused by her own deliberate act in removing a board set up for the special purpose of guarding moving machinery, even though her employment under the circumstances was a violation of the act. Between such violation and such an accident there is no legal connection. *Morris v. Boase Spinning Co.* (1895) 22 Sc. Sess. Cas. 4th series, 336, 32 Scot. L. R. 243, 2 Scot. L. T. 483.

¹ *Kansas & T. Coal Co. v. Gabsky* (1902) 70 Ark. 434, 66 S. W. 916.

² *Hart v. Penwell Coal Min. Co.* (1908) 146 Ill. App. 155.

³ *McCray v. Moveacqua Coal Min. & Mfg. Co.* (1909) 149 Ill. App. 565; *Hoover v. Empire Coal Co.* (1909) 149 Ill. App. 258.

⁴ *Collins Coal Co. v. Hadley* (1906) 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

⁵ *L. T. Dickason Coal Co. v. Unverferth* (1902) 30 Ind. App. 546, 66 N. E. 759; *Boyd v. Brazil Coal Co.* (1900) 25 Ind. App. 157, 50 N. E. 368, 57 N. E. 732; *Collins Coal Co. v. Hadley* (1906) 38 Ind. App. 637, 638, 75 N. E. 832, 78 N. E. 353.

⁶ *Gibson v. Kansas City Packing Box Co.* (1911) 85 Kan. 346, 116 Pac. 502, Ann. Cas. 1912 D, 1103.

ent upon a son for support may maintain an action for his death caused by a violation of the mining act.⁷ But she must by her petition bring herself within the statutory requirements, or it will be held that the petition does not state a cause of action.⁸ Under this statute children can maintain an action only where no widow survives, or where she dies within twelve months, the period limited for bringing the action.⁹ That the widow was, at the time of the miner's death, living in open adultery with another man, does not give the surviving children any cause of action.¹⁰

Under the Pennsylvania anthracite coal mines act (act June 2, 1891, P. L. 176), a mother has a cause of action for the death of a son, caused by the failure of the mine owner to comply with the requirements of the statute, although she had married again, and the son was living with his stepfather and his mother.¹¹

The owner of a mill owes the statutory duty to guard dangerous machinery, not only to his servants, but to a servant of an independent contractor, when such servant is employed in the mill about such dangerous machinery with the owner's knowledge, and where the independent contractor has no control over such machinery.¹²

1913. Parties liable.—The duty imposed by the Pennsylvania act of June 11, 1879 (P. L. 128), to erect fire escapes in certain fac-

⁷ *Bowerman v. Lackawanna Min. Co.* (1902) 98 Mo. App. 308, 71 S. W. 1062.

⁸ *Barron v. Missouri Lead & Zinc Co.* (1903) 172 Mo. 228, 72 S. W. 534.

⁹ *Poor v. Watson* (1902) 92 Mo. App. 89.

¹⁰ *Cole v. Mayne* (1901) 122 Fed. 836. The court said: "It is true that the Queen's bench, in *Stimpson v. Wood* (1888) 59 L. T. N. S. 218, 57 L. J. Q. B. N. S. 484, 36 Week. Rep. 734, 52 J. P. 822, held, under Lord Campbell's act, in an action brought at the relation of the widow of the deceased, to recover damages for his death, that she could not recover, where, at the time of the husband's death, she was living apart from him, and in open adultery with another. This was based on the theory that the design of that act was to secure compensation to those who by law were entitled to support from the deceased, or had reasonable ground of expectation of support at his hands while living. There is a radical difference between Lord Campbell's act and the statute under consideration. The former is for the benefit of the husband,

wife, parent, and child. The designated parties, if living, are joint beneficiaries in the right of action. Each named beneficiary has a separate, independent interest. The executor or administrator brings the action in the name of the beneficiary, for his or her proportion, and the jury makes the apportionment on the basis of compensation, dependent upon the relation of dependence and expectancy of the beneficiary in the life of the deceased. But under a statute like the one in question, giving a sole right of action to a designated person, *eo nomine*, to the exclusion of other designated beneficiaries, so long as the first in right under the statute is living, no misconduct of such preferred person constitutes a disqualification to maintain the action, unless imposed by the legislature which gives the right."

¹¹ *Gulla v. Lehigh Valley Coal Co.* (1905) 28 Pa. Super. Ct. 11.

¹² *Kanz v. J. Neils Lumber Co.* (1911) 114 Minn. 466, 36 L.R.A. (N.S.) 269, 131 N. W. 643 (headnote by the court).

tories, etc., attaches to the owner who occupies the premises and places the operatives in a position of danger, and enjoys the benefit of their services.¹ So it has been held that the Ohio statute (Rev. Stat. § 2573, as amended April 19, 1893, 80 O. L. 188) does not impose upon the owner in fee of a building the duty of providing exits when such owner is not in the possession or control thereof, although his tenant, who is in possession and control, may use the building as a factory or workshop.² But the wording of the statutes is such as clearly to impose the duty to erect fire escapes upon the owner in fee of the building.³

Section 7 of the Illinois act imposes the duty of guarding the shaft of hoisting machinery used in the construction of buildings upon both the owner and the contractor, so far as any civil liability is concerned.⁴ A similar view is taken of the New York statute.⁵

¹ *Schott v. Harvey* (1884) 105 Pa. 222, 51 Am. Rep. 201; *Keely v. O'Conner* (1884) 106 Pa. 321.

² *Lee v. Smith* (1885) 42 Ohio St. 458, 51 Am. Rep. 839.

³ In *Landgraf v. Kuh* (1901) 188 Ill. 484, 59 N. E. 501, it was held that the owner of a building is not relieved from liability for failure to provide fire escapes by the fact that a portion of the building was occupied by tenants.

See also *Arms v. Ayers* (1901) 192 Ill. 601, 58 L.R.A. 277, 85 Am. St. Rep. 357, 61 N. E. 851.

In *Carrigan v. Stillwell* (1903) 97 Me. 247, 61 L.R.A. 163, 54 Atl. 389, it was held that the owner of a building required by statute to be provided with fire escapes is not relieved from liability for not complying with the statute by the fact that the building was in possession of a tenant, where the statute requires notice to be given to him in case the premises are found to be unsafe, and imposes a penalty upon him for failure to comply with recommendations in regard thereto.

Under the New York statute the duty of providing fire escapes is placed upon the owner of the building, and not upon the one who occupies it as a manufactory. *Abrayan v. Manufacturers' Nat. Bank* (1888) 16 N. Y. S. R. 750.

⁴ *Claffy v. Chicago Dock & Canal Co.* (1911) 249 Ill. 210, 94 N. E. 551.

⁵ *Conroy v. Acken* (1906) 110 App. Div. 48, 96 N. Y. Supp. 530.

An owner engaged in the construction of a building through the instrumental-

ity of several different independent contractors is liable for an injury sustained by an employee of a contractor by falling through an unguarded elevator shaft, under a statute providing that "the contractors or owners shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides by a barrier," since the use of the word "or" in the phrase "contractors or owners" was not intended to impose the duty upon the contractor or owner severally, accordingly as one or the other should have the work in charge, but should be construed as imposing the duty on both the contractor and owner, and leaving it to them to determine which shall perform the duty so imposed. *Rooney v. Brogan Constr. Co.* (1905) 107 App. Div. 258, 95 N. Y. Supp. 1.

Upon an appeal from another trial of the above case, where the question was not squarely presented, the court of appeals seemed inclined to modify this construction of the statute, in the following language: "Whether, from the language used, the legislature intended that the duty of such protection should rest upon both owners and contractors, irrespective of the question of the control of the building, in my opinion, is open to grave doubt. If the question were actually presented by this case, I should hesitate to hold that proposition. It would seem the more reasonable construction of the statute to hold that the statutory duty was imposed only upon the person who had the pos-

The owner of a hoisting elevator who rents it to a contractor engaged in the construction of a house, and who furnishes the engineer to run the same, is not the "owner or contractor" within the statute.⁶

The obligations imposed by the Quebec industrial establishments act are imposed upon the person who maintains the establishment, not upon an owner who transfers to another person by lease, assignment, or otherwise, the right to operate it.⁷

Where a mine owner engages a contractor to open the mine, but reserves to himself the control of the hoisting machinery, he is liable for injuries to a servant of the contractor, resulting from a failure to provide the cage with a spring catch, as required by statute.⁸

One who has a contract for the operation of a lath mill by the piece, with power to employ other men, who are to be paid by the mill owner out of the amount due thereunder, is not an independent contractor, so as to relieve the owner from liability for failure to safeguard the mill machinery.⁹

An employee of the lessee of a building may maintain an action against the owner of the building for injuries caused by the latter's failure to guard the wheel hole, pulley, and cable of a freight elevator maintained in the building.¹⁰

Upon the question when is a person deemed to be an "occupier" of a factory, so as to be charged with the duty of complying with the requirements of the factory acts, see § 1873, *ante*.

session and control of the building, and that the duty was jointly imposed only where both owner and contractor could exercise control. The use of the disjunctive particle 'or' suggests a possible alternative. If the work was being performed by an independent contractor whose contract gave him the exclusive control of the building until completed, I should doubt whether the owner was intended to be held responsible for a compliance with the requirements of the labor law. But I do not think that the request presented the question, and therefore we should not determine it." *Rooney v. Brogan Constr. Co.* (1909) 194 N. Y. 32, 86 N. E. 814.

⁶ *Anderson v. Pelham Hod Elevating Co.* 129 App. Div. 639, 113 N. Y. Supp. 989.

⁷ *Julien v. Dupré* (1908) Rap. Jud. Quebec 35 S. C. 412.

⁸ *Fell v. Rich Hill Coal Min. Co.* (1886) 23 Mo. App. 216. The court said: Where the owner "undertakes to

so furnish and operate the machinery, which he knows will be used for a specific purpose in performing his part of the contract with the contractor in opening and operating his mine, the law, in the absence of any such statutory requirement, would impose upon him the duty of providing reasonably safe machinery and appliances; and as to that the relation of master and servant existed between him and the plaintiff employed in mining in this shaft."

⁹ *Barclay v. Puget Sound Lumber Co.* (1908) 48 Wash. 241, 16 L.R.A.(N.S.) 140, 93 Pac. 430.

¹⁰ *Tvedt v. Wheeler* (1897) 70 Minn. 161, 72 N. W. 1062. The court said: "The purpose of the statute is plain. It was intended to guard human life and protect human bodies from being mangled. It is a police regulation, founded upon sound public policy, and courts ought not to strain or restrict by construction its language so as to impair its useful operation. It should

B. PENAL LIABILITY OF DELINQUENT EMPLOYER, ENFORCEMENT OF.

1915. Generally.—By the express terms of almost all enactments which belong to the class discussed in the preceding five chapters, some penal consequence is attached to the non-performance of the duties imposed. On general principles it is clear that only the penalty which is specifically mentioned in the given enactment can be imposed upon a delinquent employer, unless his delinquency happens to have been of such a nature as to involve also the breach of some other statute which has no relation to his duties as an employer. Thus it has been held that the breach of a provision which declares it to be a misdemeanor for the officers and agents of certain specified corporations to exact more than a certain number of hours' work from employees does not constitute a ground for the forfeiture of the corporate charter.¹

In order to enforce a penalty for the violation of a statute, the terms thereof imposing such penalty must be clear and definite.² And no offense should be held to be committed where there is no reasonable or fair ground for holding that anything in contravention of the statute has actually happened.³ It has been laid down that a

be construed so as to effectuate the wise and humane purposes of its enactment. While the statute does not impose the duty of guarding such appliances upon the owner by name, its terms being positive and sweeping that such appliances shall be so guarded, yet there is no reason why the owner of a building should not be required to comply with the statute, as to such dangerous appliances as are a part of his building, before he delivers the possession of the building to his lessee; and we so hold. The duty, in the first instance, rests upon the owner to construct guards about such appliances, even if it should be held that the continuous duty rests upon the lessee to keep them guarded while they are in his exclusive possession and control."

¹ *People v. Atlantic Ave. R. Co.* (1891) 125 N. Y. 513, 26 N. E. 622 (N. Y. Laws 1887, chap. 529). The ground on which the decision was based is that the breach of the statute was not an offense against "the act by or under which it was created, altered, or renewed, or an act amending the same."

² In *Maker v. Slater Mill & Power Co.*

(1888) 15 R. I. 112, 23 Atl. 63, it was held that R. I. P. L. 1878, chap. 688, § 23, was too indefinite and uncertain to impose a criminal liability upon the owner of a building for not furnishing either fire escapes or stairways before the inspector of buildings required it. This decision was followed in *McCulloch v. Ayer* (1899) 96 Fed. 178, which construed the Illinois statute, and held that the duty of determining upon whom, as between landlord and the tenant, the duty of erecting a fire escape rested, was vested in the inspector, and until he has designated such person the court cannot determine that either an owner, lessee, or occupant is liable by reason of the failure to comply with the statute.

³ *Paterson v. Duke* (1904) 6 Sc. Sess. Cas. 5th series, 53.

In a prosecution under 5 & 6 Vict. chap. 99, forbidding the employment of women in mines, it was testified that two women had been seen lowering parties into the pit. This was held to be insufficient evidence to charge the person operating the mine with knowledge of the breach of the statute, though a

criminal statute is not to be extended by judicial construction.⁴ Such statutes are to be strictly construed; but they will be so construed as to carry out their evident purpose.⁵

It has been laid down that an action by the United States to enforce a penalty for the violation of the safety-appliance act is a civil action, and consequently a decision thereon is reviewable on a writ of error, at the instance of the United States.⁶ Such a review cannot be considered as putting the defendant twice in jeopardy.⁷

Penalties have been enforced under the circumstances noted below.⁸

1916. Persons liable.—Upon the general question of the criminal liability of a servant for his own acts as such servant, see chapter CXII., subtitle A, *post*. A few cases involving this question in rela-

different conclusion would have been justifiable if it had appeared that what had occurred was habitual or customary. *Reg. v. Handley* (1864) 9 L. T. N. S. 827.

⁴*State v. Erickson* (1907) 45 Wash. 441, 88 Pac. 840 (not a violation of statute to refuse to pay a fee for inspection of factory by state official on his own initiative, where the provision as to payment of fee appeared from a consideration of the statute as a whole to apply only when the inspection was made at the request of the owner or of one of his employees).

An employer is not liable to criminal prosecution or to an action for injuries by an employee, under Mass. Pub. Stat. chap. 104, until he has received notice from an inspector, as required by § 32 of that chapter. *Foley v. Pettee Mach. Works* (1889) 149 Mass. 294, 4 L.R.A. 51, 21 N. E. 304.

⁵*Hoffmeyer v. State* (1906) 37 Ind. App. 526, 77 N. E. 372.

⁶*United States v. Louisville & N. R. Co.* (1909) 93 C. C. A. 58, 167 Fed. 306.

⁷*United States v. Illinois C. R. Co.* 95 C. C. A. 628, 170 Fed. 542.

⁸In one case it was held that an indictable infraction of the spirit of an act prohibiting the employment of females in places where intoxicating liquors are sold was shown, where, immediately upon the passage of the act, the proprietress of a saloon discharged her female employees and entered into a partnership with them. *Walter v. Com.* (1878) 88 Pa. 137, 32 Am. Rep. 429. In this case it was laid down that an

indictment under the act need not show that the employee was within the proviso as to a wife or daughter of the employer.

By § 2 of the act of April 29, 1897, the object of which, as stated in the title, is to regulate the employment, and provide for the health and safety of men, women, and children in "manufacturing establishments, mining industries, laundries, renovating works, and printing offices," it is provided that no child under thirteen years of age shall be employed, nor any child under sixteen, unless his parent or guardian files an affidavit stating his age; nor any child under sixteen, who cannot read and write, unless he presents a certificate (signed by one other of the parties specified), showing that he has attended school during the preceding year for sixteen weeks. An indictment under this act is sufficient in form when the offense charged is set out in the exact words of the act. *Com. v. Beatty* (1900) 15 Pa. Super. Ct. 5.

A bucket 3 feet in diameter, 3 feet deep, and capable of holding four men, with no protector overhead and without a guard, swinging from side to side, and striking the sides and timber of the shaft when being raised or lowered, does not comply with the act of June 2, 1891, § 3, requiring a cage with the necessary buntings and guides, in the second opening of a shaft, with hand rails and efficient safety catches, and a sufficient cover overhead. *Com. v. Elk Hill Coal & I. Co.* (1898) 4 Lack. Legal News, 80.

tion to the statutes reviewed in the preceding five chapters may be noticed here.¹

One who has paid the proper fee for registration cannot be proceeded against as the occupier of an unregistered factory, though his return of particulars, erroneously stating the number of persons employed, would indicate that he should pay a further fee.²

The enactments with which we are at present concerned are usually expressed in such terms as to show that the legislature intended to cast the responsibility for their observance on the employer alone. But it is obviously just that, in cases where the establishments to which the statutes apply are intrusted to the management of agents, they also should be required to answer for breaches of the law which are due to their acts of omission or commission. This subject has been dealt with in one of the provisions of the English factory act of 1901.

By § 140 it is declared that, where an offense for which the occupier of a factory or workshop is liable under the act to a fine has in fact been committed by some agent, servant, workman, or some other person, that agent, etc., shall be liable to the like fine as if he were the occupier.

The doctrine that the effect of most of the enactments which belong to the classes considered in this chapter creates duties of a positive, non-delegable description does not seem to have been ever questioned. From such a doctrine it is a necessary deduction that those parties are liable as for a breach of the statutes although the persons immediately responsible may have been their agents. Thus it has been held, with reference to the factory act of one of the Australian states, that an employer who knows that his foreman is intending to infringe a provision which forbids the employment of females for more than a specified number of hours, and fails to take any active steps to prevent the infringement, is liable to the prescribed penalty,

¹ Under the English coal act 1881, § 49 (24), the manager of a pit may be convicted for allowing a person under the statutory age to operate machinery in it. *Sontar v. Clark* (1904) 7 Sc. Sess. Cas. 5th series, (Just. Cas.) 1.

The agent of a mine may be convicted of a breach of regulations prescribed in §§ 51, 52 of the coal mines act of 1872, although the mine is under the control of a duly certified manager. *Wynne v. Forrester* (1879) L. R. 5 C. P. Div. 361, 48 L. J. Mag. Cas. N. S. 140, 40 L. T. N. S. 524, 27 Week. Rep. 820.

The certified manager of a colliery mine, who has omitted to employ the resources at his disposal for the improvement of the ventilation of the mine, has committed an offense under § 51, for which he is liable to be convicted. *Hall v. Hopwood* (1879) 49 L. J. Mag. Cas. N. S. 17-19, 41 L. T. N. S. 797, 15 Mor. Min. Rep. 42.

² *Ferguson v. Van Breda* (1893) 11 New Zeal. L. R. 761.

although he may have given express directions that the provision should be observed.³ But in some of the statutes there are provisions by virtue of which employers are enabled, under certain circumstances, to relieve themselves from liability for the delinquencies of their agents.

By § 141 of the English factory act 1901, it is provided that if, after the offense has been proved, the occupier proves (a) that he has used due diligence to enforce the execution of the act, and (b) that the other person had committed the offense in question without his knowledge, consent, or connivance, the other person shall be convicted, and the occupier shall be exempt from the fine.

In one case, it has been held that under the mines regulation act (23 & 24 Vict. chap. 151) an owner of a mine could be convicted of a violation of the rule that safety lamps should not be given to the minors until they had been examined and locked, where the person whom they had selected to give out the lamps was competent, although he did give out unlocked lamps.⁴

It has been held that a member of an employing partnership may be convicted of an offense against a factory act, although the other members are not made parties defendant.⁵

1917. Pleading.—A complaint under the safety-appliance law of Congress to recover a penalty for hauling a car in moving interstate traffic in violation of § 2 (Acts March 2, 1893, chap. 196, 27 Stat.

³ *Goodwin v. Henderson* (1897) 13 Vict. L. R. 125, 8 Austr. L. T. 190.

⁴ *Dickenson v. Fletcher* (1873) L. R. 9 C. P. 1. In the course of the opinion, it was said: "I think that the general principle on which penal statutes imposing a penalty for neglect to do any act must, in the absence of distinct words to the contrary, be construed, is, that by neglect something in the nature of personal or wilful neglect is meant. It is argued that that cannot be the meaning in this act, because by the 10th section it is enacted that the rules therein contained shall be observed by the owner and agent, and that the effect is that, if they are not, the owner and agent are in default, even if they were personally no parties to the neglect. The answer to that contention seems to be sufficiently given by my Brother Brett, when he pointed out that it was possible that the legislature may have enacted these rules as rules the owner or agent is to cause to be observed, and if an accident occurs

through nonobservance of them, he may be liable to a civil action; but that is not inconsistent with the general rule that no penalty is incurred in the absence of personal neglect. The owner may not be personally aware that a breach of the rules contained in § 10 is taking place. In the case, for instance of the 3d rule, as to lamps, it is not only possible that he may not be present when a breach of such rule is taking place, but it is absolutely impossible that he can always be present to see whether it is carried out. It would be straining the words of this act, as it seems to me, far beyond the limits which the general rules of law and the decisions have laid down in the case of penal enactments, to say that under the mere word 'neglect' a person is to be liable to penal consequences for what was wholly the default of someone in his employ, and not in any way his fault."

⁵ *Goodson v. Henderson* (1885) 13 Vict. L. R. 125, 8 Austr. L. T. 190.

at. L. 531, U. S. Comp. Stat. 1901, p. 3174, and April 1, 1896, chap. 87, 29 Stat. at L. 85, U. S. Comp. Stat. 1901, p. 3175), relating to automatic couplers, is not demurrable (a) because it fails to negative the matter of the exception created by the proviso to § 6 (27 Stat. at L. 532, U. S. Comp. Stat. 1901, p. 3175, amended by 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314); or (b) because it only shows that one of the couplers was out of repair and inoperative, and that it was so because the uncoupling chain was "kinked;" or (c) because it fails to negative the exercise of reasonable care on the part of the railway company in maintaining the coupler in operative condition; or (d) because, although showing an actual and substantial hauling of the car in moving interstate traffic, it fails to specify how far the hauling was continued, or is silent in respect of any actual use of the defective coupler.¹ It has also been held that the pleadings in such actions should be governed by the rules of civil practice.²

A complaint based upon a violation of the Federal safety-appliance act is not demurrable upon the ground that it showed that the shipment had reached its destination, where the complaint averred that the car was being hauled "in and around" a certain city, to which it had been consigned, and its meaning apparently was that the car was being switched from yard to yard, in order to be delivered at the point of its final destination.³

An indictment based upon a violation of the provision in the factory act requiring saws to be guarded must contain an allegation that it was practical to guard the saw without rendering it inefficient for the use intended.⁴

In an action for injuries caused by a breach of a statutory duty it is not necessary that the complaint should refer to the title of the statute infringed, or aver that the defendant's negligence was in violation of that statute. It is sufficient if it states facts which bring the case within the provision in question.⁵

¹ *United States v. Denver & R. G. R. Co.* (1908) 90 C. C. A. 329, 163 Fed. 519 (syllabus by the court).

² *United States v. Atlantic Coast Line R. Co.* (1907) 153 Fed. 918.

A suit under the Federal safety-appliance act, which is in the nature of a penal action, is really an action for debt. *Atlantic Coast Line R. Co. v. United States* (1909) 94 C. C. A. 35, 168 Fed. 175.

A complaint alleging that the viola-

tion occurred "on or about" a particular date is not vague and indefinite, since pleading in a civil suit need not be as specific in alleging dates as in a criminal proceeding. *Ibid.*

³ *United States v. Western & A. R. Co.* 184 Fed. 336.

⁴ *State v. Rodgers* (1910) 175 Ind. 25, 93 N. E. 223.

⁵ *Lore v. American Mfg. Co.* (1901) 160 Mo. 608, 61 S. W. 678 (Mo. act of

1918. Defenses to penal actions.—a. In general.—The fact that a contract for employing a minor in a place where intoxicating liquors are sold was made on Sunday is no defense to an action for the violation of a statute forbidding such employment.¹

The manager of a beer garden cannot be convicted of the offense of employing a minor in a place where intoxicating liquors are sold, where he made a contract with an adult to furnish music in the garden for a gross sum, and did not know the musicians employed, nor their ages, and as soon as he ascertained that one of them was a minor, caused his discharge.²

It has been laid down generally that no excuses are sufficient in a suit for penalties, to relieve railroads from liability for failure to obey the Federal safety-appliance act.³ Whether or not the fact that a safety appliance became defective so recently before the accident that, in the exercise of ordinary care, it could not have been replaced in time to prevent the accident, is a defense to an action for a penalty, was raised, but not decided, in one case.⁴

April 20, 1891, as to the guarding of dangerous machinery).

See also *Latapie-Vignaux v. Askew Saddlery Co.* (1906) 193 Mo. 1, 91 S. W. 496; *Severson v. Hill-Warner-Fitch Co.* (1906) 116 App. Div. 108, 101 N. Y. Supp. 808; *Lohmeyer v. St. Louis Cordage Co.* 214 Mo. 685, 113 S. W. 1108.

¹ *State v. Hall*, 141 Wis. 30, 123 N. W. 251.

² *Ibid.*

³ *Galveston, H. & S. A. R. Co. v. United States*, 105 C. C. A. 422, 183 Fed. 579; *Atlantic Coast Line R. Co. v. United States* (1909) 94 C. C. A. 35, 168 Fed. 175.

That the railroad company exercised reasonable care is no defense. *United States v. Atchison, T. & S. F. R. Co.* (1908) 90 C. C. A. 327, 163 Fed. 517; *Chicago, M. & St. P. R. Co. v. United States* (1908) 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; *Chicago, B. & Q. R. Co. v. United States* (1909) 95 C. C. A. 642, 170 Fed. 556; *United States v. Southern P. R. Co.* (1909) 94 C. C. A. 629, 169 Fed. 407.

⁴ "As to the second objection, whatever may be the right of the railroad company to defend against the claim made in a suit of this kind by saying that the coupling became defective or the grab iron lost so recently before the time

named in the petition as to make it impossible, in the exercise of ordinary care, to replace or repair, that is purely a matter of defense if it ever can be asserted at all. It cannot be urged in support of a demurrer to the cause of action. If it were not so, it would be practically impossible for proof to be made in any case of a violation of the law. There are approximately two million cars in use by railroads in this country, and if the contention referred to is sound, it would be necessary, in order to sustain a cause of action in cases under this act, that proof be made that the appliance was in a condition of unrepair at one time, that it continued to be in that condition of unrepair or in a developing condition of greater unrepair up to another time, the lapse of the intervening time being so great as to show a want of ordinary care on the part of the railroad company. In the meantime the very thing to prevent which the law was passed might occur; to wit, the injury of an employee. The practical administration of justice would be denied, and the real enforcement of the law be impossible, if the construction contended for was sound. But it has been held in several cases that, even as a defense on the merits, no degree of care, no absence of negligence, can excuse for the failure

b. Contributory negligence of servant.—The fact that an employee who had suffered death or injury owing to his employer's nonobservance of a provision in a factory act was guilty of such contributory negligence as would prevent him or his representative from recovering damages in a civil suit was in one case held not to be a defense to an action to enforce the payment of the fine to which his violation of the act renders the employer liable.⁵

c. Master's ignorance of child's real age.—On the ground that an employer acts at his peril in hiring a child, it has been held by New York courts of inferior jurisdiction that the violation of a statute which prohibits the employment of a child under a certain age is not excused by the fact that the employer relied in good faith upon the erroneous statements of the child himself and upon his father's affidavit.⁶

to perform a duty unqualifiedly imposed by statute. And in the recent case of *St. Louis, I. M. & S. R. Co. v. Taylor* (1907) 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, the court very pointedly lays the unqualified responsibility upon the railroad for such a condition of unrepair." *United States v. Wheeling & L. E. R. Co.* (1908) 167 Fed. 198, 201.

⁵ *Blenkinsop v. Ogden* [1898] 1 Q. B. 783, 67 L. J. Q. B. N. S. 537, 78 L. T. N. S. 554, 14 Times L. R. 360, 46 Week. Rep. 542 (construing English factory and workshop act 1878, § 136).

⁶ *New York v. Chelsea Jute Mills* (1904 Municipal Ct.) 43 Misc. 266, 88 N. Y. Supp. 1085; *Re Clement*, 64 Misc. 439, 119 N. Y. Supp. 347.

CHAPTER LXXXIII.

SPECIAL CONTRACTS DISCHARGING OR RESTRICTING THE LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR SERVANTS.

A. CONTRACTS WITH REGARD TO FUTURE INJURIES.

1919. Contracts by which a master stipulates for absolute exemption from his common-law liability for future acts of negligence.
- a. Doctrine that such contracts are valid.
 - b. Doctrine that such contracts are invalid.
 - c. Statutory provisions.
 - d. Contracts releasing carriers from liability to employees of other persons.
1920. Contracts by which a master stipulates for absolute exemption from his statutory liability.
- a. Doctrine that such contracts are valid.
 - b. Doctrine that such contracts are invalid.
 - c. Special statutory provisions declaring such contracts to be invalid.
1921. Contracts requiring servant to elect between acceptance of benefits out of a relief fund, and a prosecution of his claims in an action for damages. Generally.
1922. Objects, organization, and legal status of relief associations.
1923. Stipulations by which it is agreed that the acceptance of the benefits shall be a bar to a subsequent action for damages. Validity apart from statute.
- a. Consideration sufficient.
 - b. Public policy not contravened.
 - c. Jurisdiction of courts not ousted.
 - d. Interests of servants subserved.
 - e. Coercion not predicable.
 - f. Undue influence and fraud.
 - g. Mistake as to strength of claim for damages.
1924. Same subject. Validity of stipulations considered with reference to statutes.
1925. Same subject. Right of action for damages, how far affected by acceptance of benefits.
- a. Acceptance by the employee himself.
 - b. Acceptance after death of employee.

- 1926. Same subject. Duration of right to benefits in cases where the injury is not fatal.
- 1926a. Stipulations making execution of release a condition precedent to payment of benefits out of relief fund, validity of.
- 1927. Right of action, how far affected by such stipulations.
 - a. During the lifetime of the servant.
 - b. After the servant's death.
- 1928. Stipulations defining the effect of institution of action for damages by members of relief associations or their representatives, validity of.
- 1928. Right of action, how far affected by such stipulations.
 - a. During the servant's lifetime.
 - b. After the servant's death.
 - c. Meaning of the expression "judgment."
- 1929a. Enforcement of restrictive stipulations in foreign states.
- 1930. Arrangements by masters with insurance companies for the indemnification of servants.

B. CONTRACTS WITH REGARD TO INJURIES PREVIOUSLY SUSTAINED.

- 1931. Generally.
- 1932. Consideration.
- 1933. Servant's ignorance of the character and contents of the instrument signed by him.
- 1933a. Servant's mental and physical condition at the time when the releasing instrument was signed.
- 1934. Servant's mistake of law.
 - a. Mistake regarding the extent of his remedial rights.
 - b. Mistake regarding the legal effect of the release.
- 1935. Servant's mistake of fact in respect of the extent of his injuries. General rule.
- 1936. Same subject further discussed. Mistake produced by misrepresentation on the part of the employer or his agent.
 - a. Innocent misrepresentation.
 - b. Fraudulent misrepresentation.
- 1937. Other elements bearing upon the validity of releases.
 - a. Public policy, contravention of.
 - b. Fraudulent intention of employer not to perform promise by which servant was induced to sign release.
 - c. Insanity of servant.
 - d. Minority of servant.
- 1937a. Ratification of voidable release.
- 1937b. Restoration of money received under the contract, how far a prerequisite to the servant's right of action for damages.
- 1938. Employer's performance of the contract of settlement.
- 1939. Effect of releases with regard to the liability of third persons.
 - a. In cases where the third person was the sole tort-feasor.
 - b. In cases where the master and the third person were joint tort-feasors.

A. CONTRACTS WITH REGARD TO FUTURE INJURIES.

1919. Contracts by which a master stipulates for absolute exemption from his common-law liability for future acts of negligence.—*a. Doctrine that such contracts are valid.*—The author has not found any English case in which the validity of a contract by which a servant exonerates a master from his common-law liability for such injuries as the servant may subsequently receive by reason of the master's negligence has been either discussed or decided. That such a contract, however, would be upheld by the courts of that country, if a case involving the point should be presented, seems to be an *a fortiori* conclusion from the fact that they have affirmed the validity of an agreement by a servant to renounce his right of action under a statute enlarging the master's liability.¹

In Georgia contracts exempting employers from liability for damages resulting from their negligence were formerly held to be valid, except as respects criminal negligence.² But this rule has now been abrogated by statute.³

¹ See *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 46 J. P. 711, the effect of which is stated in the next section.

In *Vickery v. Great Eastern R. Co.* note 7, *infra*, it was apparently assumed that the servants of the defendant company had, by agreeing to participate in the benefits of an accident allowance fund established under statutory power, renounced their right to bring an action for damages.

The statement in the text is also supported by the cases which embody the doctrine that a stipulation exempting a shipowner from liability for his own negligence, or that of his servants, is not invalid as being against public policy, or for any other reason. 2 Beven, Neg. pp. 1252, 1303, 1304.

² In *Western & A. R. Co. v. Bishop* (1873) 50 Ga. 465, the earliest case in which this doctrine was enunciated, the reasoning of the court was as follows: "We know of no law which limits the right of employer and employee to contract for themselves as to the relative rights and duties of each to the other, provided the contract be not forbidden by positive law, or be contrary to public policy. They are both free citizens. Labor is property, and the laborer has,

and ought to have, the same right to contract in reference to it as other free-men have in reference to their property. Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations by the parties. If one enter into the employment of another, and there be no stipulations as to wages, hours of labor, industry, etc., the law implies an obligation upon the employer to pay reasonable or customary wages, and upon the employee reasonable industry, and upon both reasonable hours of labor. It also implies various other duties and obligations; but, obviously, these are all only implications, in the absence of any agreement between the parties, and it would be a dangerous interference with private rights to undertake to fix by law the terms upon which employer and employee shall contract. For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same lawgiver which

In the British colonies in which the common law prevails, the same doctrine prevails as in England.⁴

The position taken in Quebec is that a master may relieve himself by special agreement from the consequences of his want of ordinary diligence, but that he cannot stipulate for exemption from responsibility for gross negligence (*faute lourde ou grossière*).⁵

claims to make a contract for them upon the one point may claim to do so upon others, and thus, step by step, they cease to be free men. We do not say that employer and employee may make any contract: we simply insist that they stand on the same footing as other people. No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers, and doctors, of buyers and sellers and bailors and bailees, as of employers and employees." The rule in cases involving the liability of an employer was considered to be different from that which governs cases in which a common carrier is contracting with shippers or passengers.

To the same effect, see *Western & A. R. Co. v. Strong* (1874) 52 Ga. 461 (widow's right of action barred by deceased husband's contract); *Hendricks v. Western & A. R. Co.* (1874) 52 Ga. 467; *Galloway v. Western & A. R. Co.* (1876) 57 Ga. 512; *Cook v. Western & A. R. Co.* (1883) 72 Ga. 48; *Fulton Bag & Cotton Mills v. Wilson* (1892) 89 Ga. 318, 15 S. E. 322; *New v. Southern R. Co.* (1902) 116 Ga. 147, 59 L.R.A. 115, 42 S. E. 391 (doctrine held to be a bar to an action by a father for the loss of the services of his minor son).

In this state, however, it has been held that a rule which requires an employee to waive certain rights which are not connected with his duty as an employee stands on an essentially different footing from rules governing the conduct of the employee while in the service of the employer. The latter are presumed to have been agreed to as soon as the employee has had an opportunity to become acquainted with their purport. But an employee is not bound by a rule that the regular compensation for services is to cover all risks, and that remaining in the service will be considered an acceptance of such condition of employment, where he has not expressly agreed to the rule: especially where the rule itself expressly requires that the

employee shall distinctly understand and agree to it. *Georgia P. R. Co. v. Dooley* (1890) 86 Ga. 294, 12 L.R.A. 342, 12 S. E. 923.

³ By § 2613 of the Civil Code (Acts 1895, p. 97), it is declared: "All contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy."

⁴ In an Ontario case, the rules of a railway providence society provided that no member should have any claim against the company for compensation on account of injury or death from accident. Held, that the receipt of the benefits to which a member was entitled, and the execution of a release by him, precluded him from maintaining an action against the company. *Harris v. Grand Trunk R. Co.* (1904) 3 Ont. Week. Rep. 211, affirmed by the Div. Ct. in 13 Ont. Week. Rep. (1904) 550, which cited the unreported case *Holden v. Grand Trunk R. Co.*

⁵ *Brasell v. La Compagnie du Grand Tronc* (1897) Rap. Jud. Quebec, 11 C. S. 150 (failure of train despatcher to communicate instructions regarding stop at a certain passing station to the conductor of a second section of a train held to be gross negligence); *Conan v. Charest* (1907) Rap. Jud. Quebec 32 S. C. 385. In the latter case one of the authorities cited is *Griffiths v. Dudley*; but the rule there enounced is not qualified by any exception in respect of the degree of negligence.

In a case which, though it came before the Supreme Court of the Dominion on appeal from a Quebec court, seems to have been decided on wholly general grounds, and not with any special reference to the French law, which is administered in that province, it was held that a contract by which a servant, upon becoming a member of a relief associa-

Where, as is usually the case, the consideration of the exonerating contract is the acquisition by the servant of a right to participate in the benefits of an insurance or relief fund,⁶ he is bound by any special provision which defines the circumstances under which the injury must have been received in order that the right may accrue to him.⁷

b. Doctrine that such contracts are invalid.—The doctrine supported by a great preponderance of American authority is that a contract by which a servant agrees to exempt his master absolutely for such injuries as may thereafter be caused by the negligence either of the master himself or of an employee whose negligence is imputed to him is invalid, as being contrary to public policy.⁸

tion partly supported by his master's contributions, agreed to renounce all claims against his master arising from injury or death in the course of his employment, was a bar to an action by his widow to recover damages. *Reg. v. Grenier* (1899) 30 Can. S. C. 42. Strong, Ch. J., said: "That a workman may so contract with his employer as to exonerate the latter from liability from negligence for which the former would otherwise be entitled to recover damages cannot be disputed." This decision was followed in *Ferguson v. Grand Trunk R. Co.* (1901) Rap. Jud. Quebec 20 C. S. 54. In both these cases the membership of the associations was compulsory. But no allusion to this circumstance was made by the judges.

⁶ See cases cited in notes 1–3. *supra*.

⁷ In *Vickery v. Great Eastern R. Co.* (1898) 79 L. T. N. S. 121, it was held that, as one of the rules relating to the disposal of an accident allowance fund provided that the sum claimed by the plaintiff, the widow of a servant, was to be paid "in case of the death of an insured from any accident in the discharge of duties in the company's service," the action could not be maintained for the reason that the deceased had been run over by a train while he was trespassing upon certain lines of rails which he had been expressly forbidden to traverse. Hawkins, J., said that it seemed "revolting to good sense to say that a man can, under any ordinary circumstances, be said to be discharging his duty to his master in doing that which is in direct disobedience to his lawful orders. It signifies nothing to my mind that many other workmen had acted in like defiance of the notices. It

was suggested that such disregard of the company's injunctions had been sanctioned by the company; but I find no evidence to such a conclusion. It would give rise to great confusion in the relations which ought to exist between masters and servants if the latter were allowed to be under an impression that frequent disobedience to the orders of their employers could alone operate as a nullification of them." It will be observed that in this case the plaintiff could not have recovered under Lord Campbell's act, as the conduct of the deceased manifestly imported contributory negligence. (The report does not state whether the action was brought at common law or under the employers' liability act of 1880. The case has therefore been cited in the present section rather than in the following one.)

⁸ In the following cases illustrative of this doctrine the statements applying or recognizing it are entirely general in their character: *Roesner v. Hermann* (1881) 10 Biss. 486, 8 Fed. 782; *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136; *Snipes v. Southern R. Co.* (1908) 91 C. C. A. 593, 166 Fed. 1; *Little Rock & Ft. S. R. Co. v. Eubanks* (1886) 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney* (1897) 148 Ind. 196, 40 L.R.A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464 (*arguendo*); *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 423; *Newport News & M. Valley Co. v. Eifort* (1894; Super. Ct.) 15 Ky. L. Rep. 600; *Blanton v. Dold* (1891) 109 Mo. 76, 18 S. W. 1149; *Strickland v. F. W. Woolworth & Co.* (1910) 143 Mo. App. 528, 127 S. W. 628; *Olson v. Nebraska Teleph. Co.*

(1909) 83 Neb. 735, 120 N. W. 421; *Dodd v. Central R. Co.* (1910) 80 N. J. L. 56, 76 Atl. 544; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Twaits v. Pennsylvania R. Co.* (1910) 77 N. J. Eq. 103, 75 Atl. 1010 (*obiter*); *Canaday v. Atlantic Coast Line R. Co.* (1906) 143 N. C. 439, 8 L.R.A.(N.S.) 939, 118 Am. St. Rep. 821, 55 S. E. 836; *Johnson v. Philadelphia & E. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854; *Johnson v. Charleston & S. R. Co.* (1899) 55 S. C. 152, 44 L.R.A. 645, 654, 32 S. E. 2, 33 S. E. 174; *Bonner v. Bean* (1891) 80 Tex. 152, 15 S. W. 798; *Pugmire v. Oregon Short Line R. Co.* (1907) 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 Ann. Cas. 384; *Stone v. Union P. R. Co.* (1907) 32 Utah, 185, 207, 89 Pac. 715, 723 (*void both at common law and under Wyo. Const.* See note 9, *infra*); *Johnson v. Richmond & D. R. Co.* (1890) 86 Va. 975, 11 S. E. 829.

By one of the inferior courts of New York an agreement by an employee, in consideration of his employment, that he would not hold the employer responsible or make any claim for damages from the fault of other employees, or machinery or defects, or any other cause, and would not appear as a witness in any suit or proceedings, or countenance or authorize any other person to sue or give testimony in any suit for damages so received, was held to be wholly void as against public policy. The *ratio decidendi* was that, even if a waiver of personal damages for negligence of the employer were valid, no agreement would be upheld which ousted the courts of their jurisdiction, or prevented the performance of a duty which was imposed by law, and in which the state has an interest. *Runt v. Herring* (1892; C. P.) 2 Misc. 105, 49 N. Y. S. R. 126, 21 N. Y. Supp. 244.

In *Purdy v. Rome, W. & O. R. Co.* (1891) 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 225, where the release in question was held to be invalid, on the ground that it was not supported by a consideration, the court declined to discuss the more general objection of its being contrary to public policy. But the doctrine formulated in the text has now been explicitly adopted in this state. *Johnston v. Fargo* (1906) 184 N. Y. 379, 7 L.R.A.(N.S.) 537, 77 N. E. 388, 6 Ann. Cas. 1, affirming (1904) 98 App. Div.

436, 90 N. Y. Supp. 725. The court argued thus: "Contracts are illegal at common law, as being against public policy, when they are such as to injuriously affect or subvert the public interests. (1 Story, Eq. Jur. § 260, note; *Chesterfield v. Janssen* [1750] 2 Ves. Sr. 125, 156.) If it were true that the interest of the employed, only, would be affected by such contracts as the present one, as it was held by the English court in *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 46 J. P. 711, *supra*, it would be difficult to defend, upon sound reasoning, the denial of the right to enter into them; but that is not quite true. The theory of their invalidity is in the importance to the state that there shall be no relaxation of the rule of law which imposes the duty of care on the part of the employer towards the employed. The state is interested in the conservation of the lives and of the healthful vigor of its citizens, and if employers could contract away their responsibility at common law, it would tend to encourage on their part laxity of conduct in, if not an indifference to, the maintenance of proper and reasonable safeguards to human life and limb. The rule of responsibility at common law is as just as it is strict, and the interest of the state in its maintenance must be assumed; for its policy has, in recent years, been evidenced in the progressive enactment of many laws which regulate the employment of children and the hours of work, and impose strict conditions with reference to the safety and healthfulness of the surroundings of the employed, in the factory and in the shop. The employer and the employed, in theory, deal upon equal terms; but, practically, that is not always the case. The artisan or workman may be driven by need; or he may be ignorant or of improvident character. It is therefore for the interest of the community that there should be no encouragement for any relaxation on the employer's part in his duty of reasonable care for the safety of his employees. That freedom of contract may be said to be affected by the denial of the right to make such agreements is met by the answer that the restriction is but a salutary one, which organized society exacts for the surer protection of its members. While it is true that the individual may be

the one who, directly, is interested in the making of such a contract, indirectly, the state, being concerned for the welfare of all its members, is interested in the maintenance of the rule of liability and in its enforcement by the courts."

In *Illinois C. R. Co. v. Cozby* (1896) 69 Ill. App. 256, the court laid it down that a contract arising out of the adoption of rules broad enough to free a railway company from liability for gross negligence was invalid. (The rules in question prescribed that the servant should examine and see that certain appliances were safe). Similarly in *Maney v. Chicago, B. & Q. R. Co.* (1892) 49 Ill. App. 105, the court pronounced in favor of the doctrine that a master cannot secure by contract exemption from the consequences of gross negligence or a wilful act. But in the more recent cases the invalidity of exempting agreements seems to be predicated, irrespective of the degree of negligence. See *Consolidated Coal Co. v. Lundak* (1902) 196 Ill. 594, 63 N. E. 1079, affirming (1901) 97 Ill. App. 109 (rule providing that "every person accepting employment in a mine does so with full notice that the danger from falling roof and coal is one of the usual risks of his service, and he will govern himself accordingly," was held to be void as a contract purporting to cast upon the servant an assumption of the risk of the master's negligence); *Himrod Coal Co. v. Clark* (1902) 197 Ill. 514, 64 N. E. 282, affirming (1901) 99 Ill. App. 332 (rules held void by which workmen were required to ascertain whether places had been made safe before they entered them); *Chicago, W. & V. Coal Co. v. Peterson* (1890) 39 Ill. App. 114.

By the Texas court of civil appeals it has been held that a stipulation by a railroad employee in his application for employment that he understood that at some points of the line there were various specified structures near the tracks which might be dangerous, and that he must inform himself of the location of such obstructions, and use due care to avoid injury thereby, was void, as against public policy, in so far as it attempted to relieve the company from its duty of providing a reasonably safe track, and of warning the employee of dangerous obstructions near the track. *Gulf, C. & S. F. R. Co. v. Darby* (1902) 28 Tex. Civ. App. 413, 67 S. W. 446.

This case seems inconsistent with an earlier decision by the supreme court of the same state, to the effect that a contract by which a parent, when hiring out his infant son, releases the employer from all claims for damages for injuries received by the infant in the course of the employment, extends only to such damages as the parent would have been entitled to recover up to the time of his son's majority, if the release had not been executed, and does not operate so as to exempt the employer from responsibility to the infant for an injury of a permanent character. *International & G. N. R. Co. v. Hinzie* (1891) 82 Tex. 623, 18 S. W. 681. The validity of the release seems to have been here taken for granted; but the point was, curiously enough, not raised. Having regard to the general trend of the American authorities, it seems improbable that effect would now be given to such a contract by this court. By the court of civil appeals it has been laid down in more recent decisions that a father cannot, either by consenting to the employment of his minor son, or in any other way, lawfully agree to exempt the master from the consequences of injuries received by the son. *Galveston, H. & S. A. R. Co. v. Pigott* (1909) 54 Tex. Civ. App. 367, 116 S. W. 841; *Pacific Exp. Co. v. Watson* (1909) 57 Tex. Civ. App. 111, 124 S. W. 127.

In *Tarbell v. Rutland R. Co.* (1901) 73 Vt. 347, 56 L.R.A. 656, 87 Am. St. Rep. 734, 51 Atl. 6, a contract between a railway company and the next of kin of an employee, whereby the next of kin released the company from all damages that accrue to him by reason of the company's negligence, was held to be invalid, both for the reason that it tended to promote negligence on the part of the company in regard to providing for the personal safety of its employees, and also for the reason that it was made for the purpose of violating Vermont Stat. § 3924, respecting the criminal negligence of railway companies.

In Ohio, on the special ground that the liability of railroad companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them is founded upon considerations of public policy, it is held not to be competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment,

c. Statutory provisions.—In some of the American states contracts of the character discussed in this section have been prohibited by the legislature.⁹

that such liability shall not attach to it. *Lake Shore & M. S. R. Co. v. Spangler* (1886) 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467.

A railroad company may exact from one applying for employment, as a condition of employment, a stipulation that it shall not be liable for the results of the employee's disobedience of specified rules relating to his conduct in its employment. Such an agreement is not open to the objection that it exempts the employer from liability for his own negligence. *Russell v. Richmond & D. R. Co.* (1891) 47 Fed. 204; *Sedgwick v. Illinois C. R. Co.* (1887) 73 Iowa, 158, 34 N. W. 790.

In *Memphis & C. R. Co. v. Jones* (1859) 2 Head, 517, the defendant in error hired to the plaintiff in error for the year 1856 two slaves. The contract of hiring contained the following stipulation: "And all risks incurred or liability to accidents whilst in said service is compensated for and covered by the pay agreed upon; the said railroad company assuming no responsibility for damages from accident or any cause whatever." On the ground merely that this stipulation should receive a reasonable construction, it was held not to relieve the company from liability for any injury or loss resulting from the wilful wrong or gross negligence of said company or its agents. The general question of the validity of the contract with relation to public policy was not discussed.

⁹ *Georgia.*—The statute has already been referred to in note 3, *supra*.

Indiana.—The restrictive clause which, as stated in § 1660, *ante*, forms a part of the employer's liability act of 1893, and is applicable only to suits brought under that act, has been supplemented by the following general provisions of chap. 225 of the Laws of 1901: Burns's Anno. Stat. 1901, § 7082a; Burns's Anno. Stat. 1908, § 8015. § 1. All contracts between employer and employee, releasing the employer from liability for damages arising out of the negligence of the employer, by which the employee is injured, or in case of the employee's death,

to his representatives, are against public policy, and hereby declared null and void.

In *Chicago & E. R. Co. v. Lawrence* (1907) 169 Ind. 319, 79 N. E. 363, 82 N. E. 768, a contract which purported to release a railway company from liability for any injury which might be caused by its violation of a municipal ordinance which prohibited it from running trains backward without a light on the rear car was treated as invalid.

Massachusetts.—Stat. 1874, chap. 508, § 6, Rev. Stat. chap. 106, § 16. It is provided that no person shall, by a special contract with his employees, exempt himself from liability which he may be under to them for injuries suffered by them in their employment, and resulting from the negligence of the employer or of a person in his employ.

An agreement, on a written application to a railway company for employment, to make, as soon as possible, a careful examination of all things near the track, so that the dangers attending them may be understood, is not contrary to this statute. *Quinn v. New York, N. H. & H. R. Co.* (1900) 175 Mass. 150, 55 N. E. 891.

In *Wagner v. Boston Elev. R. Co.* (1905) 188 Mass. 437, 74 N. E. 919, the validity of a contract by which the servant of an independent contractor released the defendant railway company was affirmed on the ground that this provision did not inure to his benefit.

Ohio.—Act of April 2, 1870, § 1 (87 Ohio Laws, 149); Bates's Anno. Stat. Everett's ed. § 3365-20. It is declared unlawful for any railway company to enter into any contract by which the servant agrees to hold it harmless on account of personal injury caused by defects in cars, etc.

[For the remainder of this section of the statute, see § 1924, note 7, *post*.]

Texas.—With reference to the statute providing that no contract made between an employer and employee, based upon the contingency of death or injury of the employee, and limiting the liability of the employer in such case, shall be valid, it has been held that a contract between a railroad and an employee, re-

d. Contracts releasing carriers from liability to employees of other persons.—Although the subject does not, strictly speaking, fall within the scope of the present work, it may be advisable to make a passing reference to the decisions regarding that class of contracts by which railway companies stipulate for nonliability in respect of injuries inflicted by the negligence of their employees upon the servants of other carriers of freight or passengers while they are engaged in performing their regular duties on the trains or premises of the railway companies, under a special arrangement made between those companies and their masters. The accepted doctrine is that contracts of this description are valid at common law.¹⁰ But this

quiring the latter, if he should sustain any personal injury in the service of the former, to allow its surgeon to examine his person in respect to the alleged injury, and providing that a refusal to allow such examination to be made shall be a bar to the institution of any action on account of such injury, was void. The court observed that such a contract was in part, at least, based on the event of injury to the plaintiff. *Galveston, H. & S. A. R. Co. v. Hughes* (1905) — Tex. Civ. App. —, 91 S. W. 643.

Wyoming.—Const. Wyo. art. 10, § 4, provides that any contract with any employee, waiving any right to recover damages for causing death or injury of any employee, shall be void. Article 19, § 1, provides that it shall be unlawful for any corporation to require of an employee any contract whereby the corporation shall be released from liability on account of personal injuries received by the employee by reason of the negligence of the corporation or the employees thereof, and that such contracts shall be void. For a case in which a contract was held to be invalidated by this provision, see *Pugnire v. Oregon Short Line R. Co.* (1907) 33 Utah, 27, 13 L.R.A.(N.S.) 565, 126 Am. St. Rep. 805, 92 Pac. 762, 14 Ann. Cas. 384.

In *Stone v. Union P. R. Co.* (1907) 32 Utah, 185, 89 Pac. 715, 723, the plaintiff's intestate, an employee both of an express company and of a railway company, had, while in Utah, executed to the former company a release of both companies. Held, that, as it was contemplated at the time when the release was executed that a part of his services were to be performed in Wyoming, and

it appeared that the injuries which caused his death had been sustained while he was performing services in that state, the release should be taken to have been executed there, and consequently to be void as regards the railway company.

¹⁰ The authorities are reviewed in Shearm. & Redf. on Neg. § 505, and Hutchinson on Carriers, §§ 1072, 1076. See also the elaborate opinions in *Baltimore & O. S. W. R. Co. v. Voigt* (1899) 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Northern P. R. Co. v. Adams* (1904) 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; *McDermion v. Southern P. Co.* (1903) 122 Fed. 669; *Chicago, R. I. & P. R. Co. v. Hamler* (1905) 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 Ann. Cas. 42, reversing (1904) 114 Ill. App. 141; *Louisville, N. A. & C. R. Co. v. Keefer* (1896) 146 Ind. 21, 38 L.R.A. 93, 58 Am. St. Rep. 348, 44 N. E. 796; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney* (1897) 148 Ind. 196, 40 L.R.A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; *Bates v. Old Colony R. Co.* (1888) 147 Mass. 255, 17 N. E. 633; *Robertson v. Old Colony R. Co.* (1892) 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650.

The above decisions relate to employees whose duties required them to travel upon trains. The validity of the releasing contracts has also been affirmed with reference to employees hired by express companies to perform work at railway stations.

Piper v. Boston & M. R. Co. (1908) 75 N. H. 228, 72 Atl. 1024; *Dodd v. Central R. Co.* (1910) 80 N. J. L. 54. 76 Atl. 544.

doctrine has, in some jurisdictions, been abrogated by statutory provisions.¹¹

Upon a subsequent appeal of the *Piper Case* ([1910] 75 N. H. 435, 75 Atl. 1041) it was held that the contract releasing the railroad company from liability for the negligence of its servants was not invalidated by a clause therein which released the company from its own negligence, although the latter clause itself was unenforceable.

¹¹ *Indiana*.—Acts 1901, p. 515, chap. 225; Burns's Anno. Stat. 1901, § 7082a; Burns's Anno. Stat. 1908, § 8015. Two of the classes of contracts declared to be void are these: (1) All contracts between employer and employee, releasing third persons or corporations from liability for damages arising out of the negligence of such third person. (2) All contracts between an employee and a third person or corporation, in which it is agreed that the employer of such employee shall be released from liability for damage of such employee, arising out of the negligence of the employer. These provisions were under discussion in *Cleveland, C. C. & St. L. R. Co. v. Henry* (1908) 170 Ind. 94, 83 N. E. 710, reversing (1907) — Ind. App. —, 80 N. E. 636. There a show company contracted with a railroad for the transportation of its show cars for a stipulated gross sum, and agreed to assume all responsibility for damages arising out of the contract, and "to indemnify and hold said railroad harmless on account of any claim for personal injuries or damage to property." While an employee of the show was in one of the show cars awaiting transportation he was killed by the negligence of the railroad company. Held, in an action against the railroad for the death, that so far as the contract was decedent's contract, it was with the railroad, relieving it as a private carrier under a special agreement from liability for accidents from all sources affecting him, and was not a contract within the inhibitions of the statute. The *ratio decidendi* was that "the deceased, by entering the showman's service, and the acceptance of the provisions made for the transportation of employees, in a modified sense made himself a party to the contract;" that the contract, so far as it was his, "was with the railroad company, in effect relieving it as a pri-

vate carrier under a special agreement from liability for accidents from all sources affecting him;" and that, as it did not fall within either of the categories specified in the statute, the case was governed by the principles of the common law.

Iowa.—By § 2071 of the Code, it is provided that railway corporations shall be liable to every person, including employees, for the consequences of the neglect or mismanagement of the company's servants; and further, that "no contract which restricts such liability shall be legal or binding." By § 2074, it is declared that no contract, receipt, rule, or regulation shall exempt any railway company engaged in transporting persons or property from the liability of a common carrier. By chap. 49 of the acts of the 27th General Assembly it is declared that no contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, shall constitute any bar or defense to any action based on the provisions of § 2071 of the Code.

In *O'Brien v. Chicago & N. W. R. Co.* (1902) 116 Fed. 502, it was held that these provisions must be construed as invalidating a contract by which an express messenger released a railway company from liability for injuries caused by its negligence, or that of its employees.

Missouri.—By Rev. Stat. 1899, § 2876, it is enacted that no contract made between "any railroad corporation" and any of its "agents or servants," based on the contingency of his injury or death, and limiting the liability of such railroad corporation for damages "under the provisions of this act" (abolishing the fellow-servant rule), shall be valid.

It has been held that this provision has no application to a contract made by a Pullman car porter with the company, whereby he releases it from liability for negligent injury, agrees to indemnify it for any liability incurred on such account to a railroad company carrying its cars under contract of indemnity for negligent injury to Pullman employees, agrees that the contract may be assigned to such carrying company for purposes of defense, and also releases the carrying company.

1920. Contracts by which a master stipulates for absolute exemption from his statutory liability.—*a. Doctrine that such contracts are valid.*—In England a contract by which a servant agrees, as a condition of his being retained in an employment, that he will not bring a suit for damages under the employers' liability act of 1880 (see chap. LXXIV., *ante*), and to accept as compensation for such injuries as he may receive the amount to which he is entitled as a beneficiary of a relief fund, kept up partly by the contributions of the employer, and partly by sums deducted from the wages of the workman himself and his coservants, is held to be valid, and to preclude recovery in an action brought either by himself, or by his personal representatives.¹ The consideration which supports such a contract is the money con-

Texas.—In *San Antonio & A. P. R. Co. v. Tracy* (1910) — Tex. Civ. App. —, 130 S. W. 639, it was held that a contract binding an employee of the Pullman Company to waive all damages inflicted by a railroad company is invalid under Sayles's Anno. Civ. Stat. 1897, art. 4560i, providing that a contract between an employer and employee, limiting the liability of the employer for injury to an employee, is invalid.

Wyoming.—In *Stone v. Union P. R. Co.* (1907) 32 Utah, 185, 89 Pac. 715, cases of the class adverted to in the preceding note were distinguished by the court in discussing the effect of the enactment mentioned in note 9, *supra*. But it would seem that that enactment is broad enough to enure also to the benefit of servants in the employ of express companies and sleeping car companies.

¹ *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357. There the facts were as follows: At the time of the passing of the employers' liability act there existed at all the defendant's collieries a benefit society or club called the "field box." A fund was raised by levying weekly contributions from the workmen, which contributions were deducted from their wages, and the defendant himself contributed to the "field box" a gross sum equal to the amount of the total contributions from the workmen. One of the benefits derived from the "field box" by the workmen was an allowance to the widow and family in case of a workman being killed in the course of his employment. The payments made out of the fund were voluntary payments at the discretion of the defend-

ant's agents who managed the "field box." On the 1st of January, 1880, the day upon which the employers' liability act came into force, the defendant caused to be circulated throughout his collieries a printed document headed, "Conditions of employment," which contained stipulations that the persons employed at the colliery must be, and continue to be, during such employment, ordinary members of the colliery club or Permanent Relief Society under its then present or any future name; that the employer should be, and continue to be, an honorary member of the society, and should subscribe thereto not less than theretofore; that, in consideration of such payment by the employer, and of being employed at the colliery, and as part of the terms of employment, every person so employed undertook for himself and his representatives, and any person entitled in case of his death, to look to the funds of the society alone, under the rules and constitution thereof, for compensation in case of injury sustained in such employment, whether resulting in death or not; and that neither the employer nor any other person in his employment, whether a fellow servant or not, should be liable in respect of any defect, negligence, act, or omission under the employers' liability act 1880, or otherwise, or in respect of any negligence occasioning such injury; that the contract should remain in force and operate as a contract between the workman and the owner for the time being of the colliery, so long as the workman continued to be employed at the colliery. Field, J., said: "There is no suggestion that the contract was induced by fraud,

tributed to the relief fund by the employer.² It not only limits the remedial rights of the servant himself, but also precludes his repre-

or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of contributions from the workmen. I am unable to concur in the view taken by the learned county court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy. . . . The last point raised for the plaintiff was one suggested by myself. But I think the court would be construing the employers' liability act too narrowly if the construction which I suggested as a possible one were placed upon § 1. At the time of the passing of the act, the law stood thus: It was an implied term of the contract between employer and workman that the latter should not recover damages if he was injured by the negligence of a person in the common employment. Then the effect of § 1 was to do away with that implied term. The workman is obliged to rely upon the contract of service; but for that contract he would have no right of action at all; he is only entitled to be upon the employer's premises by virtue of it. I think the court should take a broad view of the construction of the act, having regard to the intention of the legislature. I do not think the words of the act go far enough to compel the construction that the express contract by the workman against the operation of the act should not take effect. In all the cases referred to in argument, in which the legislature has intended to enact that a person shall not be allowed to contract himself out of an act of Parliament, very express

words have been used. As a general rule, entire freedom of contract has been preserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what would be the consequences if the construction contended for by the plaintiff's counsel prevailed, because, if injustice would result, it is unlikely the legislature intended that construction. I think great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full additional compensation when he was injured."

On the ground that a servant is presumed to have contracted with reference to any special stipulations contained in notices which the master has posted in several conspicuous places through his factory, it was held in a Scotch case that an injured servant could not maintain an action for damages, where such notices were to the effect that from the weekly wages of the workmen certain sums were to be deducted, in order to entitle them to the benefits of an insurance fund to which the master himself contributed, and that the workman, by accepting such benefits, would be held to have discharged all claims against the master. *Wright v. Howard* (1893) 21 Sc. Sess. Cas. 4th series, 25, 31 Scot. L. R. 27, 1 Scot. L. T. 259.

² See the quotation from the judgment of Field J., in *Griffiths v. Dudley*, *supra*.

The opinion has been expressed in a text-book that the employment of the servant would of itself be a good consideration for a contract to renounce the right to sue under the act of 1880, but that a mere continuing to employ him would not be. 1 *Hodges, Railways*, 7th ed. p. 637. Having regard to the lengths to which the English courts have gone in sustaining the freedom of contract in respect to exemption from future liability, this opinion may perhaps be correct. Up to the present time, however, these exonerating agreements have not been declared valid in any cases but those in which the employer had made substantial contributions to the relief fund.

sentatives from suing under the damage act in the event of his being fatally injured.³

³ In *Griffiths v. Dudley*, note 1, *supra*, the right of the decedent's widow to sue was denied in the authority of *Read v. Great Eastern R. Co.* (1868) L. R. 3 Q. B. 555, in which the doctrine was enunciated that the damage act "did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived."

Compare also *Haigh v. Royal Mail Steam Packet Co.* (1883) 52 L. J. Q. B. N. S. (C. A.) 640, 49 L. T. N. S. 802, 5 Asp. Mar. L. Cas. 189. 48 J. P. 230, where it was held that the executors of a passenger on a steamboat, who had been killed through a collision, could not receive damages, for the reason that the decedent's ticket contained a clause which was construed as exempting the owner of the steamboat from liability for an injury received under the circumstances in question.

It seems somewhat difficult to reconcile with the broad theory upon which the above cases proceed, the decision in *Farmer v. Grand Trunk R. Co.* (1891) 21 Ont. Rep. 299. There a railway employee who was killed in an accident had been a member of a benefit society, established under statutory authority, but constituting an organization distinct from the company by which the decedent was employed. His certificate did not profess to be an insurance against accidents. Nor, so far as the report shows, was any express stipulation made regarding the effect of the acceptance of the benefits, as in the contracts discussed in §§ 1923 *et seq. post*. The society paid over to his widow the sum of money to which she was entitled under its rules, and for this sum she gave a receipt which stated that the railway company was relieved from all liability, but to which the company itself was not a party. In an action for damages brought by her against the company, it was held that her acceptance of this money was not a bar to recovery, and that it should not be deducted from the amount to which she was entitled as damages. It was conceded that, if the arrangement had constituted simply an accident insurance, the deduction would have been proper

under the rule laid down in *Hicks v. Newport, A. & H. R. Co.* (1857) 4 Best & S. 403, note. The conclusion that the action was not barred by the giving of the receipt was referable to the consideration that the defendant was not a party to it, and that the relief society was technically a separate body. But it seems open to question whether the society should not have been viewed rather as being, for the purpose of paying out the stipulated benefits, the agent of the defendant. Even assuming that the receipt did not constitute an absolute bar to the action, it is submitted that the mere fact that the contract was not one of insurance did not justify the court in refusing to make any deduction in respect of the benefits accepted. The ruling of Lord Campbell in the English *nisi prius* case cited was merely to the effect that the jury might properly make a deduction on account of insurance money. It is not necessarily an authority for the converse proposition that a deduction is warrantable only in cases where such money is concerned.

In this point of view it would follow that some allowance, at all events, should have been made on account of the receipt of the insurance money. The proper method of computing the amount to be allowed in such a case is indicated by the following passage in the judgment of the Privy Council in *Grand Trunk R. Co. v. Jennings* (1888) L. R. 13 App. Cas. 800: "The pecuniary benefit which accrued to the respondent [wife of insured] from his premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration." This decision modified the doctrine previously enunciated in *Grand Trunk R. Co. v. Beckett* (1886) 16 Can. S. C. 713, affirming (1886) 13 Ont. App. Rep. 174. Such an allowance would have been in accord with the general principle which underlies the special rule regarding the deduction of insurance money, *viz.*, that "whatever comes into the possession of the family

In an earlier chapter (§§ 102, 103), the effect of the rule accepted in England, that the plea of infancy is not a complete defense to an action on a contract with regard to labor, has been discussed in relation to the validity of the contract of employment itself. The general principle there stated, that the contract is binding, according as it is or is not beneficial to the infant, furnishes the determinative test in dealing with the validity of contracts of the kind with which we are now concerned.⁴

b. Doctrine that such contracts are invalid.—In Alabama it has been held that a stipulation in a contract of service, to the effect that the agreed wages are to cover the risk of an injury caused to the servant by one of those accidents for which the master is declared by the employers' liability act of that state to be responsible (see chap. LXXIV., *ante*), is not a good defense to a suit for the recovery of damages for such an injury.⁵

who have suffered by the death of their relative, by reason of his death, must be taken into account." 1 Beven, Neg. 2d ed. p. 233.

⁴ In *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482, an infant entered the employment of a railway company. It was stipulated that he would become a member of an insurance society formed among the employees, and that he would be bound by its rules, and also that he would accept the contribution made by the company to the funds of the society, and the advantages under the rules of the society, in lieu of any claims against the company under the employers' liability act of 1880. The rules covered all accidents except those occasioned willfully or by gross negligence of the member, and were not restricted to accidents for which the employers are liable, but the relief granted was less than the sum which might be recovered under the act. The rules also provided for forfeiture of benefits in default of notice, and of claims for breaches of the regulations, or for criminal misconduct, and for reference of disputes to arbitrators. Held, that these stipulations were obligatory, and a bar to an action under the statute. The grounds upon which the contract was considered to be fair for the infant were thus stated: "First of all, no matter how the accident may happen to him, and whether he has a remedy in a court of law or not, he is to have payment made to him according to the scale set out in the

rules of the society. He avoids litigation, and having, if successful in litigation, to pay costs as between solicitor and client out of the damages he may recover. He avoids also the uncertainty of getting a verdict and the difficulty of establishing a cause of action."

In another case decided about the same time, a boy thirteen years of age, employed at a colliery, entered into an agreement with a railway company, by which, in consideration of the latter permitting the former to travel between his home and the colliery under a special arrangement between the proprietor of the colliery and the company, the former stipulated that neither he, his representatives nor relatives, should have any claim against the company for injury or loss to him or his property upon the railway, although occasioned by the negligence of the latter or its employees, and would indemnify the company against all loss or expense which might be incurred by any such injury or loss, or any claim or legal proceedings against it. This contract was held to be so much to his detriment as to be unfair to him as being an infant, and not binding upon him. *Flower v. London & N. W. R. Co.* [1894] 2 Q. B. (C. A.) 65, 63 L. J. Q. B. N. S. 547. 9 Reports, 494, 70 L. T. N. S. 829, 42 Week. Rep. 519.

⁵ *Hissong v. Richmond & D. R. Co.* (1890) 91 Ala. 514, 8 So. 776.

In another action brought under this statute for the death of a brakeman,

In Kansas it has been laid down that a railway company cannot contract in advance for a release from the liability imposed upon it by a statute abolishing in respect to railway companies the common-law rule as to the assumption of the risks of a fellow servant's negligence, and that the same rule holds, irrespective of whether there is or is not a clause in the statute peremptorily avoiding all contracts which violate its provisions.⁶

In Illinois a contract by which a servant waives the benefit of the provisions of a statute concerning the care which an employer must exercise with regard to the protection of his servants from personal injury has been declared to be against public policy.⁷ This doctrine is deemed to be controlling even in cases where the servant is given extra wages in consideration of his releasing the master from liability.⁸

evidence that there was a rule of the company the effect of which was to impose upon him a duty of looking after his own safety was held to be incompetent and irrelevant. *Louisville & N. R. Co. v. Orr* (1890) 91 Ala. 548, 8 So. 360.

These cases were followed in *Richmond D. R. Co. v. Jones* (1890) 92 Ala. 218, 9 So. 276, where a demurrer to a plea setting up a rule of the company to the effect that, if an employee was disabled by accident or any other cause, his right to claim compensation would not be recognized, was sustained.

⁶In *Kansas P. R. Co. v. Peavey* (1883) 29 Kan. 169, 44 Am. Rep. 630, the court said: "If the statute was enacted for the better protection of the life and limb of railroad employees, it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when we consider the unequal situation of the laborer and his employer. Take this illustration: In some states—and in our own—the owners of coal mines which are worked by means of shafts are required to make and construct escapement shafts in each mine for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a contract is for the benefit of employees engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance with employees for operation of the mine in contravention of the provisions of the statute. The state has such an interest in the

lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is, that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is universally true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void in regard to statutes intended generally to protect the public interests or to vindicate public morals." For more recent cases in which the same doctrine was affirmed, see *Atchison, T. & S. F. R. Co. v. Fronk* (1906) 74 Kan. 519, 87 Pac. 698, 11 Ann. Cas. 174; *Sewell v. Atchison, T. & S. F. R. Co.* (1908) 78 Kan. 1, 96 Pac. 1007; *Atchison, T. & S. F. R. Co. v. Derrick* (1908) 78 Kan. 884, 96 Pac. 1018.

⁷*Chicago, W. & V. Coal Co. v. Peterson* (1890) 39 Ill. App. 114. The statute referred to was Session Laws 1887, title, "Mines and Miners," p. 235, §§ 14 and 16.

⁸*Mt. Olive & S. Coal Co. v. Herbeck* (1900) 92 Ill. App. 441, affirmed in (1901) 190 Ill. 39, 60 N. E. 105.

In an Arkansas case, decided before the passage of the statute referred to

c. Special statutory provisions declaring such contracts to be invalid.—Several of the statutes by which the common-law obligations of masters to their servants have been modified contain clauses explicitly invalidating contracts by which the master's liability, as defined by those statutes, is limited or abrogated.⁹

in the following subsection, it was suggested that, although the common-law rule regarding the nonliability of a master for injuries caused by a fellow servant may have been abolished by the legislature, a stipulation relieving him of responsibility for their negligence, except in cases where he himself has been negligent in selecting them, or in failing to dismiss them after having received notice, actual or constructive, of their unfitness, may possibly be sustained as reasonable. *Little Rock & Ft. S. R. Co. v. Eubanks* (1886) 48 Ark. 460, 3 Am. St. Rep. 245, 3 S. W. 808. This refinement upon the general rule, however, has apparently not found acceptance with any court up to the present time. It is difficult to see upon what logical grounds it can be sustained. The essential effect of an enactment of the description mentioned is simply to render the principle *respondeat superior* controlling with respect to the whole of a certain region of facts, a portion of which has previously been treated as an appropriate domain for the operation of the doctrine of assumption of risks. In other words, he becomes chargeable thereafter for the negligence of all his servants, and not merely of those who, apart from statute, are considered to be his agents, either on the ground of their rank, or because they are intrusted with the performance of one or other of his nondelegable duties. There is no apparent reason why a contract which purports to relieve him of the liability imposed by an enactment which abrogates the distinction between these two classes of servants should be regarded as valid any more than a contract which purports to relieve him of the liability which the common law imposes upon him in respect of the negligence of servants belonging to the latter class.

⁹ *United States*.—(See §§ 1766, *ante*, 1924, note 10, *post*.)

Alabama.—(See § 1657, *ante*.)

Arkansas.—(See § 1750, *ante*.)

Colorado.—Mills's Anno. Stat. § 505.

Employers are forbidden to demand

from employees, as a condition of their employment or otherwise, a contract releasing the employers from liability for personal injuries caused by negligence.

Florida.—(See § 1772, *ante*.)

Georgia.—(See § 1774, *ante*.)

Indiana.—(See § 1660, *ante*.) For a case in which a contract was pronounced void under this provision, see *Pittsburgh, C. C. & St. L. R. Co. v. Ross* (1907) 169 Ind. 3, 80 N. E. 845.

Iowa.—(§ 1777, *ante*.)

In *Mumford v. Chicago, R. I. & P. R. Co.* (1905) 128 Iowa, 685, 104 N. W. 1135, this provision was held to be violated by a stipulation to the effect that, in consideration of employment, the servant agreed to give the railroad company notice of personal injuries sustained by him within thirty days after receiving them, and that his failure to give such notice in the manner and within the time specified should be a bar to an action therefor.

Massachusetts.—(See § 1658, *ante*.)

Minnesota.—(See § 1781, *ante*.)

Missouri.—(See § 1783, *ante*.)

Mississippi.—(See § 1753, *ante*.)

North Carolina.—(See § 1788, *ante*.)

This provision was held constitutional in *Coley v. North Carolina R. Co.* (1901) 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195.

See *Lassiter v. Raleigh & G. R. Co.* (1904) 137 N. C. 150, 49 S. E. 93.

Ohio.—(See § 1791, *ante*.)

South Carolina.—(See § 1760, *ante*.)

Texas.—(See §§ 1794, 1796, *ante*.)

With regard to this statute it has been held that the fact that plaintiff's injury, for which suit was brought in the Federal court in Texas, occurred in Mexico, is immaterial as affecting the invalidity of such contract, when pleaded as a defense. *Mexican Nat. R. Co. v. Jackson* (1902) 55 C. C. A. 315, 118 Fed. 549.

Virginia.—(§ 1794, *ante*.)

Wisconsin.—(§§ 1797, 1801, *ante*.)

Wyoming.—(§ 1802, *ante*.)

By the Ontario employers' liability act, restrictive stipulations are valid in

1921. Contracts requiring servant to elect between acceptance of benefits out of a relief fund, and a prosecution of his claims in an action for damages. Generally.—The cases referred to in the two preceding sections show that courts in the United States are virtually unanimous in asserting the illegality of agreements by which servants consent to an absolute renunciation of their right to enforce the common-law or statutory liability of their masters. On the other hand, there is in that country a concurrence of opinion, not less general, with respect to the doctrine that agreements which in substance involve merely a conditional or provisional renunciation of that right are valid. Of this nature are the stipulations usually entered into by servants who become members of relief associations. Such stipulations are divisible into three classes:

(1) Those by which it is agreed that the servant's acceptance of the specified benefits incident to his membership shall be a bar to a subsequent action for damages.

certain cases. (§ 1662, *ante*; § 10 of act.)

By the Ontario railway act of 1906, contracts by which employees of a railway company in the province waive their right to damages for injuries caused by defects in the plant are declared to be void.

In Manitoba restrictive provisions similar to those in the Ontario employers' liability act are in force.

By § 12 of the Queensland employers' liability act of 1886, a contract disentitling a workman to the benefit of the act is void.

As to the constitutionality of statutes declaring void all contracts by which a servant waives the benefit of a statutory right of action, see the concluding chapter of this treatise.

In the Iowa Code, § 2071, it is provided that railway corporations shall be liable to every person, including employees, for the consequences of the neglect or mismanagement of the company's servants; and, further, that "no contract which restricts such liability shall be legal or binding." In § 2074 it is declared that no contract, receipt, rule, or regulation shall exempt any railway company engaged in transporting persons or property from the liability of a common carrier. In chapter 49 of the Acts of the 27th General Assembly it is declared that no contract of insurance, relief, benefit, or indemnity in case of

injury or death, entered into prior to the injury, shall constitute any bar or defense to any action based on the provisions of § 2071 of the Code. By a contract made in the state, between an express company and a messenger employed by it, the latter, in consideration of his employment, agreed to assume all risk of accidents and injuries resulting from the gross or other negligence of any corporation or person engaged in operating any railroad, or any employee thereof, whether resulting in death or otherwise, and authorized the company to contract with any railway company on his behalf that no claim should be made against it by him or his representatives on account of any such injury. By a second contract made in accordance with such authority, between the express company and a railroad company, the latter agreed to furnish cars for the use of the former over its lines, and the express company agreed to protect the railroad company against liability for injuries to express messengers or agents while being transported over its line in connection with their duties. The court held that these stipulations were plainly invalid, as being in contravention of the statutory prohibitions against contracts restricting the liability imposed by the statute. *O'Brien v. Chicago & N. W. R. Co.* (1902) 116 Fed. 502.

(2) Those by which his execution of a release of his employer from liability is made a condition precedent to the payment of benefits out of the relief fund.

(3) Those which attach to the institution of an action for damages certain disabling consequences in respect of the recovery of the stipulated benefits.

The rationale of the doctrine which asserts the validity of such stipulations is that the servant's potential right to sue for damages remains intact until the event which would entitle him to exercise it has actually occurred, and that it is then still open to him to elect whether he will bring an action, or accept the benefits in discharge of the employer's liability to him.¹ The question whether the benefits received constitute an adequate consideration for the release of the employer is one which a court cannot inquire into. The servant is "at full liberty to compromise the damages with the appellant for any valuable consideration, however small, and, if he chose to accept a less amount than that to which he might have been entitled in an action therefor in the proper court, such settlement is nevertheless a full accord and satisfaction from which the courts cannot relieve him."²

Where it is provided (as is usually the case), by the rules of a relief association, that the benefits are to be paid only to members who are injured "in the discharge of their duties," a claimant cannot succeed unless he shows that the circumstances of the accident were such as to bring it within this description.³

Under a familiar rule of the law of contracts, when an agreement of this description is executed by a servant who is able to read, he is

¹ See cases cited in § 1925, note 1, *post*.

In *Barden v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 318, — L.R.A. (N.S.) —, 67 S. E. 971, the validity of the ordinary contracts required from members of railway relief departments was denied (two judges dissenting).

² *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 424.

Compare the following passage of the judgment in *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314: "If Bell had not been a member of the relief department, and after he had received the injury sued for herein and accepted from the railroad company the amount of money which he received from the relief department, or other sum

of money, by virtue of his promises that the payment and acceptance of such money should be in settlement and discharge of his claims against the railroad company for damages for his injury, can it be doubted that the payment to and acceptance by Bell of such money, in the absence of fraud or mistake, would bar this action?"

³ In *Kinney v. Baltimore & O. Employees' Relief Asso.* (1891) 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8, the accident was held to be within such a clause, where he was killed by a train in crossing the track on his way home, a few minutes after quitting his work. Contrast the English case cited in § 1919, note 7, *ante*.

presumed to understand the terms of the agreement and its effect, and it will not be set aside on the ground that he did not comprehend its legal significance.⁴

Nearly all the cases in which the courts have dealt with contracts of the type now under discussion relate to railway relief associations. But it has never been intimated, and there is no apparent reason for supposing, that (except where the question of corporate power is involved) the rights and liabilities arising from the organization and operation of such bodies are different from those which are predicable with reference to other bodies of the same description, whether constituted by a company or not. The doctrines stated in this and the ensuing sections will therefore be enunciated in general language, unless the subject-matter is such as to show that they are applicable only to the relief departments of railway companies.

1922. Objects, organization, and legal status of relief associations.—

Relief associations differ to some extent in respect to the details of their organization and the conditions and privileges incident to membership. But they are all constituted upon a similar system, the more material features of which may be described succinctly as follows:

(1) Both the employer and his servants are contributories to the relief fund, the sums payable by the servants being deducted from their wages.

(2) The employer furnishes the requisite means for carrying on the business of the association, defrays all the expenses incidental to its operation, and acts as custodian or treasurer of the relief fund.

(3) The employer guarantees the fulfilment of the obligations assumed by the association with regard to the payment of the benefits, and undertakes to make good any deficits which result from the insufficiency of the regular contributions to satisfy the claims of the members.

(4) The members of the association who are injured in the course of their employment are entitled to the sums fixed by a schedule of

⁴ *Vickers v. Chicago, B. & Q. R. Co.* (1895) 71 Fed. 139; *Fivey v. Pennsylvania R. Co.* (1902) 67 N. J. L. 627, 91 Am. St. Rep. 445, 52 Atl. 472. In the latter case, where the plaintiff alleged that, when he began to read the application for membership in the relief association, the medical examiners told him to sign as a matter of form, but failed to state that an acceptance of benefits

operated as a release, a verdict was held to have been properly directed for the defendant, the evidence being that he could read and write, that the agreement was printed in plain type, and that two months before the accident he had been furnished with a book containing a copy of his application and of the regulations respecting the relief fund.

compensation, based upon the character of the injury, and the nature of the work in which they have been engaged.¹

Under some of the systems applicants for work are engaged only on condition of their becoming members of the relief associations, and of contributing a certain percentage of their wages to the relief funds.² Under other systems servants may decline membership, if they prefer to do so.³

A consideration of the advantages of these associations from an economical or sociological point of view would be out of place in the present work. But, having regard merely to the legal aspects of the policy which has led to their organization, it may be observed that they confer definite benefits both upon the master and the servant employed. On the one hand, the servant, by becoming a member of such an association, acquires the right of claiming an indemnity for an injury, irrespective of whether the former is or is not legally liable for that injury. On the other hand, the master avoids in many

¹ The above statement seems to be amply sufficient to enable a practitioner to comprehend the purport and rationale of the decisions cited in this and the following sections. Those who desire fuller information concerning the economy and rules of these associations are referred to the Appendix to Mr. McKinney's Treatise on Fellow Servants, where the details of the organizations of one large English railway company and of several American railway companies are stated *in extenso*.

The Fifth Annual Report of the American Commissioner of Labor also contains some useful information on the subject.

Summaries more or less comprehensive of the schemes of various relief associations are given in the following cases: *Petty v. Brunswick & W. R. Co.* (1900) 109 Ga. 666, 35 S. E. 82 (very full account of the relief scheme in force on the lines composing the Plant System of railways); *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 423; *Fuller v. Baltimore & O. Employees' Relief Asso.* (1887) 67 Md. 433, 10 Atl. 237; *Chicago, B. & Q. R. Co. v. Wymore* (1894) 40 Neb. 645, 58 N. W. 1120; *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854; *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A.

264, 40 U. S. App. 448, 76 Fed. 439; *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136.

The New South Wales accident relief act 1900 provides for allowances to persons injured by mining accidents and their relatives. The relief fund is made up of deductions from wages, contributions by employers, and grants by the government.

² In the United States this requirement was first introduced by the Baltimore & Ohio Employees' Relief Association, and has since been adopted by other railway companies.

In England the rule as to compulsory membership seems to be virtually, if not quite, universal. See cases cited in §§ 1919, 1920, *ante*.

In the Illinois truck act of May 28, 1891, which has been declared unconstitutional (see the concluding chapter of this treatise), it was expressly provided that the employer might deduct such sums as might be agreed between him and his employees for a hospital or relief fund.

³ Organizations in which membership was voluntary were under review in *Pittsburg, C. C. & St. L. R. Co. v. Cow* (1896) 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641; *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931; *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314.

instances the expenses of litigation to which he would have been subjected if his servants had not possessed this right.⁴

Relief departments are not insurance companies in such a sense as to bring them within the purview of statutes relating to such companies.⁵ Nor are they charitable institutions within the meaning of the doctrine which declares such institutions to be exempt from liability for the negligence of the physician engaged by it. (See the subsequent chapter in which that subject is treated).⁶ It has been laid down that an unincorporated relief department of a railway company is a mere agency of the company, and consequently that no liability under a contract with it can be adjudged except by means of an action against the natural person who made the contract, or against the company.⁷

In several cases it has been argued that the organization of relief associations by railway companies is *ultra vires*. But the courts have always rejected this contention, whether it was based upon general grounds having relation to the nature of the business carried on by such companies,⁸ or upon the more special consideration

⁴ These two advantages are adverted to in *Fuller v. Baltimore & O. Employees' Relief Asso.* (1887) 67 Md. 433, 10 Atl. 237. The first mentioned has been specifically referred to as constituting from one point of view the consideration of the contract by which the servant renounces conditionally his right of action (see § 1925, note 2, *post*), and also as constituting a reason why a servant is not entitled to have such a contract set aside on the ground of its being unconscionable (see § 1925, subd. a, *post*).

⁵ *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 40 So. 394, 6 Ann. Cas. 804; *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Com. v. Equitable Beneficial Asso.* (1890) 137 Pa. 412, 18 Atl. 1112 (society could not legally make insurance contracts); *Northwestern Masonic Aid Asso. v. Jones* (1893) 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253 (point involved in case was the disposition of the benefit fund after the member's death); *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854 (court rejected the contention that release was invalid

because it did not in form comply with certain requirements of the statute regarding insurance companies); *Vickers v. Chicago, B. & Q. R. Co.* (1895) 71 Fed. 139 (contract with relief department not void, as not being made in compliance with laws regulating insurance companies).

⁶ *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456.

⁷ *Nelson v. Atlantic Coast Line R. Co.* (1908) 147 N. C. 103, 60 S. E. 724.

⁸ In *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 247, 40 So. 394, 6 Ann. Cas. 804, the court made the following remark: "We have been pointed to nothing in the charters of either of the companies which would prevent them from establishing such a relief hospital. The primary object of a railroad company is to build, equip, and operate its line for the transportation of freight and passengers. In doing so, a vast number of employees are employed, all of whom, while in service on the line, are subject to dangers in multiplied forms, and to physical injuries, for which the companies are subjected to liabilities, and the injured often to irreparable loss. Any device or improvement which prevents, or is intended to prevent, these evils, is incident to the

that the functions of relief associations are essentially those of an insurer.⁹

It is clear that an article in the constitution of a relief association, requiring a reference to arbitration of any differences which may arise between a member and the committee of management, will not preclude the member from suing for damages.¹⁰

1923. Stipulations by which it is agreed that the acceptance of the benefits shall be a bar to a subsequent action for damages. Validity apart from statute.—The certificate of membership in a relief asso-

due exercise of their powers, and clearly within the scope of their organization."

That the management of such bodies is within the implied powers of railway companies was laid down in *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908. The court said: "On the part of the employer such a scheme may be deemed likely to increase the efficiency of the force it employs, and on the part of the employee it may tend to relieve from anxiety as to support, if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment, therefore, it is not *ultra vires*."

In *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315, the court thus discussed the question whether the chartered rights of the defendant were sufficiently broad to permit it legally to aid in carrying on the relief department: "The argument of the appellant on that point is little more than an assertion that the defendant has not the power to aid the association. Under these circumstances, we do not feel justified in announcing any rule which shall be regarded as defining generally the powers of railroad companies in such cases, but content ourselves with saying only so much as seems to be necessary to a decision of this case. The relief department was organized solely for the benefit of the defendant and its employees. No persons excepting those in the service of the defendant can become members of the association. . . . The practical operation of the department is to furnish certain relief to its members in cases of accident or sickness, and, in case of their death, to provide something for their relatives or other beneficiaries designated, and also to make definite and certain, in cases where the benefits of the department are ac-

cepted, the liability of the defendant for injuries which have been sustained in consequence of negligence on its part. To this extent, at least, the department is beneficial to its members and to the defendant. Since the defendant is thus benefited, we cannot say that it lacks the implied power to aid the department in the mode adopted in this case."

In *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314, it was merely laid down that, in the absence of an express allegation, sustained by specific evidence, a court would not presume that a railway company transcended its powers in managing a relief association.

In *Eckman v. Chicago, B. & Q. R. Co.* (1897) 169 Ill. 312, 38 L.R.A. 750, 48 N. E. 496, affirming (1896) 64 Ill. App. 444, the court declined to express a definite opinion upon the general question of the power of railway companies in this regard, and based its decision upon the doctrine that the defense of *ultra vires* cannot be raised with respect to a contract that has been fully executed.

⁹ *Atlantic Coast Line R. Co. v. Beazley* (1907) 54 Fla. 311, 45 So. 761; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908 (court rejected the contention that the contract with the relief department was invalid because, under the state laws, no contract to indemnify a person against loss by casualty to life or property could be made by any corporation except one organized for that purpose); *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315.

¹⁰ *Kinney v. Baltimore & O. Employees' Relief Asso.* (1891) 35 W. Va. 385, 15 L.R.A. 142, 14 S. E. 8. As to agreements to refer to arbitration, see generally *Pollock, Contr.* p. 291; 2 *Parsons, Contr.* ** 707 *et seq.*

ciation ordinarily provides that the right to sue for damages shall be forfeited if either the member himself, or, in the event of his death, his designated beneficiary, shall accept the benefits specified. The effect of the cases which have turned on the validity of provisions of this type is stated in the following subsections. Many of the doctrines noticed are manifestly of general application, and are therefore predicable also with respect to the other provisions noticed in §§ 1927 *et seq. post*.

a. *Consideration sufficient*.—Stipulations of the tenor specified in the preceding section are supported by a good consideration.

In one point of view the consideration consists in the reciprocal promises of the employers and employed. A contract which involves this concurrent assumption of obligations is manifestly not wanting in mutuality.¹

In a second point of view, which has regard to the position of the servant alone, the consideration consists in the advantage which he derives from acquiring the right to compensation out of an insurance fund partially maintained by the master, irrespective of whether the injury was or was not received under circumstances which would enable him to maintain an action for damages.²

¹ In *Pittsburg, C. C. & St. L. R. Co. v. Cox* (1896) 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641, the court said: "Moved thereto by the stipulations of the employee members, the company assumes the obligation to take charge in part of the administration of the association, to pay all its operating expenses, to take care of its funds, pay interest thereon, and be responsible for their safe-keeping, and to make appropriations to supply any deficiencies. The promises are concurrent and obligatory upon both; both promise and both pay in consideration of promises and payment by the other, and the fact that third persons are interested does not impair the force of the obligation. If these stipulations do not supply consideration it would be difficult to frame such as would; and there being express assent to the terms of the contract by both parties, the element of mutuality is not wanting." This case was followed in *Petty v. Brunswick & W. R. Co.* (1900) 109 Ga. 666, 35 S. E. 82.

In *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314, the court observed: "The railroad company's guaranty of the obligations of

the relief department, and its assumption of the expenses of conducting the relief department, constitute a consideration moving from it sufficient to support the promises of Bell and every other member of the relief department." This case was followed without comment in *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42.

The mutuality of these contracts was also affirmed in *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136.

² In *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314, the court observed: "By reason of Bell's membership in the relief department, if he was disabled by sickness he became entitled to certain sums of money out of the relief fund; if he was injured, and thus disabled, he became entitled to certain sums of money out of the relief fund; and if he died from any cause, while in the service of the company, and a member of the relief department, it became liable to a beneficiary designated by him for a specific sum of money. Here, then, was a consideration moving

In a third point of view, which has regard to the position of the master under the arrangements usually incidental to these organizations, the consideration consists in the regular contributions which he makes to the relief fund, the expense which he incurs in conducting the business of the association, and the financial liability which he assumes by engaging to fulfil the obligations of the association, if the ordinary contributions prove to be insufficient to satisfy the demands upon the fund.³ But clearly, the responsibility incurred by an undertaking to supply any money that may be required for the purpose of supplying deficiencies in the relief fund is of itself, a good consideration.⁴ Where the master has entered into such an engagement, the circumstance that the relief fund is made up partly from

to Bell for the contract and promises he made, and the contributions made by him to the relief department."

See also cases cited in the notes to subsec. d, post.

³ In *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439, affirming (1894) 65 Fed. 305, a plea based upon a stipulation of the kind now under discussion was held demurrable, for the reason that it failed to show with the requisite certainty the following facts: (1) that the defendant had become legally bound to the members of the relief association to maintain that organization and to supply such funds as might at any time be needed by it to meet its obligations; (2) what sum of money, if any, the defendant had previously contributed out of its own funds to the support of the relief association; (3) what other beneficial acts the company had performed towards the maintenance of that association. With regard to the first of these defects the court was of opinion that the assumption of a legal obligation was not sufficiently averred by a statement that the plaintiff had, in consideration of certain amounts which had been and were to be paid by the company for the maintenance of the relief department, agreed that the acceptance of benefits from the relief department should operate as a release of all claims for damages against the defendant company. With regard to the second defect, it was considered to be consistent with the averments of the plea, that the moneys theretofore expended by the relief association in the care of its injured and disabled members had not been paid out of the funds

of the defendant company, but had been paid from sums deducted from the wages of those who were members of the association.

This case was followed in *Atlantic Coast Line R. Co. v. Beazley* (1907) 54 Fla. 311, 45 So. 761, where a plea averring performance of a contract to give medical relief was held bad. The court said: "In a case of this character, where the contract invoked as a defense lies close to the line dividing agreements that are lawful from those which are unlawful, it is proper to require the defendant to set out the arrangement which existed between itself and its employees, in the form of a relief department, with such fullness and certainty that the court may be able to say from an examination of the same that the arrangement is fair and reasonable, and that it is neither objectionable on grounds of public policy nor voidable for want of a valuable consideration. We are constrained to say that this has not been done in the present case, and we are confirmed in that view by a recent decision of the supreme court of Colorado, involving the sufficiency of the plea of the same character. *Chicago, B. & Q. R. Co. v. McGraw* (1896) 22 Colo. 363, 45 Pac. 383."

In the form of contract used by the Philadelphia & R. R. Co. the employee's stipulation is expressed to be simply "in consideration of the contribution made by the company." See *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854.

⁴ Under the scheme of the relief department of the Pennsylvania R. Co. no provision is made for regular contribu-

the contributions of the servants themselves is clearly an immaterial factor, so far as the legal quality of the consideration is concerned.⁵

b. Public policy not contravened.—Such stipulations are not contrary to public policy.⁶ The conception to which this doctrine is usually referred is that they are not contracts which purport to exempt the employer absolutely from liability for future negligence, but contracts under which “the employee retains until after he sustains an injury, the right to elect whether he will sue his employer for negligence or accept benefits from the association.”⁷ “There is no phase of public policy that prohibits any person agreeing that such full

tions by the company, which merely engages to make appropriations when necessary. See *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Ringle v. Pennsylvania R. Co.* (1894) 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492.

Compare also the cases cited in note 1, *supra*.

⁵ So laid down in *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 423.

⁶ *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439; *Atlantic Coast Line R. Co. v. Dunning* (1908) 94 C. C. A. 128, 166 Fed. 850; *Day v. Atlantic Coast Line R. Co.* (1910) 102 C. C. A. 654, 179 Fed. 26; *Owens v. Baltimore & O. R. Co.* (1888) 1 L.R.A. 75, 35 Fed. 715; *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136; *Hamilton v. St. Louis, K. & N. W. R. Co.* (1902) 118 Fed. 92; *Brown v. Baltimore & O. R. Co.* (1895) 6 App. D. C. 237; *Atlantic Coast Line R. Co. v. Beazley* (1907) 54 Fla. 311, 45 So. 761; *Eckman v. Chicago, B. & Q. R. Co.* (1897) 169 Ill. 312, 38 L.R.A. 750, 48 N. E. 496, affirming (1896) 64 Ill. App. 444; *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Oyster v. Burlington Relief Dept.* (1902) 65 Neb. 789, 59 L.R.A. 291, 91 N. W. 699; *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Ringle v. Pennsylvania R. Co.* (1894) 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; *Johnson v. Charleston & S. R. Co.* (1898) 55 S. C. 152, 44 L.R.A. 645, 32 S. E. 2, 33 S. E. 174.

⁷ *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439; *Day v. Atlantic Coast*

Line R. Co. (1910) 102 C. C. A. 654, 179 Fed. 26; *Traits v. Pennsylvania R. Co.* (1910) 77 N. J. Eq. 103, 75 Atl. 1011, and the cases cited *passim* in this and the following sections.

In *Atlantic Coast Line R. Co. v. Dunning* (1908) 94 C. C. A. 128, 166 Fed. 850, the court remarked: “By a great number of carefully considered adjudications of the courts, both state and Federal, contracts of this character have been upheld and determined not to be against a sound public policy, but distinctly beneficial to the employee, as well as wise on the part of the employer.”

In *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 423, the court said: “Notwithstanding the contract made with the employer in advance of the injury, the fact remains true that the appellant was in no sense compelled to receive the compensation growing out of the relief fund, and that, when he did so, he practically made a new contract with the company, by which he agreed to accept the amount offered him in full satisfaction of the damages. Having placed himself in this predicament, he is in no position to require the courts to extricate him therefrom. The rule that an employer cannot exempt himself from liability arising from injury to his employee on account of the employer's negligence, by a contract entered into between the two at a time prior to the injury, is therefore not applicable. . . . There could certainly be no just ground upon which the general contract of membership and its resulting benefits could be held void as against public policy. The only basis upon which such a claim could stand for a moment is that that portion of the contract by virtue of which the acceptance of benefits operates as a release of

compensation, or whatever he may accept as a compensation, shall be in lieu of any claim he might otherwise have against the relief fund.”⁸ “It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. . . . The substantial feature of the contract, which distinguishes it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation.”⁹

the company is an attempt to contract against liability for negligence in advance of any injury. The impediment in the way of such a conclusion, however, is, that the contract out of which the release arises is really not concluded until after the injury, and that the same is based upon a consideration paid and voluntarily accepted, also subsequently to the injury; and these several acts constitute the contract a compromise between the parties, which is not obnoxious to, but favored by, considerations of public policy.”

“The contract is not a contract relieving the defendant from the consequences of its own negligence, and, notwithstanding this contract, the party is entitled, under the death act, to sue and recover in case of death, or the party indemnified himself, if living, can maintain an action for damages as though this contract were not in existence; but the effect of the contract is to give to the party injured, if living, or to those entitled to take an indemnity under the contract in case of his death, an election, and either may, if he so elect, bring an action for the damages, ignoring the contract, or he may, if he can, comply with the conditions upon which the indemnity is payable, accept the indemnity, and, upon doing so, discharges wholly the right of action based upon the tort. Construed in this light, these contracts have been sustained as in no way infringing any rule of public policy. *Frank v. Newport Min. Co.* (1907) 148 Mich. 637, 11 L.R.A.(N.S.) 182, 112 N. W. 504.

The fact of the employee's having entered into a stipulation that, if he shall be injured, and receive money from the relief fund on account thereof, the acceptance of such money will operate as a release of his claim against the company for damages, does not estop him to maintain an action for injuries, if he does not accept any money thereunder. *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42.

⁸ *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971. In this case the court observed that its conclusion was sustained in *Griffiths v. Dudley* (1882) L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 543, 47 L. T. N. S. 10, 30 Week. Rep. 797, 46 J. P. 711. But it will be seen, by referring to § 1920, note 1, *ante*, that this decision related to a wholly different kind of contract, which, as it disabled the servant altogether from bringing an action, and did not merely put him to his election between alternative sources of compensation, would certainly have been declared void by most of the American courts, including, probably, the court which here relied upon the English authority. See § 1909, *b, ante*.

⁹ *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854.

In *Chicago, B. & Q. R. Co. v. Bell* (1895) 44 Neb. 44, 62 N. W. 314, the court said: “The argument at the bar is, that the effect of Bell's release is to enable the railroad company by contract to exonerate itself from liability for the negligence of itself and servants.

In one case the argument that stipulations of this description are contrary to public policy was based upon the special ground that they tend to make railway companies less careful in the operation of their lines. But this contention did not prevail.¹⁰

This is not a fair construction of the contract. . . . If the rules and regulations of the relief department or the terms of Bell's contract were such that his membership in the relief department and its possession of funds of which Bell had a right to avail himself of themselves released or attempted to release the railroad company from liability to Bell for injuring him, then we agree with counsel that such rules and regulations and contracts would be void, as against public policy. Again, if the rules and regulations of the relief department compelled him, in case of his injury by the railroad company, to accept the benefits and funds of the relief department in release and discharge of the railroad company's liability to him for such injury, then such rules and regulations and contract would be void, as against public policy. But nothing in the rules and regulations of the relief department, and nothing in Bell's contract or release, obligates or compels him, in case he is injured by the railroad company, to accept the funds of the relief department in release and discharge of any claim he may have against the railroad company for injuring him, nor makes the funds themselves—though Bell is entitled to them, and refuses to accept them—a release of the railroad company's liability."

In *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136, the court argued thus: "Before the contract was entered into [the servant's] right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages. He knew if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury

happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him to do so. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury." Compare also the language used in *Hamilton v. St. Louis, K. & N. W. R. Co.* (1902) 118 Fed. 92.

¹⁰ In *Pittsburg, C. & St. L. R. Co. v. Cox* (1896) 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641, the court reasoned thus: "Is the contract itself against public policy? To be so, it must, in some manner, contravene public right or the public welfare. It must be shown to have a mischievous tendency, as regards the public. And this should clearly appear. The ground urged is that it tends to make the company less careful in the operation of its road; in other words, it encourages negligence. And if it be of that character, then it would contravene public policy and be void, in that it would have a tendency to induce the employment of men less prudent and careful, which would tend to endanger the property and the lives of travelers, as well as of its employees. But this claim arises, we think, from a misconception of the contract; in assuming that, by the contract, the employee releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case; that there is no waiver of any cause of action which the employee may become entitled to, and that it is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. When that occurs he is not stipulating for the future; he is but settling for the past. He accepts compensation for injury already received. . . . Then he elects between the relief fund and the treasury of the company; between a re-

c. Jurisdiction of courts not ousted.—Such stipulations are not invalid, as being contracts binding the servant not to resort to a judicial tribunal. They simply define his rights as a member of the relief association, and specify the terms upon which he shall receive the benefits attached to membership. Accordingly the legal category to which they belong is that of matters of defense, arising from the agreement of the parties. They do not go to the jurisdiction of the court, any more than other agreements, on which no recovery can be had, if their conditions are not fulfilled.¹¹

d. Interests of servants subserved.—Such stipulations are not unconscionable. On the contrary, they are really conducive to the well-being of the servant, since they confer the optional right of sharing in the benefits of an insurance fund, payable even under circumstances which would negative the right to maintain an action for damages, as where an accident has occurred without any negligence

lief sure, immediate, and continuous, and one depending upon the hazards of litigation and certain to be delayed. If he is injured and the company is not liable (a condition which follows in much the larger proportion of the accidents to employees on railroads), he may accept the benefits; if the company is liable, he may decline benefits and sue. How can this injuriously affect the public? Is it not, on the other hand, a wise and humane provision for many of a class whom, without it, when sick or injured, would be compelled to look to public charity for aid? And does it not hold out an incentive to faithful, efficient service by encouraging expectation of benefits when the member becomes superannuated, and encourage economy and thrift by laying up something against a time of need? We fail to see how the contract, taken as a whole, encourages the employment of careless men. Those who apply for membership in this relief fund must not be over forty-five years of age, and they must pass a satisfactory medical examination. Thus, feeble men, and those made infirm by old age, are likely to be excluded, and a class of active, healthy men selected for the control of those operations of the road that require skill and care, all of which manifestly have a tendency to secure, in the interest of the public, competent service and watchful vigilance. It cannot be said that the beneficial feature of the contract tends

to make the employee less careful, and, therefore, is inimical to the public, for to do so would be to condemn the whole theory of insurance, and especially that relating to fire and accident. Nor is the contract a compulsory one. It is entered into voluntarily. If the employee conceives it to be for his interest to enter the relief class, he applies for the privilege; if not, he, with like exercise of his own judgment, stays out. . . . If the laborer, having in mind the future, and desiring to provide against a condition of sickness or accident, joins a beneficial association having insurance features, and devotes a portion of his monthly earnings to that purpose; and if, on the other hand, the corporation, actuated by a desire to advance its material prosperity by attaching its employees the more firmly to its interests, and by the humane purpose of contributing from its earnings to their personal welfare, or acting from any other motive, good or bad, becomes a party to such contract, and renders, in effort and money, valuable assistance in effecting its beneficial purposes, why should the law assume, unreasonably and arbitrarily, to deny the exercise of these rights? We think it should not, and we fail to perceive how the contract in question contravenes any interest of the public."

¹¹ *Donald v. Chicago, B & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971.

on the part of the employer,¹² or through the negligence of coservants,¹³ or by the fault of the injured employee himself.¹⁴ As the accidents which belong to one or other of these categories probably constitute the majority of those occurring on railways, the relief association is "of the highest order of beneficial societies."¹⁵ The mere fact that in some cases these contracts prove unsatisfactory to the employee insured does not of itself show that they are unconscionable or unfair.¹⁶

e. Coercion not predicable.—The fact that the assumption of membership in the relief association is a condition of employment is not a sufficient ground for holding such stipulations to be invalid, as being procured by constraint.¹⁷ This conclusion necessarily follows from the circumstance that the entry into the employment is itself a voluntary act on the part of the employee. "The employees have the right to decline the service of the company under such conditions; but, if they accept it knowing the conditions, they are bound by them."¹⁸ To enable the employee to escape from his obligations on the ground of duress or coercion, he must allege and establish facts tending directly to show that his assumption of those obligations was actually involuntary.¹⁹

f. Undue influence and fraud.—A servant who seeks to avoid such a stipulation on the ground of fraud or undue influence cannot succeed merely upon a general allegation that he was at a disadvantage

¹² *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439.

¹³ *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 934.

¹⁴ *Ibid.*

¹⁵ *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854.

¹⁶ *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931.

See also *Twaits v. Pennsylvania R. Co.* (1910) 77 N. J. Eq. 103, 75 Atl. 1010.

¹⁷ *Johnson v. Charleston & S. R. Co.* (1899) 55 S. C. 152, 44 L.R.A. 645, 32 S. E. 2, 33 S. E. 174, and cases cited in the next note.

¹⁸ *Fuller v. Baltimore & O. Employees' Relief Asso.* (1887) 67 Md. 433, 10 Atl. 237. The same consideration was adverted to in another Maryland case, where it was held that the fact that membership in the relief department of a railroad company was a condition of employment was not a sufficient reason

for relieving the plaintiff from an express stipulation in his application for membership, that each statement should constitute a warranty the truth whereof should be a condition of payment of the benefits. *Smith v. Baltimore & O. R. Co.* (1895) 81 Md. 412, 32 Atl. 181.

¹⁹ *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931.

Averments that the employee became a member of a relief department through duress and coercion on the part of defendant; and that the coercive measures adopted were not by open words, but by threats, menaces, and insinuations which could not be set out in the pleadings, were held to be too indefinite and uncertain to show that the contract of the plaintiff and the relief association, by which he agreed that the acceptance of benefits should release the company from liability for injuries, is void. *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315.

in dealing with the company.²⁰ Nor will a servant who, upon receiving the full amount of the benefits to which his membership in the relief association entitles him, voluntarily executes a release of the employer, be permitted to avoid the operation of those rules, on the ground that he was induced to become a member on the faith of agreements with and contributions to the association by the railway company which have not been carried out.²¹

g. Mistake as to strength of claim for damages.—Where the servant has accepted some benefits under the mistaken supposition that his injuries are only temporary, and has made no effort to return the money after the mistake was ascertained, he cannot maintain an action for damages.²² As to the effect of this element in relation to releases given after the injury was received, and without reference to any antecedent contract, see §§ 1935, 1936, *post*.

1924. Same subject. Validity of stipulations considered with reference to statutes.—Stipulations of the type now under discussion are not within the purview of a statutory provision by which agreements “limiting” the liability of railways to their employees are pronounced void. They do not “limit” the liability of the companies. On the contrary, they enlarge that liability in this respect, that they enable the employee to draw upon an insurance fund, to the benefits of which he is entitled irrespective of whether he could or could not recover damages for the injury in question, while at the same time his right to institute an action for damages, if he elects to do so, is fully preserved.¹ It has also been held that they are not covered by a provision which declares that “all contracts made by railroads . . . with their employees . . . releasing or relieving it from liability to any employee having a right of action under the provisions of this act are null and void.” The only purpose of such a clause is to prohibit the making of contracts relieving a railway company from liability for its own future negligence and that of its agents; while the agreements with which we are now concerned are merely agreements “for a choice between sources of compensation, where but a single one existed, and it is the final choice that gives validity to the trans-

²⁰ *Vickers v. Chicago, B. & Q. R. Co.* (1895) 71 Fed. 139.

²¹ *Spitze v. Baltimore & O. R. Co.* (1892) 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307.

²² *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315.

¹ *Hamilton v. St. Louis, K. & N. W. R. Co.* (1902) 118 Fed. 92 (relating to Mo. Rev. Stat. 1899, § 2876); *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971 (relating to Iowa Code, § 1307).

action.”² For a similar reason they have been held not to be within the prohibition of a statute against any contract to surrender or waive any right to damages against a railroad company for personal injury or death, or, in case that right is asserted, to surrender or waive any other right.³ Nor are they in violation of a provision to the effect that “contracts between master and servant, made in consideration of employment, whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be void, as against public policy.”⁴ It has also been held that they do not contravene a constitutional provision which abolishes the fellow-servant doctrine with regard to railroads, and declares that every contract or agreement, express or implied, made by an employee to waive the benefits of the provision, shall be invalid.⁵

Having regard to the above decisions and their rationale it may

² *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1899) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290, overruling *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery* (1898) 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582, where the invalidating provision of the statute had been held applicable, although the release from liability was only conditional. The doctrine of the *Moore Case* was once more affirmed in *Pittsburgh, C. C. & St. L. R. Co. v. Hosea* (1898) 152 Ind. 412, 53 N. E. 419.

³ *Pittsburg, C. C. & St. L. R. Co. v. Cox* (1896) 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641, relating to Ohio act, April 2, 1890.

Substantially to the same effect is the decision in *Johnson v. Charleston & S. R. Co.* (1899) 55 S. C. 152, 44 L.R.A. 645, 32 S. E. 2, 33 S. E. 174 (relating to S. C. Const. 1895, art. 9, § 15, in which it is provided that any waiver of the benefit of the section shall be void).

⁴ *Petty v. Brunswick & W. R. Co.* (1900) 109 Ga. 666, 35 S. E. 82.

⁵ *Day v. Atlantic Coast Line R. Co.* (1910) 102 C. C. A. 654, 179 Fed. 26 (Va. Const. § 162; Code 1904, p. CCLIX). The court said: “There is nothing in the rules or regulations of the relief department which could be averred or pleaded in bar of an action brought by him for such injury; nor did he, by becoming a member thereof, make any ‘contract, express or implied,’ by which

he waived any of the ‘benefits’ conferred upon or secured to him by the Constitution. Giving the language of the section the most liberal construction possible, nothing more is secured to the employee, injured by the negligence of a fellow servant, than the right to recover from the common master damages for such injury, in the same manner and to the same extent as if the same acts or omissions were those of the master himself in the performance of a nonassignable duty. We are unable to perceive how, by any possible interpretation, the scheme known as the relief department, or becoming a member thereof, can be said to waive the right of action secured to the employee by the Constitution. As uniformly held by other courts, in which the same contention has been made, the employee does not waive or agree to waive, any rights to which he is entitled by becoming a member of the relief department. He simply agrees that, after the injury is sustained and his cause of action accrues, he will elect whether to sue for damages or accept the benefits secured by the relief department,—that he will not do both. . . . At the moment plaintiff sustained the injury for which this action is brought, the right of action, or ‘benefit,’ secured to him by the Constitution (§ 162) of Virginia, was complete; his membership in the relief department did not affect it in the slightest degree.”

perhaps be presumed that such stipulations would not be treated as invalid under provisions which forbid employers to require, as a condition of employment, the surrender of any right of citizenship.⁶ But it seems clear that, in the form in which they are ordinarily framed, they would be deemed to contravene those descriptions of enactments which are intended to prevent employers from compelling employees to contribute to relief associations. The general effect of some of these enactments is stated below. The legislation in Ohio has, as will be observed, been declared unconstitutional.⁷

In one state the legislature has contented itself with providing that no portion of the wages of railway employees shall be retained, without their written consent, for any of the purposes specified.⁸ The essential feature of some enactments is a declaration that a contract with a relief association shall not constitute a bar to an action for damages. In some of the enactments the declaration is expressed in

⁶ Minnesota act of March 3, 1893 (chap. 25).

⁷ *Maryland*.—By Pub. Gen. Laws 1904, p. 662, § 295 (Stat. 1890, chap. 443, §§ 1, 2), it is declared unlawful, for any railroad company to withhold any part of the wages of its employees for the benefit of any relief association or the members thereof.

Michigan.—Laws 1893, chap. 192, Comp. Laws 1897, § 11,400. It is declared to be unlawful for any employer to require any person seeking employment, as a condition of such employment, to enter into any contract whereby the applicant shall agree to contribute to any fund for charitable, social, or beneficial purposes.

New Jersey.—Act of April 12, 1891 (chap. 212). Corporations are forbidden to keep back wages on pretense of relief or assistance to employees.

Ohio.—Laws 1890, chap. 125, § 1. Bates's Anno. Stat. Everett's ed. § 3365-20. It shall be unlawful for any railroad corporation to compel or require, directly or indirectly, an employee to join any company or association whatsoever, or to withhold any part of an employee's wages or salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require, either as a condition precedent to securing employment or being employed; and said railroad company shall not discharge any employee because he refuses or neglects to become

a member of any society or organization. And no railroad company, insurance society, or association, or other person, shall demand, accept, require, or enter into, any contract, agreement, or stipulation with any person about to enter or in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever, and all such stipulations or agreements shall be void. Every person, etc., violating the provisions of the section, is declared liable to a penalty.

It has been held that this particular provision does not affect the validity of a contract by which the company is released from all claims in respect of an injury previously sustained. *Bowers v. Detroit Southern R. Co.* (1904) 26 Ohio C. C. 518. But the whole of this section of the act has been declared unconstitutional. *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931; *Cox v. Pittsburgh, C. C. & St. L. R. Co.* (1895) 1 Ohio N. P. 213, 2 Ohio S. & C. P. Dec. 594.

⁸ *Indiana*.—Laws 1885, p. 123; Burns's Anno. Stat. 1894, § 2300; Burns's Anno. Stat. 1908, § 2681, applicable to the maintenance of hospital, reading room, gymnasium, or restaurant.

unqualified terms.⁹ By others the employer is authorized to set off in an action for damages the amount contributed by him to the money paid out of the relief fund to the injured employee or his representatives.¹⁰ But presumably the measure of recovery is the same, wheth-

⁹ *Iowa*.—By Acts of 27th Gen. Assem. (1898) p. 33, chap. 49, § 1307 of the Code, which declared that no contract restricting the liability which it imposed upon railway companies should be binding (see § 1777, *ante*), was amended by the addition of the following words: "That no contract of insurance, relief, or indemnity, entered into before the injury was received, should be a defense to an action brought under the section. Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or corporation acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity, by the person injured, his widow, heirs, or legal representatives, after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of the statute; but nothing herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received." This amendment was pronounced constitutional in *Chicago, B. & Q. R. Co. v. McGuire* (1910) 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259.

South Carolina.—Laws 1903, No. 48; Laws 1905, No. 488. It is provided that the acceptance of the amount to which a railway employee or his heirs may be entitled under the rules of a relief department shall not operate to estop, or in any way bar, the right of the employee, or his representatives, from recovering damages for injury or death, caused by the negligence of the corporation, firm, or person operating the railway. Agreements to the contrary are declared to be ineffective for that purpose.

In *Sturgiss v. Atlantic Coast Line R. Co.* (1908) 80 S. C. 167, 60 S. E. 939, 61 S. E. 261, this provision was considered with relation to a contract by which the employee had stipulated that, if he or his representatives brought an action for damages, then all obligations

due to him by the railway relief department should be forfeited. The court being evenly divided with regard to its true import, the question of its constitutionality was not definitely settled. The judges were all of opinion, however, that it would be invalid as unreasonably abridging the right of contract, if it were to be construed as permitting an employee to receive full compensation for an injury, and afterwards to enforce also his claims against his employer under the contract. The effect of the division of the supreme court was to work an affirmation of the judgment of Purdy, J., in the court of common pleas, who had held that the provision was unconstitutional. It was on this footing that it was held in *Atlantic Coast Line R. Co. v. Dunning* (1908) 94 C. C. A. 128, 166 Fed. 850, that, notwithstanding the provision, an employee who had elected to receive benefits as a member of his employer's relief department, and had thereupon released the employer, could not maintain an action for damages. There the court, referring to the clause in the Federal act, *infra*, which allows the employer to set off the amount of his contribution to the relief fund, remarked that it "seems to afford an element of fairness and equality which the South Carolina statute lacks in that it does not require one of the parties to the contract to fulfil his obligations and release the other party." By the decision in *Chicago, B. & Q. R. Co. v. McGuire*, *supra*, the validity of provisions of the tenor of the South Carolina statute has now been definitely settled.

Massachusetts.—The purport of § 6 of the employers' liability act 1887 is stated in § 1658, *ante*.

¹⁰ *United States*.—By § 5 of the Federal employer's liability act of 1908, (see chapter LXXXVI., *ante*), it is provided:—That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any

or the statute in question does or does not contain a qualifying clause of this description.¹¹

In some states the legislatures have passed statutes authorizing employers of certain descriptions to make arrangements with their employees for the establishment of relief associations.¹²

In conflict with what is apparently the unanimous opinion of the courts elsewhere, is the decision in a North Carolina case to the effect that a provision in the articles of a railway relief association, for the right to participate in the benefits of which employees are required to contribute of their earnings, that the acceptance of benefits by one injured by the railroad's negligence shall operate as a release of all claim against the company for damages growing out of the injury, is void under the provision of the fellow servant act that any contract or agreement, express or implied, made by any employee of a railroad company, to waive the benefit of the section of the law, shall be null and void.¹³

such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

In *United States Exp. Co. v. Ball* (1911) 36 App. D. C. 269, Ann. Cas. 1912 C, 331, it was held that under the Federal statute the acceptance of benefits did not bar a subsequent action for damages.

Georgia.—The provisions of the statute in this state (Ga. Code 1911, § 2785) are evidently modeled after the Federal act. See *Washington v. Atlantic Coast Line R. Co.* (1911) 136 Ga. 638, 38 L.R.A. (N.S.) 867, 71 S. E. 1066. (1911) 9 Ga. App. 695, 72 S. E. 69, holding that the statute applied to the case of an employee who joined the relief department of the railroad prior to the passage of the law, but who was injured subsequently thereto.

Alabama.—The provisions of the statute in this state are similar to those in the Federal act. (See § 1657, *ante*.)

New York.—(See § 1661, *ante*.)

New Jersey.—(See § 1661c, *ante*.)

¹¹ In the opinion delivered in *Chicago, B. & Q. R. Co. v. McGuire*, note 9, *supra*, there is nothing to warrant the supposition that the court regarded the given

provision as entitling an employee or his representative to claim the stipulated benefit in addition to damages. On general principles it may perhaps be presumed that, in the absence of an express enactment, the employer could not be subjected to a double liability of this character.

¹² See, for example, Mass. Laws 1890, chap. 181, applicable to street railway companies.

The Michigan enactment, Laws 1895, chap. 209 (Comp. Laws 1897, § 8584), which prohibits compulsory arrangements regarding the insurance of employees, expressly provides (§ 2) that arrangements with respect to relief associations supported by voluntary contributions shall be lawful.

¹³ *Barden v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 318, — L.R.A. (N.S.) —, 67 S. E. 971. The facts of this case were that the plaintiff, who was a member of the defendant's relief department, was taken sick and removed to the hospital conducted by the relief department, where he was operated upon; and subsequently became permanently injured because of the negligence of the surgeon and attendants of the hospital. In his action against the defendant for the injuries thus received, the latter was held not to be liable, since, the contracts requiring the employee to elect between receiving the benefits and pursuing his remedy at law

It will be seen from the facts set out in the note, that the court did not have squarely before it the effect of the statute upon the contract; and in the dissenting opinion, in which two judges concur, it is said that the observations upon the validity of the provisions in question are, in the opinion of the dissenting judges, "to be regarded as pure *obiter dicta*." But considerable weight is given to the decision by a reference to the Federal statute (note 10, *supra*). A reference to the terms of that statute will show that it provides first that any contract, etc., the purpose of which will be to enable a common carrier to exempt itself from liability created by the act, shall be to that extent void, and then provides that the employer may set off in any action for damages any sum which it has contributed to any relief benefit or indemnity that may have been paid to the employee or his representative. If the substantive portion of the statute has not the effect of rendering invalid or at least unenforceable even contracts with the relief departments or associations of the class herein discussed, it is certainly difficult to see the reason for adding the proviso.

1925. Same subject. Right of action for damages, how far affected by acceptance of benefits.—a. Acceptance by the employee himself.—So far as the employees themselves are concerned, nothing more need be remarked than that stipulations of the type now under discussion necessarily import that, after they have accepted the whole of the agreed benefits, they cannot maintain an action for damages in respect of the negligence which caused the injury upon which their claims for those benefits were founded.¹ On the other hand, if the employer fails to perform his agreement completely, the employee is remitted to his original right to bring such an action. The agreement

being void, the relief department was merely a charitable association, and the company was not liable for the acts of the surgeons and nurses and other attendants, in the absence of some proof of lack of due care in the choice thereof.

¹ For express decisions to this effect, see *Martin v. Baltimore & O. R. Co.* (1889) 41 Fed. 125; *Vickers v. Chicago, B. & Q. R. Co.* (1895) 71 Fed. 139; *Shaver v. Pennsylvania Co.* (1896) 71 Fed. 931; *Otis v. Pennsylvania Co.* (1896) 71 Fed. 136; *Brown v. Baltimore & O. R. Co.* (1895) 6 App. D. C. 237; *Petty v. Brunswick & W. R. Co.* (1900) 109 Ga. 666, 35 S. E. 82; *Lease v. Pennsylvania Co.* (1894) 10 Ind. App. 47, 37 N. E. 423; *Chicago, B. & Q. R. Co. v.*

Bell (1895) 44 Neb. 44, 62 N. W. 314; *Chicago, B. & Q. R. Co. v. Curtis* (1897) 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Clinton v. Chicago, B. & Q. R. Co.* (1900) 60 Neb. 692, 84 N. W. 90; *Graft v. Baltimore & O. R. Co.* (1887) 5 Sadler (Pa.) 94, 8 Atl. 206; *Twatts v. Pennsylvania R. Co.* (1910) 77 N. J. Eq. 103, 75 Atl. 1010.

In *Johnsor v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854, and *Ringle v. Pennsylvania R. Co.* (1894) 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492, it was held that the acceptance of the benefits was a bar to an action, although there was an additional agreement that the servant should "execute such further instrument as

cannot be pleaded in bar of the action, but the company is entitled to credit for the amount of the benefits paid and accepted prior to its institution.²

As a court cannot relieve a person against the consequences of an

might be necessary formally to evidence such acquittance," and no such release had in fact been executed. The acceptance of the benefits was deemed to be the substance of the release, and the supplementary agreement a mere formality.

In *Chicago, B. & Q. R. Co. v. Miller* (1896) 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439, the effect of the American cases as a whole was said to be that "if a railroad company organizes a relief association for the special benefit of its injured, sick, and disabled employees, pays the incidental expenses of such association, acts as treasurer or custodian of its funds, and enters into a binding obligation to support and maintain the association by paying out of its own funds such sums to discharge the obligations of the association as the assessments levied upon the members of the association are inadequate to pay, such an association, on admitting an employee of the railroad company to membership, may lawfully stipulate that, in the event of an injury being sustained by him, the acceptance of benefits from the association shall operate as a relinquishment of any right of action which the employee may have against the railroad company in consequence of the injury, and that the stipulation so made enures to the benefit of the railroad company, and constitutes a legal defense to a suit brought against it by the injured employee if the latter accepts benefits from the association." On the above point of substantive law the court disagreed with views expressed by the circuit justice, but affirmed his judgment on the ground that the plea to which he sustained a demurrer was bad. See § 1923, note 3, *ante*. As his opinion contains what seems to be the only expression of judicial disapproval of the doctrine generally adopted, it may be advisable to quote some of his remarks ([1894] 65 Fed. 305): "It is said that the employee is not bound to accept benefits from the relief fund, and, if he does accept them, with full knowledge that he waives his right of action, he ought to be bound by his act. The

logic of the proposition should be differently stated. Having paid for benefits, upon what principle can he be required to renounce them? If, for illustration, plaintiff had taken a policy in some accident and casualty company, could he be required to give up his right of action against the railroad company on accepting benefits from the insurance company? I think not. And the fact that the railroad company has entered into the insurance business does not affect the question in any way whatever. In respect to this contract, defendant is an insurance company; and, having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railroad company as an employee. Having paid for them, plaintiff is as much entitled to the benefits received by him under the contract of insurance as to his monthly wages for services rendered to the railroad company." The obvious flaw in this reasoning is that it ignores the material circumstances that, under all the schemes which have been hitherto discussed by the courts, the employer contributes to the relief fund, and incurs various liabilities and expenses in connection with its management. The servant, therefore, only pays for a portion of the benefits to which his membership in the association entitles him, and the actual consideration of the employer's release is the sum which he has himself paid, the prejudice he incurs by guarantying the obligations of the association and by defraying the expenses of its operation. There is no such parallelism as the learned judge assumes between the incidents of accident insurance on the ordinary plan and on that which is peculiar to organizations of the kind now under review.

² *Pennsylvania Co. v. Chapman* (1906) 220 Ill. 428, 77 N. E. 248. There the by-laws of the relief department of a railroad company provided for payment to an injured employee of a certain sum per day "during the continuance of his disability." It was held that the payment of the specified benefit up

error of judgment, the release of the employer which results from the acceptance of the stipulated benefits will not be avoided on the ground that, at the time of the acceptance, he was ignorant of certain facts tending to establish negligence on the employer's part, and did not know by what witnesses he could have proved those facts.³ Still less is it a valid reason for allowing him to rescind his election, that he regrets that he did not choose the other alternative open to him, or that, when he made his choice, he had forgotten the terms of his contract with the relief department.⁴

to the time the injured employee received his "return-to-work card" was not a full performance of the agreement, where the employee's wound grew worse after a week's work, and he was refused further benefits, although he continued to be disabled. The court said: "We do not think it can be seriously contended that it was contemplated in this case that either party should be bound by a partial performance on the part of the other. The whole contract must be construed together. The agreement on the part of the plaintiff that the acceptance of benefits from the relief fund should operate as a release of all claim for damages against the company is to be construed in connection with the by-laws, which amount to an agreement on the part of the relief department that it would pay him certain specified benefits. A party cannot be allowed to avail himself of the benefits of a contract which he has admittedly violated. If the defendant below had shown that the plaintiff received the full benefit of his contract, or that his failure to do so was the result of his own fault, it might well have been said that this suit was thereby barred. That is not this case, the distinguishing feature of which is that the relief department refused to pay further benefits. Had the plaintiff refused to receive those benefits, as in cases cited by counsel, a very different question would be here presented. The breach of the contract in this case was that of the defendant alone. To sustain the position of counsel for appellant would be to hold that whenever an employee of a railroad company becomes a member of the relief department and receives any benefits whatever therefrom, he must be conclusively held to have elected to look to that department alone for all damages sustained while

in the service of the company. We know of no authority or good reason for such a position."

³ *Vickers v. Chicago, B. & Q. R. Co.* (1895) 71 Fed. 139.

⁴ *Twatts v. Pennsylvania R. Co.* (1910) 77 N. J. Eq. 103, 75 Atl. 1010. Discussing the complainant's claim that the mere acceptance of the benefits was not a proof of an actual election, the court said: "He bases the claim upon his oath that he forgot the terms of the contract. There is no allegation, charge, or proof that anything was concealed, misrepresented, or withheld from him. At the time that he became a member of the relief department the contract became effective and binding upon the parties, and the complainant, over his own signature, agreed that, if he accepted the benefits due him by reason of an accident, it should operate as a release of any other claim for damages against the company on account of such accident. He does not now contend that the acceptance of the benefits does not so operate as to bar his claim for damages. But he does contend that he has the right to avoid the consequences of acceptance by rescinding his own action in that respect and giving back the amount received for benefits, and thus be left free to proceed upon a claim for damages. He, of course, does not stand upon any charge of mutual mistake; and although he argues that he has the right to rescind by reason of a mistake upon his part, I cannot see that there is any allegation, charge, or proof of what should properly be termed a mistake upon his part. He contends that the unilateral mistake was with respect to the effect of accepting the benefits; but I think this cannot properly be termed a mistake upon his part in the sense in which the word 'mistake' is

b. Acceptance after death of employee.—It has been shown in § 1920, *ante*, that, in jurisdictions in which the courts recognize the validity of a contract by which a servant, in consideration of certain benefits, renounces entirely such remedial rights as he would otherwise have in respect of compensation for injuries caused by the employer's negligence, his personal representatives cannot maintain a suit under a damage act, if he is killed by reason of that negligence. An essentially different situation arises where a servant who is a party to a contract of the type now under discussion is fatally injured, and dies without having made his election between the acceptance of the stipulated benefits and the prosecution of an action. After his decease the rights created by the contract pass either to the person specified therein as beneficiary, or, in the absence of such a specification, to the persons who are entitled to share in his personal property; but the right to recover compensation in respect of his death vests immediately in the persons by whom or for whose use a suit may be maintained under the damage act in force in the given jurisdiction.⁵ In these circumstances, it is clear that, even if, as is usually the case, a beneficiary under the contract is also a person within the purview of such a statute, his acceptance of the benefits cannot, at least, by virtue of the contract itself,⁶ affect the remedial rights of the other persons to whom the statute is applicable. It is equally clear, both on principle and authority, that, if a person designated in the contract as beneficiary is also the executor or administrator of the servant's estate,—as is frequently the case where his wife is the person designated,—the acceptance of the relief money will not of itself preclude the beneficiary from maintaining, in an official capacity, an action for the use of all the persons entitled to sue under such a statute.⁷ The cases, however, are not harmonious with regard to the question whether a beneficiary whose claims under

used in equity. If he remembered the terms of the contract, or had them before him at the time he received the benefits, it does not seem possible that it would be correct to say that his conduct was the result of any mistake upon his part. He must be dealt with as a rational human being, and the language of the contract is so utterly unambiguous that no rational human being could mistake the effect upon his claim for damages if he accepted the benefits, the provision of the contract in this respect being entirely clear and unmistakable. The only possible use of the word 'mis-

take' in respect to the complainant's conduct would be to say that he made a mistake in not re-reading his contract before acting under it."

⁵ With regard to the construction of the damage act, see generally, 1 Beven, Neg. pp. 236-251; 1 Shearm. & Redf. Neg. § 140; Cooley, Torts, *264.

⁶ This qualification is necessary in view of the decision in *Pittsburgh, C. C. & St. L. R. Co. v. Gipe*, note 10, *infra*.

⁷ *Chicago, B. & Q. R. Co. v. Wymore* (1894) 40 Neb. 645, 58 N. W. 1120; *Chicago, B. & Q. R. Co. v. Healy* (1907) 76 Neb. 786, 10 L.R.A.(N.S.) 198, 124

the contract have been satisfied is entitled to share as an individual in the money recovered in such an action. The Illinois court of appeals has answered this question in the affirmative.⁸ If the situation is to be viewed as being controlled by that principle, it will follow that the designated beneficiary should be required to make a defini-

Am. St. Rep. 830, 111 N. W. 598, reversing on rehearing (1906) 76 Neb. 783, 107 N. W. 1005. In the former case, the court argued thus: "He [the decedent] had not waived his right of action. He undertook to contract that the beneficiary named in the contract might waive it by accepting the benefit; but this action is not for the benefit of his estate, but for that of his widow and next of kin, and the measure of damages is not what he might have recovered had he lived, but their pecuniary loss by reason of his death. Whether or not he could, by a compromise after the accident, before his death, deprive them of their right of action, he could not contract away their rights before the injury, and without their consent, nor could he contract that the widow might, after his death, deprive the next of kin of their remedy. The children . . . were not beneficiaries in the contract, and his contract, and the widow's acceptance of a sum for her benefit, did not discharge the right of action on the children's behalf. The widow, in accepting the benefit, acted individually, and not as an administratrix. In maintaining this action she proceeds in her representative capacity, and is not estopped, so far as the rights of others are concerned, by her acts as an individual."

In *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1899) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290, where a demurrer to an answer alleging a release given by the plaintiff, the servant's widow, as beneficiary of the relief fund, was held to have been properly sustained in an action for damages, the *ratio decidendi* was that the release in no way affected the rights of the decedent's child, and consequently that the plaintiff had, in her representative capacity as administratrix, a right to maintain the action. "Whether the right of the administratrix," said the court, "was but a continuation of the intestate's right to sue, as contended by appellant, or whether it was a newly created right, as our

cases hold, is unimportant here. However it may be, the right exists only by virtue of the statute, and exists not for the benefit of the intestate's estate, but as a source of compensation to those who by the death become the parties injured by the wrongful act of the defendant. . . . Upon his [the servant's] death, the law conferred a right of action upon his representative for the use of his next of kin,—for the use of his child, as well as for the use of his widow; and no act of the latter, without the lawful consent of the child, will deprive the child of its benefit. The widow could only release what she was entitled to." This case was followed in *Pittsburgh, C. C. & St. L. R. Co. v. Hosea* (1898) 152 Ind. 412, 53 N. E. 419.

⁸ In *Maney v. Chicago, B. & Q. R. Co.* (1892) 49 Ill. App. 105, with reference to a provision that the acceptance by his beneficiary of the sum specified to be paid in the event of his death should operate as a release of all claims for damages which could be made by "heirs, executors, or administrators," it was held that his widow's acceptance of the "death benefits" did not bar either her own right or that of his next of kin to maintain an action.

The decision (which was rendered on demurrer) was based upon the theory that the widow and next of kin could not be deprived by the husband's contract of the property right created by the damage act and vested in them, and that, on the principle that pleas should be construed against the pleader, it would be presumed that the widow was acting in her individual capacity as beneficiary, where she applied for and received the money from the relief fund.

The court declined to render any specific decision regarding the effect of the widow's acceptance upon the amount of the damages to which she would be entitled. This case was approved in *Illinois C. R. Co. v. Cozby* (1896) 69 Ill. App. 256, where, however, another point was involved. See § 1919, note 8, *ante*.

tive and unqualified election between the stipulated benefits and such damages as may be recoverable. But there seems to be no valid reason for predicating in this instance an exception to the general principle embodied in the maxim, *Qui sentit commodum, sentire debet et onus*. There is a decided preponderance of authority in favor of this doctrine.⁹

In one case where a relief fund certificate provided that the acceptance of the stipulated benefits should operate as a release of all claims against the employer, it was held that a release which the widow of the employee had signed, both as beneficiary and also as administratrix, constituted prima facie a bar not only to the recovery of damages for her own use, but also to a recovery for the use of the decedent's children.¹⁰ The court proceeded upon the theory that the party who is administering a decedent's estate is invested with a general power to compromise suits for the recovery of damages resulting from his death, and that the release in question constituted a compromise within the scope of this power.¹¹ It is submitted, however, that this power extends only to actions arising out of claims in behalf of or against the decedent's estate. That the remedial rights conferred by the damage acts upon his children and other persons do not fall within the category thus indicated is well settled.¹²

1926. Same subject. Duration of right to benefits in cases where the injury is not fatal.—In a Texas case an unqualified stipulation that the employee was to be entitled to hospital benefits when "sick or injured" has been construed as importing that, in the absence of any understanding to the contrary, the benefits were to be continued as long as the sickness or injury required it. It was also laid down that an employee whose contract with a relief department contained such a stipulation was not bound by rules adopted after the contract

⁹ See the Indiana and Nebraska cases cited in note 7, *supra*. Compare also the cases cited in § 1929, notes 4, 5, *post*.

¹⁰ *Pittsburgh, C. C. & St. L. R. Co. v. Gipe* (1903) 160 Ind. 360, 65 N. E. 1034. Upon a subsequent hearing of this case after a new trial had taken place, the plaintiff unsuccessfully put forward the contention that the receipt itself was invalid, as having been procured by fraud. *Gipe v. Pittsburgh, C. C. & St. L. R. Co.* (1907) 41 Ind. App. 156, 82 N. E. 471; see § 1934, note 2, *post*.

¹¹ The expression of opinion to the

contrary effect in *Yelton v. Evansville & I. R. Co.* (1893) 134 Ind. 414, 21 L.R.A. 158, 33 N. E. 629, was disapproved.

¹² See *Bradshaw v. Lancashire & Y. R. Co.* (1875) L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847, 23 Week. Rep. 310; *Barnett v. Lucas* (1870) Ir. Rep. 5 C. L. 140, affirmed in Exch. Ch. (1872) Ir. Rep. 6 C. L. 247; *Chicago, B. & Q. R. Co. v. Wymore* (1894) 40 Neb. 645, 58 N. W. 1120; *Pittsburgh, C. C. & St. L. R. Co. v. Moore* (1899) 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290.

was made, and not brought to his notice, to the effect that the treatment would continue so long as the attendant or chief surgeon deemed necessary, and that benefits would not be given for injuries received in a fight.¹

In a Nebraska case where the contract provided that the "disability" during the continuance of which the agreed benefits were to be paid should "be taken to mean physical inability to work by reason of sickness or accidental injury," it was held that the expression "physical inability to work" did not connote merely an inability in respect of the performance of such work as the servant was engaged in at the time when he was injured, but applied also to inability in respect of the performance of other work of a similar description, equally desirable and remunerative. The conclusion of the court was that the obligation of the employer ceased when the employee became capable of performing work which answered either of these descriptions, but that recovery sufficient to enable him to earn smaller wages in some other kind of employment was insufficient to release the employer.² But in South Carolina a similar provision has been treated as importing incapacity to perform the kind of work in which he was engaged at the time when he was injured.³

1926a. Stipulations making execution of release a condition precedent to payment of benefits out of relief fund, validity of.—In some stipulations of this type it is provided that the benefits are to be payable only on condition that all persons entitled to sue the employer

¹ *Scanlon v. Galveston, H. & S. A. R. Co.* (1905) — Tex. Civ. App. —, 86 S. W. 930.

² *Keith v. Chicago, B. & Q. R. Co.* (1908) 82 Neb. 12, 23 L.R.A.(N.S.) 352, 130 Am. St. Rep. 655, 116 N. W. 957. It was remarked that "indemnity, and not profits," was the object of the relief department, and that this object "would be defeated if an injured member would be permitted to collect the benefits provided after he had recovered to such an extent that he could enter a similar employment, equally as desirable and remunerative." The court expressed its approval of the following remarks made *arguendo* in the opinion delivered on a motion for rehearing in *Chicago, B. & Q. R. Co. v. Olsen* (1904) 70 Neb. 570, 99 N. W. 847: "There seems to be force in the argument that, if the plaintiff had recovered from the injury so as to be able to perform labor similar and

equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an engagement that was open and available to him, whereby he could support and maintain himself, as he was able to do before the accident, he was 'able to work' within the meaning of that expression in the contract." But in this earlier case the point was left undetermined. It is to be observed, however, that on the first hearing of this case ([1903] 70 Neb. 559, 97 N. W. 831) the court had taken the position that the "disability" of a servant means "inability to perform his ordinary duties in the employment in which he was engaged at the time of his injury."

³ *Sturgiss v. Atlantic Coast Line R. Co.* (1908) 80 S. C. 167, 168, 60 S. E. 939, 61 S. E. 261.

under a damage act, in the event of the servant's death, shall release the employer from liability. It has been held that such a condition is not so unreasonable as to be void.¹

1927. Right of action, how far affected by such stipulations.—a. During the lifetime of the servant.—In some contracts it is stipulated that the servant shall not receive the specified benefits after his injury has been received, unless he executes a formal release, exonerating the employer from liability. Where a servant has agreed to be bound by such a provision, and has received the benefits to which the rules of his relief association entitle him, the mere fact that he has executed no release will not enable him to maintain an action for damages.¹

b. After the servant's death.—By some contracts it is provided that the specified benefits shall be payable only on condition that all persons who are entitled, in the event of the death of the employee, to bring suit under the damage act, shall release the employer from liability. With reference to such a contract it has been held that the payment of damages to those persons extinguishes the claim of the beneficiary designated by the contract.²

Under another form of stipulation it is provided that, in case of the death of the employee, his share of the benefit fund shall be paid to his widow, if he leaves one, and if he does not leave one, to various relatives in the order mentioned, and that the employer shall have the right to retain all sums due for indemnities under the contract until the execution of a release by all persons interested in, or injured by the death of, the employee. It has been held that such a stipulation entitles the employer to require of the widow, as a condition of her right to receive the agreed indemnity, that she shall furnish a release executed by all the persons who were injured by the death of the employee within the meaning of the damage act, and not a release which embraces merely those persons who are interested in the benefit fund by virtue of the agreement with relation thereto.³

¹ *Fuller v. Baltimore & O. Employees' Relief Asso.* (1887) 67 Md. 433, 10 Atl. 237.

¹ *Carter v. Brunswick & W. R. Co.* (1902) 115 Ga. 853, 42 S. E. 239.

² *Fuller v. Baltimore & O. Employees' Relief Asso.* (1887) 67 Md. 433, 10 Atl. 237 (beneficiaries were wife and children), followed in *Maryland use of Black v. Baltimore & O. R. Co.* (1888) 36 Fed. 655, where a member's widow who had released the defendant com-

pany, in order that the designated beneficiary, the member's mother, might obtain the benefits, was held to be debarred from maintaining an action in her own behalf.

³ *Frank v. Newport Min. Co.* (1907) 148 Mich. 637, 11 L.R.A.(N.S.) 182, 112 N. W. 504, where the suit was brought by the widow of the employee. The court observed: "It is true that in other portions of the poster or contract it is provided that this money should be

The circumstances under which a servant is entitled to repudiate a release are discussed in subtitle B, *post*.

1928. Stipulations defining the effect of institution of action for damages by members of relief associations or their representatives, validity of.—A clause which is found in the contracts made with the relief department of the Pennsylvania Railroad Company, and which has been adopted either verbatim or in substance by many other companies, provides that, if the servant or his legal representative shall make claim or bring suit against the employer for damages, on account of injury or death of the servant, payment of benefits from the relief fund on account of the same shall not be made until such claim shall be withdrawn or suit discontinued; and that any compromise of such claim or suit, or judgment in such suit, shall preclude any claim upon the relief fund for benefits on account of such injury or death. It has been held that a stipulation of this tenor is not illegal as being against public policy.¹ On the other hand, it has been held that public policy forbids the enforcement of a stipulation that, if any suit at law shall be brought against the employer for damages arising out of the death of the servant, the benefits otherwise payable shall be forfeited.² It appears, therefore, that, in respect of validity, a distinction is taken between agreements which are simply designed to protect the employer from being subjected to

payable to the widow, and that the children dependent upon the deceased are excluded; and it is argued from this that an absolute right is vested in the widow to this fund, and that therefore to require a release on behalf of others who are not interested in this fund is to require of her an impossible condition to the exercise of an admitted right. There is some force in this contention, but the contract must be construed as a whole, and if effect be given to the clause authorizing the defendant to require a release, this must act as a qualification of the widow's right to receive the indemnity, and her right must be considered as a right to receive such indemnity only on condition that she secure a release from all persons interested in or injured by the death or disability of the employee."

¹ *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971.

² *Chicago, B. & Q. R. Co. v. Healy* (1907) 76 Neb. 786, 10 L.R.A.(N.S.) 198, 124 Am. St. Rep. 830, 111 N. W.

598, reversing on rehearing (1906) 76 Neb. 783, 107 N. W. 1005. The court observed: The plaintiff "has a constitutional right that the courts shall be open to her to redress the grievance of negligently killing her husband, and to litigate her claims predicated upon such negligence; but, if she exercises that right, she must, under this contract, suffer a forfeiture for so doing. If the company required its employees to deposit money with the company upon contract that, if such employee should afterwards be injured in the service of the company, and should bring an action for damages predicated upon the negligence of the company, the money so deposited should be forfeited, would such a contract be enforced? Can a party contract beforehand, under penalty and forfeiture, that he will not litigate a claim that may thereafter arise? The policy of our law is to furnish every citizen with speedy redress for any injury that he may receive in person or property, and a contract which essentially imposes a penalty upon seek-

a double liability, and agreements which affix disabling consequences to the mere commencement of an action by the servant or his personal representatives.

1929. Right of action, how far affected by such stipulations.—*a. During the servant's lifetime.*—In a case where the servant had received a portion of the stipulated benefits and then recovered judgment in an action for damages, it was held that he could not maintain an action for such benefits as would have been due to him if he had not been successful in the previous action.¹

As the rights and liabilities of a beneficiary of a deceased servant are absolutely fixed by his election to accept the benefits to which he is entitled, and the payment of a portion thereof by the employer, the beneficiary's claim upon the residue is not forfeited by the subsequent institution of a suit which is unsuccessful solely because of the payment made to him.²

b. After the servant's death.—Under the express terms of a provision such as that specified at the commencement of the preceding section, it is clear that all claims upon a relief fund are excluded after the executor or administrator of a servant has compromised an action brought under a damage act.³

In a case in which the other form of stipulation, mentioned in the preceding section, was declared to be invalid, the invalidity was held

ing such redress is contrary to that policy. The decision in *Walters v. Chicago, B. & Q. R. Co.* (1905) 74 Neb. 551, 104 N. W. 1066, so far as it conflicts with the view herein expressed, is wrong, and is overruled." It was contended that the proper construction of the provision was that, if any suit should be brought by any party, the benefits payable to the beneficiary would be forfeited, whether such beneficiary participated in the action or not; but its meaning was declared to be, that the person who brought the action should forfeit the right to the relief fund.

¹ *Clinton v. Chicago, B. & Q. R. Co.* (1900) 60 Neb. 692, 84 N. W. 90; *Koeller v. Chicago, B. & Q. R. Co.* (1911) 88 Neb. 712, — L.R.A. (N.S.) —, 130 N. W. 420.

² *Chicago, B. & Q. R. Co. v. Bigley* (1901) 1 Neb. (Unof.) 225, 95 N. W. 344; *Chicago, B. & Q. R. Co. v. Olsen* (1903) 70 Neb. 559, 97 N. W. 831, 99 N. W. 847.

³ *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61

N. W. 971. There the court made the following remarks as to nature of the rights of the beneficiary, who was the mother of the decedent. The court said: "As a beneficiary, she takes merely what her son contracted she should take. Independent of his contract, she has no claim whatever on the relief fund. The contract in no way impairs what the law would give her from his estate. This is a right he has attempted to create for her by contract. When the contract was made, he knew, as did the company, that in case of his death, as it afterward occurred, an action could be brought against the company; and he had the right, as between himself and the company, to agree that, if any authorized person brought such a suit, and it was compromised, the beneficiary would have no claim on the fund. As she had no prior right, she is in no position to urge a claim not in accord with the terms of the contract. She must take the certificate with the conditions imposed by the contract, or not at all."

to involve the consequence that the rights of a widow as beneficiary of her deceased husband, are not forfeited where a judgment rendered against the employer in an action for damages instituted by her, as administratrix, in her own behalf and for the use of her children, is set aside by a court of review. It was remarked that, under the earlier decisions of the court, her own rights as beneficiary, but not those of her children, are extinguished by such a judgment, if it is sustained on appeal or not impugned.⁴

The widow of a deceased servant is not entitled to sue in her own behalf for the agreed benefits, after she has, as administratrix, recovered judgment in a similar suit brought for the use of her children only.⁵

c. Meaning of the expression "judgment."—Where the effect of the contract is to disentitle the servant or his designated beneficiary to share in the relief fund when a suit for damages is prosecuted to judgment, the "judgment" contemplated is one which actually awards the plaintiff some damages, and not one which turns on the mere form of the pleading.⁶

1929a. Enforcement of restrictive stipulations in foreign states.—In one case a stipulation to the effect that the servant's acceptance of the benefits specified by his contract with a relief association should be a bar to a subsequent action for damages was enforced in a foreign state. The *ratio decidendi* was that, as the supreme court of the state in which the contract was made had decided that a stipulation of this tenor was to be construed merely as requiring the servant to elect between two alternative remedies (see § 1923, note 6,

⁴ *Chicago, B. & Q. R. Co. v. Healy* (1902) 65 Neb. 789, 59 L.R.A. 291, 91 (1907) 76 Neb. 786, 10 L.R.A. (N.S.) 198, 124 Am. St. Rep. 830, 111 N. W. 598, reversing on rehearing (1906) 76 Neb. 783, 107 N. W. 1005. In so far as it conflicted with the decision thus rendered, *Walters v. Chicago, B. & Q. R. Co.* (1905) 74 Neb. 551, 104 N. W. 1066, was overruled. In that case, the plaintiff was the mother of a deceased servant who had left neither widow nor children. Accordingly, although she prosecuted her action for damages as administratrix, she prosecuted it solely in her own interest. After a final judgment had been rendered against her in this action, she attempted to recover as beneficiary of the relief fund. It was held that her former action was a bar to such recovery.

⁵ *Oyster v. Burlington Relief Dept.*

(1902) 65 Neb. 789, 59 L.R.A. 291, 91 N. W. 699. The court observed that in the former action (see [1899] 58 Neb. 1, 78 N. W. 359) the administratrix had sued as trustee for all the beneficiaries, and that the mere fact that the petition omitted to name some one beneficiary would not prevent such beneficiary from participating in the distribution of the fund, when recovered. If the plaintiff had not, as widow, received her distributive share, she might recover it in an action against herself as administratrix.

To the same effect, *Jack v. Pennsylvania R. Co.* (1910) 43 Pa. Super. Ct. 337, citing the *Oyster Case*.

⁶ *O'Reilly v. Pennsylvania R. Co.* (1903) 69 N. J. L. 119, 54 Atl. 233, affirmed in (1904) 70 N. J. L. 828, 59 Atl. 1118.

ante), the circumstances were not appropriate for the application of the rule that an agreement which contravenes the public policy of the state of the forum will not be recognized in that state.¹ The writer has not found any reported cases in which stipulations of the other two types discussed in the preceding sections have been considered.

1930. Arrangements by masters with insurance companies for the indemnification of servants.—In some instances employers, instead of organizing a relief department in connection with their own business, arrange with accident insurance companies for the indemnification of their servants according to a certain schedule, the premiums being provided for by sums deducted from the wages of the servants. Such an arrangement is doubtless valid, unless it has been expressly prohibited by statute.¹ But it does not constitute a defense to an action against the employer, unless there is evidence either that the plaintiff had previously agreed to accept the insurance money in full settlement of any future claim for damages that might accrue to him, or had consented, after the injury in question was sustained, to accept that money in satisfaction of his claim.²

In Indiana it has been held that the insurance company is the proper party to sue in the event of an accident to one of the servants.³

¹ *Cannaday v. Atlantic Coast Line R. Co.* (1906) 143 N. C. 439, 8 L.R.A. (N.S.) 939, 118 Am. St. Rep. 821, 55 S. E. 836. The fact that contracts such as the one in question had been declared invalid by the South Carolina statute of 1903 (see § 1924, *ante*) was mentioned in the opinion. Although the court does not explicitly refer to the point, it may be presumed that this enactment came into force after the plaintiff made his contract. Otherwise, the decision must have been different.

¹ By Michigan Laws 1895, chap. 209, § 1 (Comp. Laws 1897, § 8584), it is declared unlawful for corporations to require any of their employees to procure life or accident insurance in any particular company.

² *Dover v. Mississippi River & B. T. R. Co.* (1903) 100 Mo. App. 330, 73 S. W. 298. There the court, after referring to the cases which involve the consequences of an election to accept the benefits of a relief fund (see §§ 1923 *et seq.*, *ante*), proceeded thus: "The facts in the case at bar do not bring it within the range of those decisions. . . . The testimony herein fails to

establish any express contract by which he [the plaintiff] agreed to accept or did accept the indemnity paid by the insurance company in settlement of his claim for damages against the defendant. The claim made by him for indemnity under the policy against the insurance company, and the receipt indorsed upon the draft for the amount paid him under the policy, do not mention the defendant, but, on the contrary, the terms of the release expressly are confined to a discharge of the insurance company, and no implied agreement for release of the claim for damages by plaintiff against defendant can be logically inferred from the mere claim and acceptance of the benefits of the accident insurance policy. We have seen no authority sustaining any such implication, and the general rule is well established that there can be no abatement of damages by reason of partial compensation from a collateral source." *Dillon v. Hunt* (1891) 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516.

³ *Carpenter v. Chicago & E. I. R. Co.* (1898) 21 Ind. App. 88, 51 N. E. 493.

In Quebec it has been held that the employer is responsible for the payment of the insurance money, and that, in an action against him to recover it, he is not entitled to plead as a defense a condition in the policy to the effect that it was to be null and void under certain circumstances. The theory adopted by the court was that, in making the arrangement for insurance, he acts, not as the agent of the insurer, but as a principal.⁴

Questions arising out of contracts for the insurance of employers against loss resulting from their liability to injured employees do not fall within the scope of this treatise.⁵

B. CONTRACTS WITH REGARD TO INJURIES PREVIOUSLY SUSTAINED.

1931. Generally.—To an action brought by a servant against his master to recover damages for a personal injury, a prior release of the master from liability is a complete defense, unless its effect can be avoided on one or other of the grounds noticed in the following sections.¹

Where the contract of settlement is made by an agent of the employer, the ordinary rule of the law of agency applies; that is to say, the employer is bound if the agent made the settlement while acting within the scope of his apparent authority, and the person

⁴ *McKenzie v. Garth* (1899) Rap. Jud. Quebec 9 B. R. 224. Several authorities were cited by counsel, showing that this is the accepted French doctrine.

⁵ The right of an employee to maintain an action upon such a contract is fully treated in the note to *Allen v. Aetna L. Ins. Co.* 7 L.R.A. (N.S.) 958.

¹ *Erickson v. Great Northern R. Co.* (1910) 57 Wash. 520, 107 Pac. 365.

Illinois C. R. Co. v. Welch (1869) 52 Ill. 184, 4 Am. Rep. 593; *Chicago, W. & V. Coal Co. v. Peterson* (1890) 39 Ill. App. 114, and the cases cited *infra*.

In *Thomas v. Chicago, R. I. & P. R. Co.* (1892) 49 Mo. App. 110, the evidence was held not to be sufficient to warrant the court in declaring that the instrument signed was not what it appeared to be.

Where a railroad employee made, in settlement of a claim for an injury, a written proposition containing a stipulation, "I am to remain in the service of said company as brakeman as long as I want to, providing my work shall prove satisfactory," and subsequently

signed a release which the company's claim agent presented to him, in which it was provided that he was to be employed "for such time only as may be satisfactory to said company," it will be presumed, in the absence of any showing of fraud or mistake, that claimant consented to such variance. *Phares v. Lake Shore & M. S. R. Co.* (1898) 20 Ind. App. 54, 50 N. E. 306.

A release of a railroad company from all claim for negligently killing an employee, executed by the father and mother of the decedent, who were his sole heirs at law, is a bar to an action for his death by an administrator subsequently appointed, where there were no claims against the decedent. *Christie v. Chicago, R. I. & P. R. Co.* (1898) 104 Iowa, 707, 74 N. W. 697.

As to the general rule that, in order to constitute a bar to a suit for damages, the satisfaction pleaded must have been given and accepted in respect of the identical cause of action complained of, see Addison, Torts, 8th ed. 80.

A written release, signed by the serv-

with whom the settlement was made had no knowledge of any limitation placed upon his authority.²

As the elements which determine the obligatory quality of releases are the same where a servant is concerned as in other instances, a detailed discussion of the general principles upon which their validity depends would carry us beyond the scope of the present treatise. But a succinct statement of the effect of the cases in which the rights of the parties to contracts of service have been determined with reference to those principles may advantageously be inserted in the present chapter.

1932. Consideration.—In order to constitute a good defense to an action for damages against the master of the injured servant, a release must have been executed for a valuable consideration.¹ No such consideration is predicable where the servant was already in the employment of the defendant at the time when the release was signed, and it does not appear that any new employment was tendered to or accepted by him, or that any promise was made that the

ant, constitutes prima facie a good defense, when it is introduced in an action for damages, and the burden of proving its invalidity lies on him. *Louisville & N. R. Co. v. Crutcher* (1909) 135 Ky. 381, 122 S. W. 191.

In jurisdictions in which the right to sue under a damage act for an injury resulting in death is regarded as being derivative, the administrator of a deceased employee cannot sue if the decedent released the cause of action before his death. *Mooney v. Chicago* (1909) 239 Ill. 414, 88 N. E. 194.

² *Maloney v. Hudson River Water Power Co.* (1909) 133 App. Div. 499, 117 N. Y. Supp. 601.

¹ Under a contract stipulating that the measure of damages to an employee for injuries received shall be his regular wages until he is able to work, if not more than six months, an agreement to accept one month's wages in full of all damages, where there is no dispute as to his right to such wages, is without consideration, and will not bar his recovery of wages for a further time during which he is unable to work. *Carlton v. Western & A. R. Co.* (1888) 81 Ga. 531, 7 S. E. 623.

In a jurisdiction in which a seal is declared by statute to be only presumptive evidence of consideration, a release under seal will not bar an action for

injuries, if the evidence conclusively establishes that there was no consideration. *Wabash Western R. Co. v. Brown* (1895) 13 C. C. A. 222, 31 U. S. App. 192, 65 Fed. 941.

In *Illinois C. R. Co. v. Fairchild* (1910) — Ind. App. —, 91 N. E. 836, a railroad employee, having sustained a personal injury, had an interview with the general claim agent of the company, who proposed to give him a specified sum and a life job in consideration of a release. The employee understood that the release, voucher, and a letter to the superintendent with a request to employ him would be sent to him. The voucher and release, reciting as the consideration the specified sum, were sent to him, and, without signing the release, he wrote to the claim agent, calling his attention to the absence of the letter to the superintendent. The claim agent replied that he had not promised the employee a position, as he had no authority to make such a promise, and that the employee could not expect to be placed at work until he executed the release. The employee then went to the superintendent, who told the employee to sign the release and get his money, and that he would then get work. Held, that the release was executed in consideration of a specified sum and the agreement to employ the employee for life.

employment he was already engaged in should continue after the execution of the paper, or that the execution of the release was made a condition of his continued employment.² On the other hand the servant is bound by a release given in consideration of a promise to furnish him with permanent or steady employment,³ or with employment as long as the business is carried on,⁴ or with employment for so long as the employee may desire,⁵ or with employment so long as the releasor's work is satisfactory to the releasee,⁶ or with employment for an indefinite period.⁷ That agreements of this

² *Purdy v. Rome, W. & O. R. Co.* (1891) 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255, affirming (1889) 52 Hun, 267, 23 N. Y. S. R. 469, 5 N. Y. Supp. 217. "The agreement," said the court, "constituted a simple gratuity on the part of the plaintiff to the defendant, relieving it from a liability or responsibility which then existed in favor of plaintiff, and in obtaining which the defendant surrendered and promised nothing. The plaintiff was in precisely the same position he was prior to its execution, excepting he had given up to the defendant all claim upon it which he otherwise might have by law, and he had received not one particle of consideration for such surrender of his legal rights."

³ *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Hobbs v. Brush Electric Light Co.* (1889) 75 Mich. 550, 42 N. W. 965.

⁴ *Carter White Lead Co. v. Kinlin* (1896) 47 Neb. 409, 66 N. W. 536.

⁵ *East Line & R. River R. Co. v. Scott* (1888) 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99.

⁶ *Cleveland, C. C. & St. L. R. Co. v. Hilligoss* (1908) 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; *Forbs v. St. Louis, I. M. & S. R. Co.* (1904) 107 Mo. App. 661, 82 S. W. 562; *Rhoades v. Chesapeake & O. R. Co.* (1901) 49 W. Va. 494, 55 L.R.A. 170, 87 Am. St. Rep. 826, 39 S. E. 209.

The cases, however, are in conflict with two Texas decisions which proceed upon the ground that a release exacted as a condition of permitting an injured employee to return to work is deemed to be without consideration, where the employer merely undertakes to continue the employment as long as the services may be satisfactory to him. *Missouri,*

K. & T. R. Co. v. Smith (1904) 98 Tex. 47, 66 L.R.A. 741, 107 Am. St. Rep. 607, 81 S. W. 22, 4 Ann. Cas. 644; *Gulf, C. & S. F. R. Co. v. Winton* (1894) 7 Tex. Civ. App. 57, 26 S. W. 770; *Gulf, C. & S. F. R. Co. v. Winter* (1905) 38 Tex. Civ. App. 8, 85 S. W. 477. In the case first cited it was also held that the fact that the employee had, as a matter of fact, been permitted to return to work, and received wages, did not supply the consideration which was originally lacking. The court overruled *Carroll v. Missouri, K. & T. R. Co.* (1902) 30 Tex. Civ. App. 1, 69 S. W. 1004, where it was held that, under such circumstances there was a good consideration. It is difficult to see how these decisions can be supported without the aid of the untenable doctrine that the adequacy of the consideration is a material element. See note 7, *infra*. The same doctrine seems to be requisite for the support of another decision in this state to the effect that the re-employment of an injured employee for one day, and for such further time as may be satisfactory to the employer, is a sufficient consideration to support a release, where, at the time the release was given, the injuries were believed by both parties to be slight and insignificant, although they subsequently prove to have been serious, and to have destroyed the employee's ability to labor. *Quebe v. Gulf, C. & S. F. R. Co.* (1904) 98 Tex. 6, 66 L.R.A. 734, 81 S. W. 20, 4 Ann. Cas. 545, affirming (1903) — Tex. Civ. App. —, 77 S. W. 442.

⁷ *Tindall v. Northern P. R. Co.* (1910) 58 Wash. 118, 107 Pac. 1045, where the release recited that the servant was "to be simply reinstated, and allowed to work under the same circumstances as before the accident."

type are not open to exceptions on the ground of a want of mutuality is also well settled; but the grounds upon which this doctrine is rested differ somewhat, according to the terms of the compromise.

* In *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802, an agreement by a railroad company to give an injured employee "steady and permanent employment," in consideration of his releasing the company from further liability for his injuries, was attacked on the ground that it lacked mutuality. The position of the defendant's counsel was that in every contract of hiring there must be a twofold obligation,—on the part of the employer, to hire, and on the part of the employee, to serve,—and that these correlative obligations must bind both parties for a definite time. He also insisted that an employment for an indefinite time is an employment at the will of the parties, and therefore, when the term of service is left to the discretion of either, it is at the will of either. To this argument the court replied as follows: "These propositions are doubtless correct as abstract statements of law, and whatever force they might have when applied to an ordinary case of hire, they can have no application where the consideration for the employment is paid, partially at least, as it was here, in advance. Suppose that, instead of the release executed by the appellee, he had paid the appellant \$500 in cash, in consideration of which the latter had agreed to employ the former as a flagman in its yards, during his life, at the rate of \$2 per day. Could it be held that the want of mutuality would entitle the appellant to keep the \$500, and after a few months of employment and without any fault on his part, discharge him? We think not. There is no want of mutuality in such a case. The appellee has parted with value and the appellant owes him a reciprocal obligation, and that is to furnish him work at stated wages to enable him to make a living, or partly so. There is no difference in principle between the case supposed and the one in hand. Here the appellee has relinquished a claim against the appellant that had a certain value. He has placed it beyond his power to recover upon that claim, and the appellant has received a corresponding benefit."

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Where an employee, in consideration of an agreement on the part of the employer to give him work so long as he is able to perform it, releases a claim for damages said to have been caused by the employer's negligence, the agreement is not void for want of mutuality. On the one hand the employee, by releasing his claim, pays in advance for an optional contract, and acquires the right that it shall remain optional with him how long he shall continue to work. On the other hand, the employer undertakes the reciprocal obligation of furnishing the employee with work as long as he is able to perform it. *Smith v. St. Paul & D. R. Co.* (1895) 60 Minn. 330, 62 N. W. 392.

Where an employee, in consideration of an agreement on the part of the employer to give him work as long as he gives satisfaction to the foreman or superintendent under whom he works, releases his claim for damages for said injury, there is no lack of certainty or mutuality in the agreement, for all its terms are settled, and by releasing his claim for damages the employee has paid in advance for the option to perform such work for his employer as he is able to do. *Rhoades v. Chesapeake & O. R. Co.* (1901) 49 W. Va. 494, 55 L.R.A. 170, 87 Am. St. Rep. 826, 39 S. E. 209.

In *Carter White Lead Co. v. Kinlin* (1896) 47 Neb. 409, 66 N. W. 536, relying upon the general principle that a contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other party," it was held that a contract to employ an injured employee as long as the employer's business is carried on cannot be impugned for want of mutuality, merely because it binds the employer to furnish employment for a definite or an indefinite period, not depending on his own volition, and at the same time gives the servant the option of releasing himself from the contract whenever he sees fit. In the same case it was held that want of mutuality could not be predicated on the ground that the employee was not shown to have had an enforce-

As a general rule, the adequacy of the consideration received by an injured servant for releasing his claims will not be inquired into.⁹ But this rule is subject to an exception where inadequacy is relied upon as one of the probative facts tending to establish fraud, undue influence, or coercion.¹⁰

With regard to the general question whether consideration other than that recited in a written release can be proved there is, as the text-books show, a conflict of opinion.¹¹ That conflict is reflected in the cases cited below.¹²

able claim for damages. As to the principle here applied,—that a compromise of litigation is a good consideration,—see generally, 1 Chitty, Contr. 29; 1 Parsons, Contr. *467.

The same principle was applied in another case in which it was held that an agreement by which the plaintiff was to be given employment for so long a period as he might desire, in consideration of his releasing the company from liability, was not wanting in mutuality, although there was no reciprocal promise binding the servant to serve the employer. *East Line & R. River R. Co. v. Scott* (1888) 72 Tex. 70, 13 Am. St. Rep. 758, 10 S. W. 99.

A contract providing that, in consideration of regular wages during disability, necessary nurse hire, and all doctor's bills, resulting from present disability, and employment when recovered, plaintiff released defendant from liability for the injury, was signed and acknowledged by plaintiff alone. Held, that this contract, having been accepted and acted on by defendant, was binding on both parties, though it did not, in terms, contain a promise by defendant to pay the consideration specified. *American Quarries Co. v. Lay* (1905) 37 Ind. App. 386, 73 N. E. 608.

An agreement by a corporation to employ a person at a stated salary as long as its business continues, provided he discharges his duties efficiently, and continues to hold in his own name a specified amount of the capital stock, is supported by mutual consideration on both sides. Here, if the servant disposes of his stock, the employer suffers a loss, while, if the employer ceases doing business, the servant is injured. *McMullan v. Dickinson Co.* (1896) 63 Minn. 405, 65 N. W. 661, 663.

⁹ *Lease v. Pennsylvania Co.* (1893) 10

Ind. App. 47, 37 N. E. 423; *Lumley v. Wabash R. Co.* (1895; C. C. E. D. Mich.) 71 Fed. 21 (consideration in this case was proved to have been wholly inadequate).

An employee who had been injured executed a release of his right to sue for damages "for and in consideration of the re-employment" of the servant "for such time only as may be satisfactory to" the employer. Held that, though agreement to re-employ was vague and indefinite in duration, it constituted a sufficient consideration for the release. *Forbs v. St. Louis, I. M. & S. R. Co.* (1904) 107 Mo. App. 661, 82 S. W. 562.

In *Bartlett Oil Mill v. Capps* (1909) 54 Tex. Civ. App. 354, 117 S. W. 485, an action on a contract made in settlement of a servant's claim for injuries, evidence that plaintiff was injured while at work for defendant, that defendant's manager proposed the settlement, and that plaintiff, believing that he had a cause of action, in good faith accepted the proposition, was held to be sufficient to show a consideration, though there was no evidence that the injuries were due to defendant's negligence.

For a general collection of the authorities for the doctrine that a contract is binding, even though the consideration is inadequate, see 1 Parsons, Contr. **473 *et seq.*

¹⁰ See, for example, *Mitchell v. Pratt* (1841) Taney, 448, Fed. Cas. No. 9,668 (release of a seaman who had been assaulted by the master of his ship, set aside on the ground of coercion); *Louisville & N. R. Co. v. Helm* (1905) 121 Ky. 645, 89 S. W. 709 (fraud); *Keller & B. Co. v. Berry* (1909) — Ky. —, 121 S. W. 1009 (fraud).

¹¹ See 1 Parsons, Contr. *430.

¹² In *Jackowski v. Illinois Steel Co.*

The plea that an agreement by a company to furnish an injured servant with employment for life, in consideration of his giving a release for his claim for damages, was *ultra vires*, cannot be set up as a defense to an action on the agreement, when the defendant has already had the full benefit of that agreement.¹³

1933. Servant's ignorance of the character and contents of the instrument signed by him.—The principle upon which some decisions proceed is that, where there is no suggestion of fraud, and the serv-

(1899) 103 Wis. 448, 79 N. W. 757, where the written release purported to be in consideration of a specified sum therein stated to have been received in full payment and satisfaction of the servant's injury, it was held that evidence of a further consideration was not admissible, unless the validity of the release should be attacked on the ground of fraud or mistake.

In *Atchison, T. & S. F. R. Co. v. Vanordstrand* (1903) 67 Kan. 386, 73 Pac. 113, it was laid down that when a contract, not tainted by fraud, and full and complete in its terms, unambiguous, reasonable, and plain, contains no agreement regarding the future employment of the releasor, parol evidence that an agreement of that description was made in the negotiations which preceded the execution of the release is not admissible, even though it is alleged that the agreement was the inducing motive for executing the release.

In *Harrington v. Kansas City Cable R. Co.* (1895) 60 Mo. App. 223, the doctrine stated was, that a recited consideration may be varied by parol, unless the release indicates that the consideration itself was intended by the parties to be the subject of a specific agreement.

In *Maloney v. Hudson River R. Co.* (1909) 133 App. Div. 499, 117 N. Y. Supp. 601, it was laid down that, although a written release purports to have been executed in consideration of the payment of a certain sum, it is competent to show by parol evidence that the employer also undertook, as a part of the consideration, the obligation of supporting the employee for so long a period as his injuries should render him physically unable to care for himself.

In *White v. Richmond & D. R. Co.* (1892) 110 N. C. 456, 15 S. E. 197, it was laid down that, in order to make good a claim based upon the existence of an additional consideration besides

the one expressed in a written release, the employee must show by specific evidence that there was such a consideration; otherwise the words of the writing will be regarded as being fatal to his claim. The whole consideration of a settlement was held to be presumably embraced in an instrument by which an injured employee, "in consideration of" a specified sum, released his employers "from all claims upon them for damages received," and "from any further liability or care of him on account of the accident." It was accordingly decided that, as it had not been made to appear that the whole consideration was not embraced in the release, he could not recover the balance of a sum claimed to be due as compensation for services rendered after the accident, under an alleged contract for employment for life.

An injured servant executed a written contract whereby, in consideration of \$20 and the payment of \$1.50 per day during the time he was confined to the house, he released his employers from all liability for the injury. He sought to avoid this contract by showing that the real inducement to execute it was a contemporaneous agreement by the employers to pay his doctor's bill, and to employ him at \$1.50 per day for the rest of his life. As the only testimony with regard to the agreement was that of himself and his wife, and was contradicted by the evidence of two other employees, the court refused to reform the written contract on the theory that the agreement had actually been made. *Ogden v. Philadelphia & W. C. Traction Co.* (1902) 202 Pa. 480, 52 Atl. 9.

¹³ *Usher v. New York C. & H. R. R. Co.* (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, where the company had retained the servant in the stipulated position until his original right of action for the injury had been barred by the statute of limitations.

ant did not ask to have the given release read to him before he signed it, he cannot repudiate it on the ground that it was not read to him, and that he was under the impression that it was a different kind of an instrument. The broad position taken in this point of view is that he had the opportunity to ascertain the contents of the paper, and that it was his own fault if he did not know its purport.¹ On the other hand, it has been laid down without any qualification that, where a servant signs a release, believing it to be a document of some other description, and the question of settlement is not mentioned at the time when his signature is affixed, the release is invalid, as being obtained by fraud or mistake.² Between these extreme doctrines lies that which is indicated by several cases, the rationale of which is, that a positive obligation on the employer's part to make known and explain the contents of the release when it is tendered is predicable or not predicable, according as he has or has not notice, actual or constructive, that the servant is illiterate, either absolutely, or as regards the language in which the document is drawn.³

¹ *Leddy v. Barney* (1885) 139 Mass. 394, 2 N. E. 107 (servant supposed he was signing merely a receipt for money given as a gratuity to pay certain expense; report states that he was a common laborer, but does not describe him as illiterate); *Jossey v. Georgia S. & F. R. Co.* (1899) 109 Ga. 439, 34 S. E. 664 (document supposed to be merely a voucher for the time lost by the servant while he was disabled).

² *Louisville & N. R. Co. v. Crutcher* (1909) 135 Ky. 381, 122 S. W. 191. The duty of a servant to read a document which he signs, or to ascertain its purport by inquiry, was not adverted to, nor does it appear from the report that any active steps were taken to give him a false impression regarding the nature of the document, or that his physical condition was such as to prevent him from understanding its import. The failure of the court to take account of these material elements renders the decision an unsatisfactory one, and it would scarcely be treated as authoritative outside of the jurisdiction in which it was rendered.

³ In a case where defendant relied on a release drawn in the English language and executed by plaintiff, who understood only Slavonic, the execution of the release was procured by the English-

speaking secretary of the corporation, who knew no Slavonic. A fellow countryman of the servant, in the same employment, was, without objection by the servant, called in to interpret, and through him the secretary undertook to make known the purport of the instrument presented for execution. Held, that the interpreter must be considered the agent of defendant, and that, if the purport of the instrument was not adequately imparted to plaintiff, it was not a valid release. *Burik v. Dundee Woolen Co.* (1901) 66 N. J. L. 420; 49 Atl. 442.

A receipt for wages, given by an illiterate employee, will not release the employer from liability for an injury caused by the latter's negligence, although the words "in full for services and damages," are written thereon, where the employee did not understand that such receipt was to be a release of damages. *Whitney & S. Co. v. O'Rourke* (1898) 172 Ill. 177, 50 N. E. 242, affirming (1896) 68 Ill. App. 487.

In *Robertson v. Fuller Constr. Co.* (1905) 115 Mo. App. 456, 92 S. W. 130, plaintiff, a laborer engaged on a building, testified that, before he was injured, several other men had been hurt; that he understood that the defendant aided them until they were able to work; that,

Irrespective of whether the servant was or was not capable of reading and understanding the releasing instrument, he is, as a general rule, not bound by it in any case where active steps, by way of misstatement or otherwise, have been taken to deceive him with regard to the character of the document which he is asked to sign. Under such circumstances his ignorance of its contents is ordinarily deemed to be excusable, even though the means of ascertaining the truth may have been accessible to him.⁴

being without money, he sent his wife to defendant to see if he would help him; that the following day defendant's representative gave him \$10.50, asking him to sign a receipt for it; that the paper was not read to him, nor was he advised of its contents; that the representative simply said: "Here, I want you to sign this receipt," putting his finger on the mark where plaintiff was to sign; that it was too dark in the room to see without a light, and that plaintiff did not and could not read the paper, but signed it, believing it to be merely a receipt for part wages until he was able to work. Held, that fraud in the procurement of the release might properly be inferred.

In *Spitze v. Baltimore & O. R. Co.* (1892) 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307, the facts that the servant could not read English, that the releases which he signed were not read to him, and that he did not understand their meaning, were held not to constitute a sufficient reason for avoiding them, as having been fraudulently obtained, no evidence having been adduced to show that the defendant's agents had notice that he could not read the documents, or that he did not comprehend their nature and legal effect. The court was of opinion that, under such circumstances, carelessness on the part of the servant, not fraud on the part of the employer, was inferable. The servant, it was declared, "cannot invoke his own heedlessness to impeach his solemn release, and then call that heedlessness someone else's fraud. If he did not know what he was signing, it was his plain duty to inquire. He had no right to act as one who understood what he was doing, unless he intended to lead those with whom he was dealing to believe that he did understand the act that he did."

⁴ *Illinois C. R. Co. v. Welch* (1869) 52 Ill. 184, 4 Am. Rep. 593 (declared

to be a question for the jury whether the servant had been induced to sign the release by representations that it covered merely a month's time or wages); *National Syrup Co. v. Carlson* (1892) 47 Ill. App. 178, affirmed in (1895) 155 Ill. 210, 40 N. E. 492 (document not read over to a servant who could not read English, and was led to believe that its purpose was merely to show how certain sums given him while he was disabled were expended); *Louisville & N. R. Co. v. Crutcher* (1909) 135 Ky. 381, 122 S. W. 191 (release signed on representation that it was for wages due him); *Vaillancourt v. Grand Trunk R. Co.* (1909) 82 Vt. 416, 74 Atl. 99 (release from liability for severe injuries, on payment of small sum, signed upon a false statement that it was a gift); *Mensforth v. Chicago Brass Co.* (1910) 142 Wis. 546, 135 Am. St. Rep. 1084, 126 N. W. 41, 512 (release signed on representation that money paid was a mere gratuity); *Pioneer Cooperage Co. v. Romanowicz* (1900) 186 Ill. 9, 57 N. E. 864, affirming (1899) 85 Ill. App. 407 (employee was illiterate and had been led to believe that the instrument signed by him was executed merely for the purpose of procuring a physician); *Cleary v. Municipal Electric Light Co.* (1892 Sup. Ct.) 47 N. Y. S. R. 172, 19 N. Y. Supp. 951, affirmed in (1893) 139 N. Y. 643, 35 N. E. 206 (release signed upon a false statement that the document was merely a receipt for wages).

In *Christianson v. Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640, the question whether there had been an accord and satisfaction was held to be for the jury where the evidence showed that the injured servant was quite an ignorant man, and that his intellect was naturally weak, and had been impaired by his injuries, that he had been told that the employer was giving the money in question "because he was

poor," and "out of kindness," and he thought the paper was merely a receipt for that money. The court laid down the general rule that "a settlement of a controversy cannot be avoided because of a mistaken conception of its effect by one of the parties, unless it is shown that he was induced to agree to it by some act of the other party which would amount to a fraud upon his rights."

For a general discussion of the English cases regarding the effect of a misrepresentation concerning the character of the document signed, see Pollock, *Contr.* ** 413 *et seq.*

An employee was sent by a railway company to its hospital for treatment, and while there was asked by the hospital clerk to sign his discharge from the hospital. The body of the instrument was covered by another paper, and, though plaintiff could read, he signed the paper at the place indicated by the clerk without reading it, and the same proved to be a release of his claim for damages against the company for his injuries. Held, that such evidence was sufficient to sustain a finding of fraud in procuring the execution of the release. *International & G. N. R. Co. v. Harris* (1901) — Tex. Civ. App. —, 65 S. W. 885 affirmed in (1902) 95 Tex. 346, 67 S. W. 315.

Where plaintiff was injured and his employer gave him a nominal sum, exacting from him a release, which plaintiff, who could not read English, signed, on what he alleged were fraudulent representations of defendant's agent, a finding of the jury that the release was obtained by fraud was held to be sustained by the evidence. *Schus v. Powers-Simpson Co.* (1902) 85 Minn. 447, 69 L.R.A. 887, 89 N. W. 68.

In *O'Neil v. Lake Superior Iron Co.* (1886) 63 Mich. 690, 30 N. W. 688, the court said: "It is not the intention, but the effect upon the plaintiff of what was said and done at the time the paper was signed, that is material here; for if the effect was to lead him to believe that he was signing a mere receipt, and call his attention away from the fact that he was signing so important a paper as an agreement for a release of defendant from liability, the result would be the same,—he was deceived as to the true character of the paper he was signing. He testifies that he did not know that he was signing, and did not intend to sign,

an agreement to release defendant from liability arising from its negligence."

In *McCall v. Toxaway Tanning Co.* (1910) 152 N. C. 648, 68 S. E. 136, it was held that if an injured employee is induced to sign a release by false and fraudulent representations on the part of the agent of the employer, to the effect that it is a receipt to enable the agent to obtain certain insurance and has no bearing on his claim for damages, the release is void, regardless of the employee's mental and physical condition at the time.

In *Hot Springs R. Co. v. McMillan* (1905) 76 Ark. 88, 88 S. W. 846, where the settling agent of the defendant company had substituted the release in question, it was held that a verdict for the plaintiff was proper, as the evidence tended to establish the contention of the plaintiff that the alleged release was fraudulent, and that when he signed it, he did so under the impression that he was signing a receipt for money which was due, and which the company had paid; not as a part consideration for the release, but in pursuance of its custom to continue paying the wages of servants while they were disabled.

In *Vaillancourt v. Grand Trunk R. Co.* (1909) 82 Vt. 416, 74 Atl. 99, in an action by a brakeman against a railroad company for injuries resulting in the loss of both his legs, the defense was a sealed release, signed by plaintiff, which purported to discharge defendant from all liability for \$150, but which as plaintiff asserted was obtained by the fraudulent representation of the claims agent that the money was a gift, and that the alleged release was only a receipt therefor. Held, that evidence to the effect that, before he signed the release, he had consulted a lawyer, who advised him that he apparently had a good case against the company, was competent, as bearing upon the question whether he understood at the time when he signed the release, that he was discharging the company from all liability.

In the absence of specific evidence that false or fraudulent representations were made with regard to the document signed, or that its true nature was concealed from the servant, an illiterate man, an instruction stating the legal effect of such evidence is error. *St. Louis Southwestern R. Co. v. Demsey* (1905) 40 Tex. Civ. App. 398, 89 S. W. 786.

In 34 Cyc. 1060, a large number of

1933a. Servant's mental and physical condition at the time when the releasing instrument was signed.—The doctrine upon which several cases proceed is that fraud sufficient to invalidate a release is predicable whenever it is shown that the releasor, by reason either of a naturally weak understanding, or of a temporary mental incapacity produced by his injury, was incompetent to form an intelligent opinion regarding his legal rights in the premises, or to appreciate precisely the consequences of the transaction.¹ If we advert to the

cases are cited in support of the general doctrine formulated with regard to releases; *viz.*, that, if the releasee or his agent induces the releasor to sign the release without reading it, and to rely upon his statement of its contents or effect, and such statement is fraudulent, the releasor may avoid the instrument. But it is observed that, in nearly all these cases, the releasor was either illiterate or incapable of reading the paper signed, and that, according to some of the authorities, a releasor cannot avoid his release on the ground of fraud, where, being able and in a condition to read and understand the paper for himself, he relies on the statement of the agent of the releasee as to its contents.

¹*Colorado City v. Laife* (1901) 28 Colo. 468, 65 Pac. 630 (effect of injury in this case had been aggravated by the administration of narcotics. Jury found that releasor did not know what he was doing); *Christianson v. Chicago, St. P. M. & O. R. Co.* (1896) 67 Minn. 94, 69 N. W. 640 (question whether there had been an accord and satisfaction was held to be for the jury, the evidence being conflicting, but tending to show that the servant was an illiterate man, who was also intellectually weak, and that his brain had been affected by the accident); *Bliss v. New York C. & H. R. R. Co.* (1894) 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65 (plaintiff testified that his mind was "dazed and rattled" when he signed the release); *Butler v. New England Structural Co.* (1906) 191 Mass. 397, 77 N. E. 764 (question whether plaintiff understood what he was doing held to be for jury upon evidence which is not stated in the report); *Erickson v. Northwest Paper Co.* (1905) 95 Minn. 356, 104 N. W. 291 (jury warranted in finding fraud, where a release given by a father in respect of injury caused by his son's death was

procured at a time when he was prostrated with grief).

In *Keller & B. Co. v. Berry* (1909) — Ky. —, 121 S. W. 1009, the injured servant was "a poor, ignorant negro, uneducated and unused to the English language, and unable to speak it with any degree of clearness. He had a terrible wound on the top of his head, his leg was broken in two places, his foot was crushed, and a number of his teeth were knocked out." The court remarked that a settlement, attested by a receipt in full, the consideration of which was only \$50, would not be enforced against such a person except on the clearest proof that it had been freely made and fairly obtained. It was held that the evidence in the record fully justified the jury in disregarding the agreement.

In *Louisville & N. R. Co. v. Helm* (1905) 121 Ky. 645, 89 S. W. 709, where the release was found to have been induced by fraud, the court observed that the jury "no doubt took into consideration the circumstances surrounding the parties and the transactions between them. The one party being an ignorant and probably unsuspecting negro, confined to his bed with a wounded leg, having neither relation, friend, or counsel near to advise him of his rights or caution him against imposition; the other represented by a shrewd and zealous agent, ready to do what he could to advance the interests of his employer. This inequality of the parties, the gross inadequacy of the sum paid in settlement, the helplessness of appellee, his inability to resist importunity, and the persistency and haste with which appellant's agent forced the settlement upon him, were all circumstances that doubtless had great weight with the jury."

A release from liability for personal injuries, executed by a minor who was ignorant of the English language, and was called into defendant's office and his

shameless brutality with which the claim agents of large corporations are wont to force their way even to the bedside of the injured and press them to make a settlement, and also bear in mind the natural unwillingness of a servant to act at such time in a manner calculated to diminish his chances of future employment, it seems to be putting the matter somewhat mildly to say that the evidence should, in cases involving such circumstances, be construed liberally in favor of the servant.²

1934. Servant's mistake of law.—a. Mistake regarding the extent of his remedial rights.—On the ground that the presumption that everyone is presumed to know the law “disappears entirely in the face of a positive representation of what the law is, and upon the truth and good faith of which reliance is placed,” it has been held that a release is not binding upon a servant who was led by the statements of his master to believe that, under the given circumstances, he had no right of action.¹

signature to a release obtained, there being no interpreter or other person or friend of plaintiff present, is properly held invalid. *Simeoli v. Derby Rubber Co.* (1908) 81 Conn. 423, 71 Atl. 546.

In *Douda v. Chicago, R. I. & P. R. Co.* (1909) 141 Iowa, 82, 119 N. W. 272, it was held that evidence that plaintiff and the members of his family present at the time when the agent for the defendant secured his signature to an instrument of release were unable to read the English language was admissible. On the facts, however, it was found that plaintiff did understand the terms of the contract.

See also *Union P. R. Co. v. Harris* (1895) 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, affirming (1894) 12 C. C. A. 598, 27 U. S. App. 450, 63 Fed. 800,—a case involving a passenger's release.

² In *Bramble v. Cincinnati, F. & S. E. R. Co.* (1909) 132 Ky. 547, 116 S. W. 742, it was pertinently remarked by the court: “These day-after-the-accident settlements, made by corporation agents with injured employees, are not looked upon with favor by the courts. The transaction on its face has too often the appearance of overreaching and undue advantage. The parties are not on an equality. They are not dealing at arms' length. An injured employee, confined to his bed, suffering with pain, unacquainted with the full extent of his in-

juries, and not knowing how long he will be incapacitated to labor, and frequently in urgent need of money to defray the necessary current expenses of himself and family, is not in a condition to cope intelligently with an adroit, experienced, and plausible claim agent.” See also *Law-Fos Co. v. Rowlett* (1911) 144 Ky. 690, 139 S. W. 836.

¹ *O'Neil v. Lake Superior Iron Co.* (1886) 63 Mich. 690, 30 N. W. 688. There the defendant company, which had organized a club for the benefit of sick and injured servants, had stated in posters that “all employees assume their own risk of accidents or illness, from whatever cause.” It was laid down that an injured person who had contributed to the benefit fund, and who could only secure the right to share in it by signing the required agreement to release the employing company from all liability caused by negligence for which it would legally be liable, was not bound by the agreement, unless it appeared that he had knowledge both of the company's negligence and of its legal liability therefor, and fully understood that by signing the agreement he was releasing it from liability. The court observed that the assertion in the poster was an incorrect affirmative statement of what the law is, made to a class of persons ignorant of what the law is, and who might justly rely upon the truth of the representation made. It

b. Mistake regarding the legal effect of the release.—The general rule is that, where an injured person has signed a release, after acquainting himself with its contents, the fact that he misapprehended its legal effect will not of itself entitle him to have it set aside.² It

may be doubted, however, whether every court would accept the proposition that even ignorant and illiterate servants are always entitled to trust the statements of their employer with respect to a point of law.

² In *White v. Richmond & D. R. Co.* (1892) 110 N. C. 456, 15 S. E. 197, it was held that it was not enough for the servant to aver that the release was executed under a mistaken impression that it did not extend to a certain accessory agreement by which he was promised employment for life. In order to procure the submission of the question of mistake to the jury, it was necessary for him to allege also that the mistake was caused by surprise, fraud, or the like.

Denver & R. G. R. Co. v. Sullivan (1895) 21 Colo. 302, 41 Pac. 501. There the releasor, an employee of a railway company which had the right to operate its trains on the track of another company, was injured owing to a defect in that track, and was induced to release his employers by the assertion of their superintendent that only the company which owned the track was responsible for his injury. Held, that this misstatement did not entitle the injured person to repudiate the release although the real situation was that both companies were liable to him, and the effect of the release was to discharge both of them. It was considered that the misstatement was merely the expression of an opinion, and that there was nothing in the relationship between the superintendent and the releasor that would imply undue influence, or that should have induced him to accept without question what he had said.

In *Gipe v. Pittsburgh, C. C. & St. L. R. Co.* (1907) 41 Ind. App. 156, 82 N. E. 471, the widow of a member of a relief association, after having signed a release in her individual name, was also required to sign as administratrix; and when she asked the reason for this demand, she was informed by the agent in charge that it was necessary to sign both as widow and as administratrix;—that the instrument presented for her signature “was just a mere form to get

the \$750;” “was a form that they would have to go through to get the \$750;” and that “everything was all right.” She then signed as administratrix, after having informed the agent that she did not know what they would do in the future with reference to decedent's death. She was a woman of ordinary sagacity and ability, and was able to read and learn that the legal effect of the paper was to release the railroad company from liability for her husband's death. Commenting upon the evidence relied upon to support the charge of fraud, the court said: “Three rational inferences only could have been drawn from Eddy's statements: (1) His opinion as to the legal effect of the instrument; (2) a statement of a fact regarding a form of release the company required to be signed before paying the money; (3) ‘everything is all right,’ meaning that the release would not affect the rights of the children, and was a form necessary to get the money. Admitting that the first and third inferences were misrepresentations as to the legal effect of the instrument, they would not amount to a legal fraud. *Burt v. Bowles* (1879) 69 Ind. 1; *Fry v. Day* (1884) 97 Ind. 348; *Mullen v. Beech Grove Driving Park* (1878) 64 Ind. 202, 207. In *Clem v. New Castle & D. R. Co.* (1857) 9 Ind. 488, 489, 68 Am. Dec. 653, it is said: ‘As a general rule, a party who has been induced to execute an agreement by reason of the fraudulent representations of the other party may set up such representations in bar of an action on the agreement. But this rule is subject to various exceptions; and one of them occurs when the representations, though false, relate to the legal effect of the instrument sued on. Every person is presumed to know the contents of the agreement which he signs, and has therefore no right to rely on the statements of the other party as to its legal effect.’ As to the second inference, if the company had actually adopted the form of release presented to appellant to sign, and there is nothing to the contrary, such representation was not untrue, and consequently not fraudulent.”

may be observed, however, that the facts involved in the cases controlled by this rule sometimes approach somewhat closely to those presented by cases in which error is viewed as an element excluding true consent to the contract embodied in the given instrument.³

1935. Servant's mistake of fact in respect of the extent of his injuries. General rule.— According to one theory, a release expressed in general words covering claims or demands in respect to all the damages that have accrued or may accrue to the releasor by reason of the accident which caused his injury cannot be repudiated by him on the mere ground that, when he executed it, he was mistaken with regard to the actual extent of his injuries. This doctrine has been deemed applicable both to cases where the clause of this tenor is preceded by another which particularizes a certain injury,¹ and to cases in which there is no such specification of an injury.² On the

³ In *Lee v. Lancashire & Y. R. Co.* (1871) L. R. 6 Ch. 527, 25 L. T. N. S. 77, 19 Week. Rep. 729, the theory of the plaintiff (a railway passenger) was that the receipt he had given for a certain amount, although on its face it purported to be a complete release, was, according to the real understanding of the parties, to be applicable only in respect of the injuries then known to have been sustained, and that he was to have a further amount if it should turn out that his injuries were more serious than was supposed. The court was of opinion that the statement in the receipt could be rebutted by evidence showing that the money specified was not accepted in full satisfaction of all demands. It was also stated by James, L. J., *arguendo*, that it might be open to the plaintiff to say that, if the receipt given did exclude him from further compensation, he had a right to have it set aside, because he had given it under a mistake produced by the representations of the company's agent that it could not so exclude him from further compensation.

¹ *Quebe v. Gulf, C. & S. F. R. Co.* (1904) 98 Tex. 6, 66 L.R.A. 734, 81 S. W. 20, 4 Ann. Cas. 545, affirming (1903) — Tex. Civ. App. —, 77 S. W. 442. The *ratio decidendi* was that "no ordinary release relating to only one cause of action should be construed as splitting it up, unless the purpose is expressed in its language."

² In *Houston & T. C. R. Co. v. McCarty* (1901) 94 Tex. 298, 53 L.R.A. 507, 86 Am. St. Rep. 854, 60 S. W. 429, the em-

ployee appeared to have sustained no other injury than a dislocation of the ankle, and it was shown by the evidence that no other injuries were discussed by the parties to the settlement, or formed any part of the consideration for the agreement, and that neither the employee nor the employer's agent knew or suspected the existence of any other injury. Afterwards it was discovered that the employee had received injuries which would practically destroy his usefulness for the remainder of his life. The court said: "We are unable to see any circumstance in this case to take the release out of the general rule. The appellee, who was plaintiff in the court below, had at least the same knowledge and the same means of obtaining knowledge as the appellant, and if there was no fraud in the transaction, the settlement was binding upon him. That where a party who has a claim against another for personal injuries agrees upon a settlement of his claim, and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded by the settlement, is a proposition sustained, as we think, by the great weight, if not by an unbroken line, of authority. . . . Here no particular injuries are mentioned. The release is of all damages which have accrued or which may accrue to the plaintiff by reason of the accident in which he was injured. Here, then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of

other hand, the position has been taken that, where a release enumerates certain injuries known and considered as the basis of the settlement, the fact that general language follows the particular specifications will not justify the inference that the release is applicable to a subsequently discovered injury, unknown to both parties when the document was signed, and so serious as to indicate clearly that, if it had been known to the servant, the release would not have been executed.³

The doctrine that a release of all claims and rights of action arising out of the injuries in question does not, as a matter of law, cover an unknown injury, also has been affirmed in a case where no injury was expressly mentioned in the instrument.⁴ Of these opposing views the latter seems to be decidedly preferable, as being more in harmony with the fundamental principle that, in construing a contract, the intention of the parties is the controlling element.

1936. Same subject further discussed. Mistake produced by misrepresentation on the part of the employer or his agent.—a. Innocent misrepresentation.—There is much conflict of opinion concerning the extent to which the rights and liabilities arising from a contract are affected by the circumstance that it was induced by an innocent misrepresentation made by one of the parties with regard to a ma-

such an instrument it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries has been clearly developed, they may be more or may be less than appearances would indicate, and therefore in every settlement of the character of that under consideration, the parties take the chances of future development,—the one of paying more than an adequate compensation for the wrong inflicted, and the other of receiving less."

The above case was followed in *Chicago, R. I. & T. R. Co. v. Williams* (1906) 44 Tex. Civ. App. 168, 99 S. W. 141 (both parties mistaken as to the length of time that the disability of the employee would continue); *San Antonio & A. P. R. Co. v. Polka* (1910) 57 Tex. Civ. App. 626, 124 S. W. 226.

For a general collection of authorities with regard to the scope of a release in respect of matters not specifically mentioned in it, see 34 Cyc. 1092.

³ *Lumley v. Wabash R. Co.* (1896) 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, a case where the injured person was a drover in charge of cattle on a railway train. The court said: "If the terms of the release are so broad and comprehensive as to embrace a distinct and independent injury, not known or considered by the parties to the release, it will be most inequitable that it should stand as an impediment to the recovery of just compensation therefor." The two distinct grounds upon which the court declared that relief might be justified in such a case are stated in § 1936, note 2, *post*.

⁴ *Shook v. Illinois C. R. Co.* (1902) 52 C. C. A. 651, 115 Fed. 57, where it was held that the question whether an injury was within the contemplation of the parties should have been left to the jury.

terial fact.¹ This conflict of opinion is reflected in the cases which involve the effect of releases executed by injured persons.²

¹ See Page, Contr. §§ 149-153.

² See 34 Cyc. 1059, for general collection of such cases. Some decisions regarding servants are cited below.

In *Lumley v. Wabash R. Co.* (1896) 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66, the court held that the annulment of the given release was justifiable on two grounds "First. If the existence of this injury was known or suspected by the surgeon of the defendant, it was his duty, under the facts stated in this bill, to have informed Lumley of the trouble. To say to him that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud. To say that Lumley ought not to have trusted or relied upon his opinions or representations, knowing that he was in the service of the company against whom he had a claim, is no answer. On the facts stated he knew that a release was being bargained for upon the basis of his opinion as to the extent and character of the injuries complainant had received, and the probable time he would lose from his occupation by reason thereof. He was under strong obligation to give his honest opinion upon a matter of professional knowledge, upon which he had every reason to know this ignorant man was implicitly relying. Second. But if this surgeon honestly supposed the shoulder pain to be sympathetic, either because his examination had been superficial, or because he had made none, we would then have a case where a release is comprehensive enough to cover a matter or claim unknown to both parties, and was therefore not the subject of consideration. Equity relieves from mistakes as well as frauds. The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The sub-

sequent discovery by one giving such a release that he was worse hurt than he had supposed would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill; to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof."

This decision was followed in *Great Northern R. Co. v. Fowler* (1905) 69 C. C. A. 106, 136 Fed. 118. There plaintiff, a railroad brakeman, after being injured, was solicited by defendant's claim agent to make a settlement, and went with him to the office of defendant's physician, who, after an examination, either through mistake or to deceive complainant, minimized his injuries, and stated that he would be able to work in a week or two. Thereupon plaintiff, without other advice, was induced to sign a release of all damages and demands on account of his injuries, in consideration of payment of doctor's and nurse's bills and his wages for such period of time. Eventually, however, it was found that plaintiff was seriously injured, that a subsequent hazardous and delicate surgical operation on the skull was necessary, and that he would probably never be able to resume his avocation. Held, that the release was executed by mutual mistake of the parties, and was subject to vacation. The court said: "It is true that where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. . . . But it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby."

b. Fraudulent misrepresentation.—A release, the execution of which is induced by false representations wilfully and knowingly made, with respect to the nature and extent of the injuries, either by the employer himself or by an agent whose statements concerning the subject-matter are binding on him, will, of course, be treated as invalid.³ In most of the cases which involve the representations of

In *Houston & T. C. R. Co. v. Brown* (1902) — Tex. Civ. App. —, 69 S. W. 651, where the evidence tended to show that the employer's surgeon had incorrectly represented to the injured servant that he was cured, and that this statement had been made for the purpose of inducing him to execute the release, the court said: "We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart were a mere expression of opinion. It was more than an opinion,—it was the statement of a fact. The effect of his statement was that the appellee was a sound man, and that the bones of his arm had knitted together, and that it would be all right. It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement, and executed the release believing the statement was true. In such a case innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false."

The doctrine that a release executed by an injured servant in reliance upon the correctness of statements made by the employer's surgeon concerning his physical condition is no defense to an action for his injuries was also adopted in *St. Louis, I. M. & S. R. Co. v. Ham-bright* (1908) 87 Ark. 614, 113 S. W. 803.

On the other hand the position has been taken that a release should not be set aside where the statements of the defendant's surgeon regarding the extent of the injury were merely the expression of an honest, though mistaken, opinion. *Atchison, T. & S. F. R. Co. v. Bennett* (1901) 63 Kan. 781, 66

Pac. 1018; *Quebe v. Gulf, C. & S. F. R. Co.* (1904) 98 Tex. 6, 66 L.R.A. 734, 81 S. W. 20, 4 Ann. Cas. 545, affirming (1903) — Tex. Civ. App. —, 77 S. W. 442. The general principle relied upon in the former of these cases was that a concealment is not a ground for rescission unless it amounts to a wilful suppression of facts which the party in question is bound to disclose.

The reasons for sustaining the contract are, of course, especially strong where the employee had the advice of his own physician, and it does not appear that he relied upon the statement of the employer's agent. *Douda v. Chicago, R. I. & P. R. Co.* (1909) 141 Iowa, 82, 119 N. W. 272.

³ In *Stewart v. Great Western R. Co.* (1865) 2 DeG. J. & S. 319, 11 Jur. N. S. 627, 13 L. T. N. S. 79, 13 Week. Rep. 907, a release executed by a passenger was set aside on the ground that the defendant's settling agent had made misrepresentations as to the opinions given by medical men.

In *Hirschfeld v. London. B. & S. C. R. Co.* (1876) L. R. 2 Q. B. Div. 1, 46 L. J. Q. B. N. S. 94, 35 L. T. N. S. 473, the defense to an action by a passenger was that, after his accident, the plaintiff accepted money from the defendant's officer in satisfaction of his cause of action, and executed a release. The plaintiff replied that the defendants' officer procured him to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the defendants, and that the plaintiff was thereby induced to execute the deed, and that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated. Held, that the reply was good, as it contained a separate

agents, the servant's right of rescission has been affirmed without any intimation that a different rule might be applicable, according as the agent in question was or was not an active participant in the negotiations which preceded the settlement, and his representations were or were not made in the course of those negotiations. In a few decisions, however, the court proceeds upon the theory that these considerations may properly be treated as a ground of differentiation.⁴ It is submitted that such a position is essentially inconsistent

and independent statement that the plaintiff was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial and temporary character. Lush, J., had no doubt that a fraudulent representation as to the effect of a deed may be relied upon as a defense to an action upon the deed.

For other cases in which releases executed in reliance upon fraudulent representations by the employer's agents concerning the physical condition of injured servants were held to be invalid, see *Galveston, H. & S. A. R. Co. v. Cade* (1906) — Tex. Civ. App. —, 93 S. W. 124; *Texas & P. R. Co. v. Jowers* (1908) — Tex. Civ. App. —, 110 S. W. 946; *Southern R. Co. v. Nichols* (1910) 135 Ga. 11, 68 S. E. 789; *Great Northern R. Co. v. Kasischke* (1900) 43 C. C. A. 626, 104 Fed. 440; *Houston & T. C. R. Co. v. Brown* (1902) — Tex. Civ. App. —, 69 S. W. 651; *Texas & P. R. Co. v. Jowers* (1908) — Tex. Civ. App. —, 110 S. W. 946; *St. Louis, I. M. & S. R. Co. v. Hambricht* (1908) 87 Ark. 614, 113 S. W. 803.

In *Coles v. Union Terminal R. Co.* (1904) 124 Iowa, 48, 99 N. W. 108, employment had been given to a servant, voluntarily and without any reference to a release previously executed in consideration of a money payment. While he was at work he discovered that the release had been procured by fraud, but continued to perform services for two weeks, after which he was obliged to leave on account of illness. Held, that his retention of the employment and his acceptance of an entire month's wages had not estopped him from bringing suit to set aside the release for fraud. The grounds upon which the court proceeded were, that, in order to constitute a waiver of a right, the transaction relied on must

have relation to the principal subject-matter; that the settlement involved only the payment of money in consideration of the release; that the subsequent employment was wholly independent of the settlement; and that the sum paid when he left was to be regarded as merely compensation for the services rendered.

In courts where legal and equitable remedies are administered in different proceedings, the effect of a release given with a knowledge of the nature of the instrument cannot be impeached in an action at law for fraud which is not inherent in the execution thereof, but which goes only to the extent of the consideration. *Vandervelden v. Chicago & N. W. R. Co.* (1894) 61 Fed. 54, where the rule was applied in a case where the plaintiff was induced to sign the release by misrepresentations made by defendant's surgeon with regard to the permanent character of his injuries. The action, however, may be suspended while plaintiff brings an independent suit in equity to rescind the release for fraud.

⁴*Gulf, C. & S. F. R. Co. v. Huyett* (1906) 99 Tex. 630, 5 L.R.A.(N.S.) 669, 92 S. W. 454, reversing (1905) — Tex. Civ. App. —, 89 S. W. 1118. The court said "There is no evidence that the doctor knew of the interviews between plaintiff and the claim agent, or that a settlement was then being discussed between them; nor is there any evidence that the claim agent knew of the statement made by the doctor to the plaintiff, or that the doctor in any way acted with him in procuring or for the purpose of procuring a settlement. It may be conceded that the evidence sufficiently shows that Dr. Scott was an agent of the defendant in rendering services as physician and surgeon to its injured employees at the hospital, and that it lay within the scope

with the fundamental juristic principle, that no one shall be allowed to profit by another's fraud. That principle is certainly none the less controlling because the fraud of which a defendant seeks to obtain the advantage was committed by his own agent. In this point of view, the rule relied upon in the case cited, *viz.*, that an agent's representations which were not made at the time when the contract in question was entered into, or which had no relation to the subject-matter, are not binding upon his principal, would seem to be wholly irrelevant.

of his employment not only to treat them, but to advise them concerning the nature and duration of their injuries, and the probability of their recovery. It appears, also, to have been a part of his duty to give information on these subjects to the defendant's employees in its claim department. But, beyond this, he had no connection with that department, and nothing to do with making settlements and obtaining releases or in conducting negotiations therefor. The representation relied on to avoid the release, therefore, does not appear to have been made in the transaction in which the contract of settlement was made, nor by the agent authorized to represent the defendant therein; but, so far as the evidence indicates, it was disconnected from that contract, and made by an agent whose duties as agent had no relation to such matters. . . . According to this, if the representation relied on had been made by the agent who affected the settlement, but in a different transaction, it could not affect the rights of the principal under the contract. For a stronger reason is this true of a representation made not only in a different transaction, but by another agent having no authority in relation to or connection with the settlement. His statements have only the relation to the contract of settlement that those of a stranger would have, for the reason that in making them he did not represent the defendant with respect to the settlement. 5 *Thomp. Corp.* § 6324; *American Nat. Bank v. Cruger* (1898) 91 Tex. 451, 44 S. W. 278. The mere fact, therefore, that he was an agent of the defendant for some purposes does not make his representation available as a reason for avoiding a contract which he did not make. It is

true that if he, assuming to act for defendant, had procured the release, whether authorized to do so or not, and the defendant were seeking to avail itself of it as a defense, any fraud practised by him in obtaining it would be imputed to defendant. But a contract complete in all respects was made by defendant through its other agent, and hence the principle laid down in *Henderson v. San Antonio & M. G. R. Co.* (1856) 17 Tex. 560, 67 Am. Dec. 675, is not applicable, for the reason that the representation of an agent, not shown to have had connection with that contract, cannot be used to defeat it. It is also true that, if it were shown that defendant or its claim agent used the physician as an instrument to deceive plaintiff as to his condition in order that an advantageous settlement might be made, or that the claim agent and the physician acted together in so procuring the release, the contract would be affected by the physician's representations as fully as if he had been the only agent employed in the transaction. (*International & G. N. R. Co. v. Shuford* [1904] 36 Tex. Civ. App. 251, 81 S. W. 1189); and it may be that, if the claim agent in effecting the settlement knew and took advantage of the state of plaintiff's mind, caused by deception practised by the doctor, the result would be the same. But such things as this must be proved, and cannot be supplied by conjecture or suspicion."

In *Nelson v. Chicago & N. W. R. Co.* (1910) 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748, it was held that where an attending physician, although in the employ of the defendant, expressed a mistaken, but honest, opinion as to the period within which the injured person, suffering from a known

1937. Other elements bearing upon the validity of releases.—a. Public policy, contravention of.—In the cases cited below compromise agreements entered into by servants of railway companies, in consideration of their being given permanent employment, were unsuccessfully assailed on the ground that they contravened public policy.¹

b. Fraudulent intention of employer not to perform promise by which servant was induced to sign release.—A release the execution of which was induced by a promise of future benefits which the employer did not intend to perform will be treated as invalid,² especially if the case involves other elements which tend to prove that the injured servant was imposed upon.³

c. Insanity of servant.—The question whether a release should be avoided on the ground that the servant was insane when he executed it is obviously one of fact.⁴

injury, would recover, and where that expression of opinion, when made, had no connection whatever with a settlement, or with negotiations for a settlement, a release executed in reliance on his statement, under the circumstances here shown, was properly held valid.

¹ In *Jessup v. Chicago & N. W. R. Co.* (1891) 82 Iowa, 243, 48 N. W. 77, it was held that a contract to give an employee permanent employment upon a switch engine was not contrary to public policy, as binding the company to employ him even if incapable for services. The contract would not be construed as compelling the company to employ under such circumstances.

In *Pennsylvania Co. v. Dolan* (1892) 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802, it was held that an agreement to give an injured employee "steady and permanent" employment as long as he is able, ready, and willing to perform such services as the company may have for him to perform, will not be declared contrary to public policy, on the ground that the company, being a quasi public servant, cannot tie its hands by such an agreement. The court simply said: "The rights of the public cannot be in any manner impaired or made to suffer by holding the company to its contract," but remarked that, if the company intended to rely on the incapacity of the servant as a reason for escaping liability, that would be matter of defense, for the answer.

² *Rapid Transit R. Co. v. Smith*

(1905) 98 Tex. 553, 86 S. W. 322, reversing (1904) — Tex. Civ. App. —, 82 S. W. 788.

In *Illinois C. R. Co. v. Keebler* (1905) 27 Ky. L. Rep. 305, 84 S. W. 1167, where a release had been executed for a nominal consideration, the actual consideration being a promise to retain the releasor in the employment after he recovered from the effects of his injury, it was held that fraud justifying the avoidance of the agreement might properly be inferred from evidence which showed that he had been dismissed the day after he resumed work, and that his dismissal was effected in pursuance of a purpose conceived by the employer before the release was signed.

³ In *Simeoli v. Derby Rubber Co.* (1908) 81 Conn. 423, 71 Atl. 546, where the defendant had held out to the plaintiff, a minor, and his father, expectations regarding regular employment in the future, and both of them were discharged soon after they were put to work, it was held that these circumstances, coupled with the facts of the plaintiff's infancy and his ignorance of the English language, constituted sufficient reasons for treating the release as invalid.

⁴ Where the injury had produced a marked change in the temperament of a servant who had executed a release after his capacity for work had returned, and he had exhibited signs of mental derangement between the time when the injury was received and the

d. Minority of servant.—Undoubtedly the courts will closely scrutinize a contract purporting to release an employer for injuries to a minor.⁵

1937a. Ratification of voidable release.—The question whether a voidable release was ratified after its execution must be determined with reference to the general rules of the law of contracts. It seems to be established by the authorities that a ratification should be inferred as a matter of law, whenever the releasor, without any protest or reservation of rights, accepted the whole or a part of the stipulated consideration, after the circumstances which entitle him to repudiate the contract became fully known to him.¹ Acceptance of the agreed benefits while he was still ignorant of the invalidating circumstances will not preclude him from impugning the contract.²

1937b. Restoration of money received under the contract, how far a prerequisite to the servant's right of action for damages.—Under the general rule regarding releases, a servant who wishes to repudiate a settlement and sue for damages must in the first instance return or offer to return any money or other benefits which he may have received from his employer in pursuance of the contract.¹ But this

time when he was finally adjudged insane, three years afterwards, the question whether he was insane when he executed the release was held to be one for the jury. *Shook v. Illinois C. R. Co.* (1902) 52 C. C. A. 651, 115 Fed. 57.

For another case in which the insanity of the injured servant was an issue, see *Treadway v. Union Buffalo Mills Co.* (1909) 84 S. C. 41, 65 S. E. 934.

⁵ In *Robertson v. Henderson* (1904) 6 Sc. Sess. Cas. 5th series, 777, 41 Scot. L. R. 597, 12 Scot. L. T. 113, an agreement between the master and an injured minor servant, which fixed the latter's compensation in accordance with the rules of the compensation act of 1897, was set aside upon the ground that it was prejudicial.

¹ See generally Page, *Contr.* § 139; 34 Cyc. 1066.

² *Louisville & N. R. Co. v. Helm* (1905) 121 Ky. 645, 89 S. W. 709; *Bramble v. Cincinnati, F. & S. E. R. Co.* (1909) 132 Ky. 547, 116 S. W. 742. In the latter case, where the servant had, after executing the release, and while still disabled, been placed, at his own request, on his employer's pay roll, and received his wages, the court re-

jected the contention that, by thus demanding and receiving these wages, with the knowledge that they were paid in settlement of any claim for damages which he might have, and not on any other account, he had, as a matter of law, ratified the settlement, and was therefore estopped from impeaching it on the ground of fraud.

¹ *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 40 So. 394, 6 Ann. Cas. 804; *Bramble v. Cincinnati, F. & S. E. R. Co.* (1909) 132 Ky. 547, 116 S. W. 742; *Louisville & N. R. Co. v. McElroy* (1896) 100 Ky. 153, 37 S. W. 844; *Louisville & N. R. Co. v. Helm* (1905) 121 Ky. 645, 89 S. W. 709; *Treadway v. Union Buffalo Mills Co.* (1909) 84 S. C. 41, 65 S. E. 934; *Conrad v. Keller Brick Co.* (1907) 31 Ohio C. C. 700, judgment affirmed in (1909) 79 Ohio St. 461, 87 N. E. 1134; *Retzer v. Jacob Dold Packing Co.* (1894) 58 Mo. App. 264.

In *Lumley v. Wabash R. Co.* (1895) 71 Fed. 21, the court refused relief, although the servant's failure to tender back the amount received was caused by his poverty.

In *Treadway v. Union Buffalo Mills Co.* (1909) 84 S. C. 41, 65 S. E. 934,

rule is subject to an exception in cases where the ground upon which he seeks to invalidate it is that its execution was induced by a misrepresentation with respect to the contents and character of the document in question.² Nor does the rule require the plaintiff to return

where the consideration expressed in the given release was that the releasor was to receive certain sums and that the bills of his doctor and nurse were to be paid, a tender of the amount paid to the releasor himself, and an offer to pay the other amounts as soon as ascertained from the employer's agent, who had been requested to furnish information with regard to them, was held to be sufficient.

A tender of the amount received under the settlement is sufficient; interest from the time when that amount was received until the tender was made need not be included. *Louisville & N. R. Co. v. Helm* (1905) 121 Ky. 645, 89 S. W. 709.

In *Darnley v. Canadian P. R. Co.* (1908) 14 B. C. 15, the decision proceeded upon the ground that an infant employee who tenders back the consideration of a release signed by him may maintain an action for damages.

As to the necessity of restoring the consideration of a release before attacking its validity, see generally 34 Cyc. 1071 *et seq.*

²In *Cleary v. Municipal Electric Light Co.* (1892) 47 N. Y. S. R. 172, 19 N. Y. Supp. 951, affirmed in (1893) 139 N. Y. 643, 35 N. E. 206, where the employee testified that the money in question had been paid to him as wages, and that he had been asked to sign merely a receipt for such a payment, the position taken was that to the plea based upon the existence of the releasing contract it was a sufficient answer that, under the circumstances shown, there was no such contract. The fraud alleged did not consist in inducing the plaintiff to enter into the contract, but in a false statement as to the contents of the paper signed. The plaintiff, therefore, was not seeking to rescind the contract which, according to his testimony, had been made with him. It was conceded that if the plaintiff had admitted the compromise, or his execution of the release, but had claimed that he had been induced to make the compromise by fraud, duress, or imposition, he would have been bound to return the consideration received before he could maintain his

action. But his position was absolute denial that any such compromise had been made.

And in *Herman v. P. H. Fitzgibbons Boiler Co.* (1910) 136 App. Div. 286, 126 N. Y. Supp. 1074, citing the *Cleary Case*, it was held that where the fraud, if any, consisted in procuring the servant to execute an instrument of the contents of which he was ignorant, and not in getting his consent to a contract, he was not required to return the money in order to maintain the action.

For a case in which similar facts were involved and a similar decision rendered, see *St. Louis, I. M. & S. R. Co. v. Hambright* (1908) 87 Ark. 614, 113 S. W. 803.

In *McGill v. Louisville & N. R. Co.* (1902) 114 Ky. 358, 70 S. W. 1048, where defendant pleaded payment in full under a compromise agreement set forth, that a reply that this payment was the same as that admitted in the petition, and that the compromise agreement was signed by plaintiff at a time when he could not read, and under a false representation that it was a receipt for payment only for drug bill and loss of time, was held not to be demurrable for failing to tender repayment of the amount received.

In *Bramble v. Cincinnati, F. & S. E. R. Co.* (1909) 132 Ky. 547, 116 S. W. 742, plaintiff showed by his pleadings and evidence that, though he alleged the release to be fraudulent, it had been stated to him that the employing company had insurance on its employees, and that a release was needed to obtain the insurance money, and that they did get this money and presented it to him. Held, that a tender of the money was not a condition precedent to contesting the release, as the question of donation was involved, which, if the evidence sustained it, was for the jury. The court said: "It is only when the receipt is assailed upon the sole ground of fraud and misrepresentation is it necessary that the money received under the settlement should be tendered. If the person receiving the money asserts in an appropriate pleading that it was

amounts voluntarily paid, without any reference to the contract of settlement.³ Nor, of course, has the rule any relevancy in a case where it appears that, in point of fact, the release was given without any consideration,⁴ or that the injury for which damages are claimed was one distinct from that which the parties had in contemplation when the settlement was made.⁵

1938. Employer's performance of the contract of settlement.—The cases cited below turned upon the question whether the obligations undertaken by the employer in consideration of his being released from liability had been duly performed.¹

received by him for any other purpose than in settlement of his claim for damages, and that the receipt given was obtained by fraud or misrepresentation, a tender is not necessary." *Bramble v. Cincinnati, F. & S. E. R. Co.* (1909) 132 Ky. 547, 116 S. W. 742, 745.

See also *Mullen v. Old Colony R. Co.* (1879) 127 Mass. 86, 34 Am. Rep. 349, where the injured person was not a servant of the defendant.

In *O'Neil v. Lake Superior Iron Co.* (1886) 63 Mich. 690, 30 N. W. 688, where the plaintiff, an illiterate man, testified that he had signed the release in question under the impression that it was merely a receipt for money received out of a relief fund, the court said: "This fund, by the terms of the address, was to be held by the company. Nevertheless, it was trust money, and did not belong to the defendant in any other capacity than as trustee. The moneys paid out were paid in the same capacity. This suit is not brought against the defendant as trustee of the fund, nor to reach the fund in its hands; and if the jury should find that the agreement set up in bar of the action, founded on defendant's negligence, was not binding on plaintiff by reason of fraud or mistake, we can see no obligation resting upon plaintiff to repay the benefit fund before bringing action against defendant." Having regard to the other authorities, it is clear that the broad language used in the final clause of the above passage must be taken as being applicable merely to the particular kind of fraud involved; *viz.*, deception with respect to the character of the document signed.

³ *Simeoli v. Derby Rubber Co.* (1908) 81 Conn. 423, 71 Atl. 546 (wages and hospital expenses); *Louisville & N. R.*

Co. v. Helm (1905) 121 Ky. 645, 89 S. W. 709 (expenses of treatment at a hospital to which the employee had been taken without any request on his part).

⁴ *L'indicator Consol. Gold Min. Co. v. Firstbrook* (1906) 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108.

⁵ Where a seaman, on a whaling voyage, upon his discharge in a foreign port, signed a writing, acknowledging that he had received a certain sum in full of his share of the proceeds of the voyage, and relinquishing all claims against the owners, master and officers, it was held, that the relinquishment was only of the claim for which he had received compensation, and not of claims for personal violence committed by the master. The position was taken that if such a receipt were ambiguous, the ambiguity was not to the prejudice of the seaman. *Payne v. Allen* (1855) 1 Sprague, 304, Fed. Cas. No. 10,855.

¹ Where plaintiff, while in defendant's employ as a spare brakeman, was injured, and, on recovery, entered into a written contract whereby, in consideration of his re-employment for such time as his services and conduct should be satisfactory, he released all claims for damages, the term "re-employment" means the same service in which he was formerly employed; and a lay-off because of a change in the trains, which made his services no longer needed, was not a breach of the contract. *Saw v. Detroit, G. H. & M. R. Co.* (1902) 129 Mich. 502, 89 N. W. 368.

Where a servant executes a release to the master, in part consideration of being retained in the same capacity in the master's employ, and returns to work in that capacity, but afterwards voluntarily accepts other work, which is less remunerative, and retains the other

1939. Effect of releases with regard to the liability of third persons.—

a. In cases where the third person was the sole tort-feasor.—The extent to which a release given by a servant to his employer will operate as a bar to his recovery of damages from a third person whose negligence was the sole efficient cause of the injury in question will depend upon the language of the document.¹

part of the consideration paid by the master for the release, he cannot withdraw from such employment and maintain an action against the master for his injuries. *Missouri, K. & T. R. Co. v. Chumlea* (1901) — Tex. Civ. App. —, 61 S. W. 524.

An employee who releases his employer from liability for injuries, in consideration of permanent employment, cannot recover for breach of such contract, where an appointment is given him to a position within the contract, and he refuses to accept it. The mere fact that notice of such appointment was delayed one day will not excuse his refusal. *Chicago, B. & Q. R. Co. v. Cochran* (1894) 42 Neb. 531, 60 N. W. 894.

In *Szymanski v. Chapman* (1899) 45 App. Div. 369, 61 N. Y. Supp. 310, there was evidence tending to prove that when or after the agreement was signed, the representative of the defendants agreed that, as soon as the plaintiff was sufficiently recovered from his injuries, the defendants would give him employment, and that they afterwards neglected to perform that agreement, but there was nothing to show that the defendants practised any fraud upon the plaintiff when he signed the release in question. Held, that the fact of the defendants' having failed to perform that part of the agreement by which they promised to give the plaintiff employment was not of itself a sufficient ground for setting aside the settlement, but that, if the jury should find that the defendants had agreed to furnish work as a part of the consideration for the settlement of the plaintiff's claim against them, the plaintiff could recover in a proper action such damages as he had sustained by their failure to perform that agreement.

To the same effect, *Maloney v. Hudson River Water Power Co.* (1909) 133 App. Div. 499, 117 N. Y. Supp. 601; See also *American Car & Foundry Co. v. Smock* (1910) — Ind. App. —, 91 N. E. 749.

In *Camden Interstate R. Co. v. Lester* (1909) — Ky. —, 118 S. W. 268, in an action on a contract, whereby the defendant had agreed to pay the plaintiff a stated sum daily until defendant's physician certified that he was able to resume work, it was held that the burden of proving that a certificate given had been fraudulently made lay on the plaintiff, and that evidence regarding the extent of plaintiff's injuries and his condition when the certificate was given was admissible on the issue of fraud.

¹In *Chapman v. Pittsburg R. Co.* (1905) 140 Fed. 784, affirmed in (1906) 76 C. C. A. 418, 145 Fed. 886, the plaintiff, while engaged in his duties upon the top of a train of freight cars, was thrown off by striking against a trolley wire across the track, placed by defendant, a street railroad company, at an unsafe distance above the railroad tracks. Plaintiff was a member of the railroad company's relief department, and on receiving benefits from such fund on account of his injury signed a release to the company of liability therefor, as required by the terms of his contract. Held, that such release did not operate to discharge the defendant from liability, since it was not a joint tort-feasor with the railroad company, but its acts of negligence, if any, which rendered it liable to plaintiff, were separate and distinct.

In *El Paso & S. R. Co. v. Darr* (1906) — Tex. Civ. App. —, 93 S. W. 166, the agreement, which purported to be in consideration of \$500, recited that it should "in no wise affect any claim" which the servant might have against the third person. Parol evidence showed that the employee never claimed that the employer was liable, and that the employer gave the employee the \$500 as a gratuity. Held, that the release did not estop the employee from recovering from the third person for the injuries sustained, but that the money was a part payment for the injury, and consequently that the third person, when

b. In cases where the master and the third person were joint tort-feasors.—The general rule, that an accord and satisfaction by one wrongdoer for the whole injury discharges all the wrongdoers,² has been applied in some cases in which the complaining party was a servant.³ It has been held, however, that where a servant sustains an injury through the concurrent negligence of his employer and a third person, the latter is not discharged from liability by a merely partial satisfaction made by the former, which was neither intended as a settlement in full, nor received as full compensation. In this point of view, the partial satisfaction made by the master at most entitles the third person to a credit in respect of the amount paid to the servant.⁴

sued, was entitled to the benefit thereof in reduction of damages.

² Addison, Torts, 8th ed. 118; 24 Am. & Eng. Enc. Law, 306.

³ *Hubbard v. St. Louis & M. River R. Co.* (1903) 173 Mo. 249, 72 S. W. 1073 (release of express company by servant injured by collision with street car company, caused partly by the negligence of the latter company and partly by the negligence of a fellow servant of the injured person,—held to be a good defense to an action against the street car company, although the express company was exempt from liability by reason of the doctrine of coservice); *Leddy v. Barney* (1885) 139 Mass. 394, 2 N. E. 107 (release of employer by servant whose injuries were caused by the negligence of the employer's super-

intendent, held to be a bar to an action against the superintendent); *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386 (release of special police officer who is a servant of a carrier, from liability for false arrest, also releases the carrier); *Sircey v. Hans Rees' Sons* (1911) 155 N. C. 296, 71 S. E. 310 (release of master releases master's joint tort-feasor).

⁴ *Bailey v. Delta Electric Light, P. & Mfg. Co.* (1905) 86 Miss. 634, 38 So. 354. In this case the court declined to follow the decisions to the effect that any release of one of two or more joint tort-feasors absolves the others. It was conceded that such absolution would result from full satisfaction by one of the tort-feasors.

CHAPTER LXXXIV.

WHAT EMPLOYEES ARE WITHIN THE PURVIEW OF STATUTES REGARDING THE OBLIGATIONS OF MASTERS TO THEIR SERVANTS.

1940. Introductory.

A. SCOPE OF THE STATUTES CONSIDERED WITH REFERENCE TO THE MEANING OF THE EXPRESSIONS USED TO DESIGNATE THE EMPLOYEES TO WHICH THEY ARE APPLICABLE.

1941. Scope as dependent upon the character of the service rendered.

1942. Employees entitled to a preference under the English and Colonial bankruptcy and insolvency acts.

a. Scope of acts as indicated by the reasons for allowing the preference.

b. Footing on which these acts are to be construed.

c. Meaning attached to the specific expressions used to designate the preferred classes of employees.

d. Scope of statutes considered with reference to the character of the remuneration.

e. Preference as dependent upon the fact of the employer's being a trader.

f. Scotch act of sederunt, 1779.

1943. —under the United States bankruptcy acts.

a. Reasons for allowing the preference.

b. Footing upon which these acts are to be construed.

c. Meaning attached to the specific expressions used to designate the preferred classes of employees.

d. Scope of act considered with reference to the character of the remuneration.

1944. —under other American statutes giving a priority to claims for wages. Generally.

a. Scope of the statutes as indicated by the reasons for their enactment.

b. Upon what footing they are construed.

c. Scope of statutes considered with reference to the character of the remuneration.

d. —to the fact that the employer is or is not a corporation.

e. —to the exhaustive character of the enumeration of the preferred classes of employees.

f. Duration of the contract as an element.

- g.* Preference of employees of corporations who are also stockholders.
 - h.* Preference of employees of receivers of insolvent estates.
- 1945. Same subject, scope of the term "laborer."
 - a.* Generally.
 - b.* Applicability of term to supervising employees of the higher grades.
 - c.* Applicability of term to supervising employees of the lower grades.
 - d.* Occasional performance of manual labor; differentiating import of.
- 1946. —of other single terms primarily imputing manual work.
 - a.* "Workmen."
 - b.* "Mechanics."
 - c.* "Operatives."
 - d.* "Persons performing labor as operatives."
 - e.* "Farm laborers."
- 1947. —of groups of terms importing manual work.
 - a.* All persons doing any "work or labor."
 - b.* "Mechanics and laborers."
 - c.* "Mechanics, workmen, and laborers."
 - d.* "Mechanics, laborers, and operatives."
- 1948. —of groups of terms partly importing manual work.
 - a.* "Laborers or servants."
 - b.* "All persons doing labor or service of whatever kind."
 - c.* "Laborers and employees."
 - d.* "Laborers, servants, and employees."
 - e.* "Employees and other operatives."
 - f.* "Employees, operatives, and laborers."
 - g.* "Employee, laborer, or other person who may aid by his labor, etc."
- 1949. —of words, single or grouped, not specifically importing manual work.
 - a.* "Employees."
 - b.* "Clerks."
 - c.* "Clerks, servants, and employees."
 - d.* "Bookkeepers, clerks, agents, reporters, and other employees."
- 1950. Employees within the scope of statutes granting a preference to wages in the administration of decedent's estates.
 - a.* Scope of statutes as indicated by the reasons for their enactment.
 - b.* On what footing construed.
 - c.* Classes of employees covered by the word "servants."
- 1951. Persons entitled to privileges under statutory provisions in civil law jurisdictions. Louisiana.
 - a.* Scope of provisions as indicated by the reasons for allowing the preference.
 - b.* Footing on which these provisions are construed.
 - c.* Meaning attached to specific terms.

1952. —Quebec.
- a. Footing on which the enactments in this province are construed.
 - b. Meaning attached to specific terms.
1953. Employees within the purview of statutes imposing upon shareholders in companies a personal liability for wages.
- a. Scope of statutes, as indicated by the reasons for enacting them.
 - b. Rule of construction applied in determining the scope of these statutes.
1954. Same subject. Construction of specific words and phrases.
- a. "Laborers."
 - b. "Laborers and operatives."
 - c. "Laborers and servants."
 - d. "Laborers, servants, and apprentices," and "laborers, servants, or employees other than contractors."
 - e. "Laborers, servants, apprentices, and employees."
 - f. "Laborers, servants, or clerks."
 - g. "Laborers, servants, clerks, and operatives."
 - h. "Clerks, servants, and laborers."
1955. Employees within the purview of statutes which render directors of companies personally liable for wages.
1956. —of statutes imposing upon principal employers liabilities for the wages of persons performing labor for contractors.
- a. Footing upon which these statutes are construed.
 - b. Employees entitled to sue as "laborers."
 - c. —as "workmen."
1957. —of statutes affecting the exemption of wages. Construction generally.
1958. Same. Statutes. Scope of terms, single or grouped, importing manual work.
- a. "Laborers."
 - b. "Mechanics and other laboring men."
 - c. "Journeyman, mechanics, and day laborers."
1959. Same. Statutes. Scope of groups of terms partly importing manual work.
- a. "Laborers and employees."
 - b. "Laborer or other employee."
 - c. "Laborer or any person in public or private employment."
 - d. "Servant, laborer, or workman."
 - e. "Mechanic, workman, laborer, servant, clerk, or employee."
1960. Same statutes. Applicability to public employees.
1961. Same statutes. Applicability to seamen.
1962. —of statutes permitting claims for wages to be enforced against exempt property.
- a. Claims or debts for "labor."
 - b. "Laborer or servant."
 - c. "Laborers or mechanics."
 - d. "Laborer, mechanic, and clerk."

- 1962a. —of the truck acts and other statutes designed to secure the payment of the full amount of the wages.
- a. English acts.
 - b. American acts.
1963. —of statutes regulating the times at which wages are to be paid.
1964. —of statutes affecting the rights of discharged servants.
1965. —of statutes regulating the hours of work.
- a. Public work.
 - b. Private work.
1966. —of statutes enabling servants to recover attorneys' fees in suits for wages.
1967. —of statutes relating to the place where wages are to be paid.
1968. English employers and workmen act 1875, and earlier statutes of a similar character. Employers' liability act 1880. Truck acts.
- a. Generally.
 - b. "Domestic or menial servant."
 - c. "Laborer."
 - d. "Servant in husbandry."
 - e. "Journeyman."
 - f. "Artificer."
 - g. "Handicraftsman."
 - h. "Miner."
 - i. Persons "otherwise engaged in manual labor."
 - j. "Working under a contract with an employer."
 - k. Application of the rule of *ejusdem generis*.
1969. Colonial master and servant acts.
- a. Quebec.
 - b. New South Wales.
 - c. Victoria.
1970. —of statutes relating to the liability of employers for injuries received by servants.
- a. English enactments.
 - b. American enactments.
 - c. Canadian enactments.
 - d. Australian enactments.
1971. —of statutes prohibiting Sunday work.

B. SCOPE OF THE STATUTES AS DEPENDENT UPON THE EXISTENCE OF THE RELATIONSHIP OF MASTER AND SERVANT BETWEEN THE CLAIMANT AND THE PERSON FOR WHOM THE GIVEN WORK WAS PERFORMED.

1972. Statutes usually deemed to be applicable only to persons hired as servants.
1973. Circumstances bearing upon the nature of the relation between the parties in question.
- a. Generally.
 - b. Performance of stipulated work wholly or partially with the assistance of others.
1974. Statutes usually deemed to be applicable only to the immediate employers of the persons for whose benefit they are enacted.
1975. Servants not within statutes creating possessory liens.

1940. Introductory.—The decisions regarding the construction of the clauses by which the scope of the statutes of this description in respect of persons is defined are extremely conflicting. This remark is applicable even to the groups of cases in which statutes directed to the same general objects are under construction; and the antagonism is of course more pronounced if those of a dissimilar, as well as those of a similar, type are included in the comparison. Under these circumstances it is apprehended that the preferable method of dealing with the subject is to take up each of the enactments seriatim, and show what construction has been placed upon it. But it will be advisable in the first place to specify the various rules of statutory construction and other elements which are treated as determinative considerations in cases of the kind with which we have to deal.

(1) The rule that the words used in a statute are to be taken in their ordinary sense.

(2) The rule that "general words are to be restricted to the same genus as the specific words which precede them."¹

(3) The kindred rule which is summed up in the phrase, *Noscitur a sociis*.²

(4) The rule that "each word used in an enumeration of several classes or things is presumed to have been used to express a distinct and different idea."³ It is obvious that the operation of the rule is, generally speaking, directly antagonistic to that of the two mentioned

¹ Willes, J., in *Fenwick v. Schmalz* (1868) L. R. 3 C. P. 313, 316.

"The general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words." Maxwell, Stat. 4th ed. p. 499 (§ 405 in Endlich's adaptation of this work). "When there are general words following particular and specific words, the former must be confined to things of the same kind." Sutherland, Stat. Constr. § 268.

² "When two or more words, susceptible of analogous meaning, are coupled together . . . [they] are understood to be used in their cognate sense. They take, as it were, their color from each other; that is, the more general is restricted to a sense analogous to the less

general." Maxwell, Stat. 4th ed. 491.

(§ 400 in Endlich's adaptation of this treatise). This statement was adopted in *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525; *Wakefield v. Fargo* (1882) 90 N. Y. 213.

³ *Palmer v. Van Santvoord* (1897) 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915.

Another case in which the court proceeded upon the principle that an intention on the part of the legislature to enlarge the scope of the statute in question was to be inferred from the addition of another descriptive term to those used in the context is *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.* (1886) 66 Wis. 481, 29 N. W. 285 (see § 1948, note 15).

in the preceding paragraphs. In fact, as will be shown hereafter, its application to the concrete facts involved in the New York case cited has produced an embarrassing conflict of authorities in that state. See § 1948, *f. post.*

(5) The footing upon which the statute in question should be construed, whether strictly or liberally. The diverse views entertained on this point by the American courts have been a fruitful source of inconsistency. See especially §§ 1944, *b*, and 1953, *b, post.*

(6) The objects which it may be supposed that an enactment of the kind under consideration was intended to subserve. Under this head, particular reference may be made to the numerous cases in which it has been declared that the inducing motive which has prompted the enactment of the various statutes which confer extraordinary privileges in respect either to the recovery of earnings from employers, or the exemption of those earnings from the demands of creditors, has been the desire of the legislatures to afford a special protection to those classes of employees to whom the non-payment or seizure of their remuneration causes the greatest hardships. See §§ 1942, *a*, 1943, *a*, 1944, *a*, 1950, *a*, 1951, *a*, 1953, *a*.

(7) The previous course of legislation in the same country or state. The fact that the language of a provision is broader and more comprehensive than an earlier enactment *in pari materia* may sometimes be a sufficient reason for holding the latter to be applicable to classes of employees which were not within the purview of the former.⁴ It is obvious that a court which delas with a case from this standpoint may conceivably be led to conclusions different from those which might have been reached if the later statute stood alone.

(8) The term by which the remuneration which is the subject-matter of the statute is described. As will be shown in §§ 1944, *c*, 1955, 1957, the use of the word "wages" alone is regarded as an element which is indicative of an intention on the part of the legislature to exclude from the purview of the statute those descriptions of employees who are ordinarily spoken of as being in the receipt of "salaries."

⁴ See, for example, *Weise v. Rutland* (1894) 71 Miss. 933, 15 So. 38. See also the extract from the opinion of the court in *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —, 29 Atl. 326, case illustrates the conclusion which may be indicated by the course of legislation, both as a factor which justifies an enlarged construction, and as a factor which operates restrictively. § 1948, *b, post.* The argument in that

A. SCOPE OF THE STATUTES CONSIDERED WITH REFERENCE TO THE MEANING OF THE EXPRESSIONS USED TO DESIGNATE THE EMPLOYEES TO WHICH THEY ARE APPLICABLE.

1941. Scope as dependent upon the character of the service rendered.—

In every case in which an employee is seeking to enforce a statutory right, or in which his liability for the nonperformance of a statutory obligation is involved, there is a preliminary question to be determined: *viz.*, whether the occupation in respect of which his contract of hiring was made, or the particular work in which he was engaged at the time to which the alleged cause of action has reference, is within the purview of the enactment relied upon.¹ It is obvious that, unless this question can be answered in the affirmative, the action cannot be maintained, even though the services rendered by him may have been of such a quality as to bring him within the scope of the descriptive expressions used by the legislature.²

¹ In *McDaniel v. Osborn* (1904) — Ind. App. —, 72 N. E. 601, the complaint was held to be demurrable, for the reason that the allegations did not show that the claimant's labor had been performed in connection with the business in which the insolvent employer was engaged.

² (a) *Enactments applicable to "employees" generally.*—By § 2 of New York Laws 1897, chap. 415 (labor law), it is declared that the term "employee" "shall be taken to mean a mechanic, workingman, or laborer" who works for another for hire. In *People ex rel. Sweeney v. Sturgis* (1903) 78 App. Div. 460, 79 N. Y. Supp. 969, it was held that firemen were not within the purview of the act, as it was not applicable to persons who hold municipal positions which are included in the classified lists of the Civil Service Law, who receive salaries, not wages, and who enjoy rights and privileges which differentiate them from laborers.

(b) *Enactments relative to more than one kind of occupation.*—In *Schilling v. Carter* (1886) 35 Minn. 287, 28 N. W. 658, it was held that farm laborers were not within a statute for the protection of "mechanics, laborers, and others," the decision being based upon the ground that the context clearly indicated that only employees connected with "works, manufactory, or busi-

ness," were within the province of the enactment.

The following decisions were rendered with relation to the Pennsylvania act of April 9, 1872, and its supplements:

The act of 1872 specified as the classes of employees entitled to a preference, "miners, mechanics, laborers, and clerks," but provided in effect that the employer must have been engaged in conducting "works, mines, manufactory, or other business." It was held under this act that only those employed in industries of the same character as those specifically enumerated were entitled to the benefit of the statute. *Sullivan's Appeal* (1874) 77 Pa. 107; *Allen's Appeal* (1875) 81 Pa. 303; *Pardee's Appeal* (1882) 100 Pa. 408; *Solms's Estate* (1876) 13 Phila. 539 (farm laborers not entitled to preference). Many cases were decided on this footing by courts of first instance.

By the act of June 13, 1883, a large number of additional classes of employees were specified as being entitled to a preference; but the words of the earlier act in respect of the business of the employer were repeated without change.

In *Sproul v. Murray* (1893) 156 Pa. 293, 27 Atl. 302, the court took the position that although some of these additional classes were not correlated to any of the specified classes of employees, the doctrine of *ejusdem generis*

wanted for the purpose of harmonizing the clauses of the statute yields sufficiently to permit such an extension of the general words "or other business" as would comprehend the corresponding classes of employees. Before this decision was rendered there had been much conflict of opinion in the lower courts with regard to the question of construction thus presented.

By the act of May 12, 1891, all limitations as to business of the employer and places of employment were removed with respect to the specific classes of employees enumerated in the act. *James Rees & Sons Co. v. Hulings* (1899) 9 Pa. Super. Ct. 265; *Strang v. Adams* (1893) 16 Pa. Co. Ct. 21.

In *Pfaender v. Hoffman* (1877) 4 W. N. C. 171, a skilled florist was held not to be within the descriptive clause, "any miner, mechanic, laborer, or clerk." The ratio decidendi was that the statute was confined by its express terms to the employees of the owners or lessees of "works, mines, manufactories," or other industries *ejusdem generis*.

This is also the explanation of the decisions to the effect that the term "laborer," as used in the statute, does not include a hotel cook (*Sullivan's Appeal* [1874] 77 Pa. 107; *Allen's Appeal* [1875] 81 Pa. 303); nor a professional baseball player (*Kaercher v. Sullivan* [1884] 2 Chester Co. Rep. 461).

A bone boiling and soap-making establishment is a "manufactory" within this act. *Walker's Appeal* (1886) 1 Sadler (Pa.) 295, 2 Atl. 857.

For decisions of lower courts in which this act was construed, see *Halifax Bank v. Christman Bros.* (1876) 2 Pearson (Pa.) 246; *Ulrich v. Feaser* (—) 2 Lanc. L. Rev. 25; *Burge v. Comer* (1888) 5 Pa. Co. Ct. 5; *Teets v. Teets* (1876) 6 Luzerne Leg. Reg. 19; *Allen's Estate* (1892) 2 Pa. Dist. R. 87.

Work done on the surface of the ground in obtaining mineral has been held to be "mining," and the men who do it "miners," within this act. *Taylor v. Smith* (1876) 1 Chester Co. Rep. 106.

It has been held that a millwright employed by a mill furnishing company to install the company's machinery at different places is entitled to a preference under the act of 1891, although none of his work was done at the mill. *Egleston v. Levan* (1894) 11 Lanc. L. Rev. 316.

The phrase, "clerks employed in stores and elsewhere," is held not to embrace a traveling salesman paid by commission. *Mulholland v. Wood* (1895) 166 Pa. 486, 31 Atl. 248.

That a man engaged in soliciting orders for, and selling the products of, a mine on commission, was not a "miner," was held in *Willauer's Estate* (1882) 1 Chester Co. Rep. 533.

A girl employed in a "concert saloon" was held not to be within the description, "any servant girl at hotels . . . restaurants . . . or any other servant and helper in and about said houses of entertainment." *Cleveland v. O'Neil* (1883) 4 C. P. Rep. 148.

But in *Weaver v. Wheaton* (1886) 2 Pa. Co. Ct. 428, a bartender in a hotel was allowed a priority under this clause.

The general doctrine has also been adopted that this act contemplates a business that is "complete and independent, and of a fixed and permanent character, as opposed to a temporary employment that is merely incidental to a particular branch of business." The decisions from this standpoint are as follows: *Pardee's Appeal* (1882) 100 Pa. 408 (cutting saw logs and driving them on a stream to the place of manufacture, not a "business" within the act); *Llewellyn's Appeal* (1883) 103 Pa. 458 (mechanics and laborers, whose services were rendered in the repair and equipment of a plant preparatory to the production of pig iron, held to be not entitled to a preference out of the property of the manufacturer); *Wolf v. Krick* (1895) 17 Pa. Co. Ct. 118 (person who performed labor in the equipment of a manufactory under the employment of the persons who proposed to carry on the manufacturing business held not to be entitled to a preference out of the assets of such persons); *Pacific Guano Co. v. Kuhns* (1898) 7 Pa. Dist. R. 531 (preference not available to the employees of a log jobber, or of a railroad or building contractor).

In *Thompson's Appeal*, it was laid down in general terms that the lien cannot be asserted unless the evidence shows that the given services were rendered in and about the business in which the debtor was engaged, or in and about the property from the sale of which the fund for distribution arose. Accordingly, as it appeared that the employer was engaged in the business

of refining oil, and the subject-matter of his assignment for the benefit of his creditors was the land and buildings used in connection with that business, the wages of the claimant, a man engaged by the month to haul stone in a wagon, were held not to be entitled to a preference. *Childs's Estate* (1890) 135 Pa. 214, 19 Atl. 897.

In *Gibbs & S. Mfg. Co.'s Appeal* (1882) 100 Pa. 528, it was held that the employees of a man who undertook the drilling of oil wells were not working for a "contractor," as that word is construed in the original act of April 9, 1872. The position of the court was that this word, as used, is applicable only to persons employed by the owner or lessee of the mine or works to produce the mineral or the article manufactured, as the case may be, and "does not embrace those who undertake to perform some special service in the construction of works, or the opening of mines preparatory to their being operated." But it is perhaps open to doubt whether a similar construction would be placed upon a provision in which phraseology of a less special character was employed.

(c) *Enactments relative to manufacturing and other productive work.*—Under the Kentucky enactment (Stat. 1894, § 2487) which gives to employees of "manufacturing establishments" a lien upon such property and effects as may have been involved in the business, an employee is not entitled to a lien for services rendered outside of the manufacturing establishment. *Winter v. Howell* (1900) 109 Ky. 163, 58 S. W. 591.

A laundry is not a "manufacturing establishment" within the meaning of this enactment. *Muir v. Samuels* (1901) 110 Ky. 605, 62 S. W. 481.

The provision in Wis. Rev. Stat. 1898, § 3329, that any person or persons who perform any labor or services in manufacturing lumber shall have a lien thereon, does not give a lien for labor performed in hauling lumber from the mills after it is manufactured. *McGeorge v. Stanton-De Long Lumber Co.* (1907) 110 Wis. 7, 110 N. W. 788.

Laborers performing work in, around, and about a lumber mill, in some manner connected with and incidental to the conversion of timber into lumber, were held to be entitled to a lien under *Bellinger & C. Comp. Stat. (Or.)* §

5678, declaring that every person performing labor, or who shall in any manner assist in the manufacture of lumber, has a lien thereon while remaining in the yard where manufactured. *Alderson v. Lee* (1908) 52 Or. 92, 96 Pac. 234.

On the other hand, it has been held that an employee engaged in cutting and delivering logs to his employer's sawmill is not entitled to a lien, under *Ballinger's Anno. Codes & Stat. (Wash.)* § 5919, giving a lien for labor "in the operation of a sawmill," etc., but that he may assert a lien on the logs cut and delivered, under §§ 5390 *et seq.*, giving to a person performing labor on logs and other timber a lien thereon, etc. *Graham v. Gardner* (1907) 45 Wash. 648, 89 Pac. 171.

With reference to Washington Laws 1893, page 428, § 2, which provides that every person performing work or labor upon or assisting in manufacturing saw logs and other timber into lumber and shingles shall have a lien upon the lumber while it remains in the possession or under the control of the manufacturer, it was held in *Bryan v. Guilfoil* (1896) 13 Wash. 373, 43 Pac. 351, that a man employed by the manufacturer to haul posts from the place of manufacture to the place where they were to be delivered by the manufacturer to a purchaser was not entitled to a lien.

But under this provision, men engaged in cutting shingle bolts, which were used in the manufacture of shingles, are entitled to a lien upon the shingles. *Campbell v. Sterling Mfg. Co.* (1895) 11 Wash. 204, 39 Pac. 451.

In *Davidson v. Frayne* (1902) 9 B. C. 369, it was held that § 5 of the British Columbia lien for wages act, which is applicable to "labor or services performed in connection with logs or timber," inures only to the benefit of men engaged in getting timber out of the forest, and does not embrace those working in a sawmill. The court would seem to have proceeded on the ground that the enactment was to be construed strictly. On any other footing the decision was scarcely justifiable.

That a man who had contracted with the owner of logs to drive them for an agreed compensation was within the terms of an act giving a lien to any person who might perform any labor or services in running, cutting, etc., logs, was held in *Shaw v. Bradley* (1886) 59

Mich. 199, 26 N. W. 331. The *ratio decidendi* was the generality of the provision.

It has been held that a statute declaring a lien in favor of persons performing labor in connection with "logging" covers cooks and blacksmiths in logging camps. *Winslow v. Urquhart* (1875) 39 Wis. 260; *Breault v. Archambault* (1896) 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348.

The Michigan statute which gives a lien to any person who does work in connection with the lumbering industry expressly declares that the word "person" is to be understood as including "cooks, blacksmiths, artisans, and all others usually employed in performing such labor or services." (See § 1954, *post*). There is a similar declaration in the woodmen's lien acts of Ontario (Rev. Stat. 1897, chap. 154, § 2 [3]), and of British Columbia (Rev. Stat. 1897, chap. 194, § 2 [3]).

In *Menery v. Backus* (1895) 107 Mich. 329, 65 N. W. 235, it was held that an employee of one operating a sawmill, lumber camp, and farm, whose time is kept, but not apportioned, is entitled to a lien on the products of the mill for work done in the camp and about the mill. Whether his estimate of the proportion of time devoted to such work and that spent on the farm is correct is a question for the jury.

The Arkansas act of July 23, 1868 (Mansfield's Dig. § 4425), by which laborers were given a "lien on the production of their labor," has been held not to embrace laborers working on a railroad. *Dano v. Mississippi, O. & R. River R. Co.* (1872) 27 Ark. 564.

In another case it was held that the superintendent of a shingle mill who filed saws and occasionally did other work at the mill, the night watchman who cleaned the machinery and raised steam in the morning, and a person who removed sawdust and splints from the mill, were not entitled to liens upon shingles sawed at the mill; but that a lien might be claimed by the engineer, sawyer, and all others who directly assisted in sawing the shingles, including one who asserts them. *Van Etten v. Cook* (1891) 54 Ark. 522, 16 S. W. 477. The *ratio decidendi* was that the right to the lien depended upon whether the labor in question did or did not directly contribute to the production of the given subject-matter.

That a bone-boiling and soap-making establishment is a "manufactory" within the Pennsylvania act giving a preference to the wages of employees of manufactories was held in *Walker's Appeal* (1886) 1 Sadler (Pa.) 295, 2 Atl. 857.

In another case that expression was held to be applicable to a shop in which eight or ten workmen were employed in making shoes for customers. *Allen's Estate* (1892; Pa. C. P.) 2 Pa. Dist. R. 87, 23 Pittsb. L. J. N. S. 81.

(d) *Enactments relative to work in mines and quarries.*—Work done in cleaning up and washing gold taken from a mining claim is "labor done upon the claim," for which the workmen are entitled to a lien under Civil Code (Alaska) § 262. *Cascaden v. Wimbish* (1908) 88 C. C. A. 277, 161 Fed. 241.

A man in charge of the pump which raised the water from the mine in question, and the engineer of the hoisting engine, have been held to be within the purview of Code Civ. Proc. (Cal.) § 1183, which it is provided that any person who performs labor in a mining claim, or in or upon real property worked as a mine, either in the development thereof or in working therein by the subtractive process, has a lien upon the same. *Tredinnick v. Red Cloud Consol. Min. Co.* (1887) 72 Cal. 78, 13 Pac. 153.

On the ground that tools and machinery used in working and developing a mine are deemed to be "affixed to the mine" under Cal. Civ. Code, 661, it has been held that work upon such tools and machinery while they are so used is work within the purview of the same provision. *Malone v. Big Flat Gravel Min. Co.* (1888) 76 Cal. 578, 18 Pac. 772. This case was followed in a Canadian one in which it was held that a blacksmith employed for sharpening and keeping tools in order for the work of a mine is entitled to a lien for his wages on the mining location, under Ont. Rev. Stat. chap. 153, § 4, which gives to "any person who performs any work or service upon or in respect of" any building or mine, etc., a lien upon such building or mine for the price of such work or service. *Davis v. Crown Point Min. Co.* (1901) 3 Ont. L. Rep. 69. The *ratio decidendi* was that the work was necessary for the purpose of carrying on the operations in the mine itself. The court was of opinion that

a man employed to cook for the men employed at the mine was not within the purview of the statute, the authority cited being *McCormick v. Los Angeles City Water Co.* (1870) 40 Cal. 185.

To entitle an employee to a lien under this provision, his labor must be performed in the course of the actual work of mining or developing the mine. Consequently it does not include the services of the night watchman, engaged in caring for the mine while it is lying idle. *Williams v. Hawley* (1904) 144 Cal. 98, 77 Pac. 762.

In a case where plaintiff was employed by defendant on an idle oil claim, part of the time as watchman, and at other times in pumping oil from the claim for use in the boiler, it was held that for his services in pumping oil he was entitled to a lien under this provision, but that for his services as watchman, he could only look to defendant's personal liability. *Danaldson v. Orchard Crude Oil Co.* (1907) 6 Cal. App. 641, 92 Pac. 1046, following *Williams v. Hawley*, *supra*, with regard to the inability of the plaintiff to recover for his services as watchman.

That a man who performs labor in sinking a shaft in a quartz mining claim is entitled to a lien under the same provision was held in *Hines v. Miller* (1898) 122 Cal. 517, 55 Pac. 401, 19 Mor. Min. Rep. 609.

With reference to the Idaho provision of the same tenor, it has been held that a lien might be claimed by a man employed in a quartz mill located upon and belonging to a mine, whose labor consisted in working "as an amalgamator," placing silver into batteries, dressing plates, keeping the machinery in running order, looking after the concentrates, and adjusting them and putting them into proper condition to run, cleaning amalgam, looking after the rockbreaker, and attending generally to the entire machinery. *Thompson v. Wise Boy Min. & Mill Co.* (1903) 9 Idaho, 363, 74 Pac. 958.

A claim for hauling quartz to a quartz mill has been held to be within the Nevada statute which provides that all persons performing labor "for carrying on any mill" shall have a lien on such mill for such work or labor. *Re Hope Min. Co.* (1871) 1 Sawy. 710, Fed. Cas. No. 6,681.

Under Oregon Laws 1891, p. 76, § 1,

a lien is given to every person "who shall do work or furnish materials for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working or development of any such mine, lode, or deposit, in search of such metals or minerals." In *Williams v. Toledo Coal Co.* (1894) 25 Or. 426, 42 Am. St. Rep. 799, 36 Pac. 159, it was held not to be a prerequisite to the enforcement of a lien for work done in "searching for metals or minerals," that the mine should have actually yielded minerals before the conclusion of the work for which the lien is claimed. The court, however, was of opinion that labor performed in building a wagon road, which did not constitute an incline or excavation, did not, however necessary it might be to the successful operation of a mine, give a right to a lien under this provision.

That men who obtained mineral from the surface of the ground were "miners," within the scope of the Pennsylvania act of April 9, 1872, which allows a preference to wages was held in *Taylor v. Smith* (1877) 1 Chester Co. Rep. 106.

In *Farmers' Bank Appeal* (1862) 1 Walk. (Pa.) 33, it was held that a laborer who hauled coal from a mine to a wharf 2 miles distant, and a clerk who was stationed at the wharf to aid in shipping the coal, were entitled to a lien, as being within the scope of the descriptive expression "miner, mechanic, laborer, or clerk, employed in and about the business" of the mine operator.

It has been held that a person who labors in manufacturing slate at a place other than in the quarry cannot claim a lien thereon under the Maine statute which gives a lien to persons who "labor in mining, quarrying, or manufacturing slate in any quarry." *Union Slate Co. v. Tilton* (1882) 73 Me. 207.

The provision in N. Y. Laws 1880, chap. 440, giving a lien to "any person who shall hereafter perform any labor in or about the sinking, drilling, or completing of any oil well," has been held to issue to the benefit of a person engaged in exploding torpedoes to increase the flow of oil. *Gallagher v. Karns* (1882) 27 Hun, 375.

(e) *Enactments applicable to construction work of various descriptions.*

1942. Employees entitled to a preference under the English and colonial bankruptcy and insolvency acts.—*a. Scope of acts as indicated by the reasons for allowing the preference.*—It has been stated that the principle upon which a preference has been accorded to the “servants and clerks” of bankrupts is that they suffer more severely than any other creditors from the loss of their employment.¹

b. Footing on which these acts are to be construed.—With regard to one of the earlier acts, it was laid down by one of the commissioners in bankruptcy that the provision as to the preference of wages was to be strictly construed.² The doctrine thus propounded was,

—Teamsters have been held to be within the provisions of Indiana act of March 9, 1889, concerning the liens of “mechanics, laborers, and materialmen.” *McElwaine v. Hosey* (1893) 135 Ind. 481, 35 N. E. 272.

In *Hill v. Newman* (1861) 38 Pa. 151, 80 Am. Dec. 473, it was held that a teamster who, at the request of the owner or contractor, and not as a mere hireling under a contractor or subcontractor, hauls lumber for a building, is entitled to a lien thereon.

“It has been held that the word “laborer,” in Sayles’s Civ. Stat. (Tex.) art. 3179a, giving a lien to persons performing labor in the construction, operation, or repair of a railroad, means one who performs manual services in the construction, repair, or operation of the road, and does not embrace one who may work in preparing something of his own to sell a railway company. *St. Louis, A. & T. R. Co. v. Matheus* (1889) 75 Tex. 92, 12 S. W. 976.

Housepainters are deemed to be within the protection of the Illinois statute which secures liens to persons who “furnish labor for erecting or repairing” a building. *Martine v. Nelson* (1869) 51 Ill. 422.

In *Adams v. Burbank* (1894) 103 Cal. 646, 37 Pac. 640, a lien claimed for labor performed by an employee of a materialman in hauling material furnished for a building was disallowed on the ground that he had not “performed labor upon the building,” within the meaning of the statute.

It was held in *McCormick v. Los Angeles City Water Co.* (1870) 40 Cal. 185, that a man hired to cook for the laborers engaged in constructing a reservoir, although he was a “laborer,” was not within a statute giving a lien M. & S. Vol. V.—379.

to persons who performed labor on such a work. The court was of opinion that the scope of the statute was limited to laborers whose services had relation to the actual work of construction. As to cooks in lumber camps, see subd. c. *supra*.

(f) *Enactments relative to agricultural work.*—In *Lumblay v. Thomas* (1887) 65 Miss. 97, 5 So. 823, it was held that the lien given by the Mississippi statute (Code, § 1360) to persons “who may aid by their labor to make, gather or prepare for market or sale any crop,” enured to the benefit of a laborer on a plantation, who, at different seasons of the year, ploughed, hoed, chopped wood, hauled cotton, worked in the blacksmith shop, attended to the engine by which the cotton-ginning machinery was operated and assisted in making, gathering, and ginning cotton grown on the plantation.

On the ground that the privilege on the crops accorded to laborers on plantations by the Louisiana Code extends to laborers who work upon the crop in any and all of its stages,—in the planting, cultivation, gathering, and preparing it for market,—and who perform any work on the plantation required for such purposes or incident thereto, it has been held that the wages of laborers whose work is performed in the sugar house in the making of the sugar are privileged. *Saloy v. Dragon* (1885) 37 La. Ann. 71. In that case it was also held that the privilege could not be claimed in respect of work performed in repairing a sugar house and machinery upon a plantation.

¹ *Ex parte Gee* (1839) Mont. & C. Bankr. 99, 3 Deacon, Bankr. 563.

² *Ex parte Hampson* (1842) 2 Morr.

however, not stated with relation to the scope of the provision *quoad personas*. It was not alluded to in any of the cases cited in the following subsections, and there is no indication of its having appreciably influenced any of the conclusions at which the courts arrived. So far as any controlling principle of construction is traceable in those cases, it seems to be simply that the descriptive expressions are to be understood in their ordinary sense.

c. Meaning attached to the specific expressions used to designate the preferred classes of employees.—In the earlier English bankruptcy acts the only words used to designate the classes of employees entitled to a preference were “any clerk or servant.” By the terms of the preferential payments in bankruptcy act 1888, § 1 (which, so far as regards the subject now under discussion, is a re-enactment of the corresponding provision in the bankruptcy act 1883), a priority is allowed to the “wages or salary of any clerk or servant,” and to the “wages of any laborer . . . whether payable for time or piecework.” The more comprehensive terms of the later enactments are apparently to be regarded as indicating an intention to include all the servants of the classes specified, irrespective of the duration of their engagements. If this supposition be correct, the case in which it was laid down that the provision contained in the act of 1825, although its operation was not confined to servants hired by the year,³ was not applicable, unless the hiring was of longer duration than a week,⁴ can no longer be considered as good law. On the other hand, the alterations of phraseology have evidently not in anywise impaired the authority of any of the earlier decisions which proceeded, as may be supposed, on the broad principle that the word “servant” was to be understood in its ordinary legal sense of a person under the control of the bankrupt with respect to the details of his work. This remark is applicable to the cases in which it was held

D. & DeG. 462, 11 L. J. Bankr. N. S. 12, 6 Jur. 376.

³ *Ex parte Collier* (1834) 4 Deacon & C. Bankr. Cas. 520, 2 Mont. & Ayr. 29; *Ex parte Humphreys* (1833) 3 Deacon & C. Bankr. Cas. 114, 1 Mont. & B. Bankr. 413.

⁴ *Ex parte Crawfoot* (1831) Montagu, Bankr. Cas. 270; *Ex parte Skinner* (1833) Mont. & B. Bankr. 417, 3 Deac. & C. Bankr. Cas. 332 (see *Ex parte Collier* [1834] 2 Mont. & Ayr. 29, 4 Deacon & C. Bankr. Cas. 520, where the report of the earlier case was corrected by the

court); *Ex parte Neale* (1829) Mont. & M'Arth. 194.

The considerations upon which the court relied in *Ex parte Crawfoot*, *supra*, were that the insertion of the word “clerks” would have been surplusage if the word “servants” had been used in a general sense; that the phraseology by which the terms of remuneration—“six months’ wages and salary”—were described could not, with propriety, be understood as having reference to workmen who were paid daily or weekly; and that there was no express mention of “workmen” in the act.

that the preference enured to the benefit of a commercial traveler, engaged upon a yearly salary;⁵ of a city editor of a newspaper, employed at a weekly salary;⁶ of the ballet dancers and members of the chorus in a theater;⁷ of a seaman;⁸ that a claimant who had worked during the evening for the bankrupt, and during the day for another person, was entitled to a preference.⁹ The application of the same test seems to justify the conclusion that in a case in which the manager of a cotton mill was allowed a preference would still be recognized as a valid precedent.¹⁰ That case is not essentially inconsistent with a recent decision to the effect that a managing director of a company is not a "clerk or servant."¹¹ As shown by the authorities cited, the rationale of that decision was that the claimant was a director.¹² The earlier decision respecting the claimant who was merely a manager was apparently not brought to the attention of the court. But in Scotland the position has been explicitly taken that only subordinate servants are within the purview of the preferential payments act of 1888, and that the salary of a person acting as manager and secretary of a company is not entitled to a priority.¹³

The doctrine laid down in a recent English case is that a secretary to a company may be a "clerk or servant" within the preferential payments in bankruptcy act 1888, but that these terms are not applicable to a secretary who does not give his whole time to the service of the company, and discharges the general duties of his office by a clerk appointed and paid by himself.¹⁴ "In my opinion," said

⁵ *Ex parte Neale* (1829) Mont. & M'Arth. 194.

⁶ *Ex parte Chipchase* (1862) 11 Week. Rep. 11, 7 L. T. N. S. 290.

⁷ *Re Delafield*, an unreported case referred in *Ex parte Harcourt* (1858) 31 L. T. Journ. 188, where, for reasons which are not stated in the report, it was held by a commissioner in bankruptcy that a singer at a tavern was not entitled to a preference.

⁸ *Ex parte Homborg* (1842) 2 Mont. D. & De G. 642, 6 Jur. 898.

⁹ *Ex parte Oldham* (1858) 32 L. T. 181.

¹⁰ *Ex parte Collier* (1834) 2 Mont. & Agr. 29, 4 Deacon & C. Bankr. Cas. 520.

¹¹ *Re Newspaper Proprietary Syndicate* [1900] 2 Ch. 349, 69 L. J. Ch. N. S. 578, 83 L. T. N. S. 341, 16 Times L. R. 452. For a similar decision with reference to the United States bankruptcy act, see § 1943, note 5, *post*.

¹² The cases relied upon (*not having*

any reference to the bankruptcy act) were *Dunston v. Imperial Gaslight & Coke Co.* (1832) 3 Barn. & Ad. 125, 1 L. J. K. B. N. S. 49, and *Hutton v. West Cork R. Co.* (1883) L. R. 23 Ch. Div. 654, 52 L. J. Ch. N. S. 689, 49 L. T. N. S. 420, 31 Week. Rep. 827. The purport of both of these is simply that a director is not a servant. The question whether the functions of a claimant who is discharging the duties of a servant, as well as of a director, might not be regarded as separable in such a sense as to entitle him to a preference in the capacity of a servant, was not discussed.

¹³ *Re Scottish Poultry Journal Co.* (1896) 4 Scot. L. T. 167. The significance of this decision, however, is considerably diminished by the circumstance that the English case in which a manager was allowed a preference was not mentioned.

¹⁴ *Cairney v. Back* [1906] 2 K. B.

Walton, J., "the priority given by the section was intended to apply to the wages due in respect of the personal services rendered by the clerk or servant. The defendant did not exactly serve the company, but provided services, attending himself occasionally when required." A similar point of view is indicated by a Scotch case, of somewhat earlier date, in which it was held that the mere fact of an employee's being denominated a "secretary" is not sufficient to justify the denial of a preference, if he is in reality merely a clerk; but that he is not within the scope of the act if he does not devote his whole time to the work of the employer, and is by occupation a law agent, who has other employees and clients.¹⁵

In Canada a commercial traveler is included within the phrase "clerks or other persons," in § 70 of the Dominion winding up act.^{15a}

In Victoria it has been denied that a manager is within the purview of Victoria companies act 1885 (No. 851), § 3, in which the phrase "clerk or servant" is defined as including "any clerk, artificer, handcraftsman, journeyman, servant in husbandry, laborer, workman, domestic or menial servant."¹⁶ That this decision, however, was rendered with reference to the special phraseology of the given statute, and was not intended to embody a doctrine different from that applied in the English case respecting the manager, is shown by the fact that the court also held that such an employee was within the description "clerk or servant" in the insolvency act 1871, § 113.¹⁷

In Newfoundland the term "servants" has been held to include all persons who (not being contractors or mechanics engaged on an occasional or special service) render personal services in the ordinary course of business on the trading establishment of an insolvent.¹⁸

d. Scope of statutes considered with reference to the character of the remuneration.—Having regard to the broader phraseology of the

746, 75 L. J. K. B. N. S. 1014, 22 Times L. R. 776, 96 L. T. N. S. 111.

¹⁵ *Re Clyde Football Co.* (1901) 8 Scot. L. T. 328.

^{15a} *Re Morlock* (1911) 23 Ont. L. Rep. 165, 18 Ont. Week. Rep. 545.

¹⁶ *Re Intercolonial S. & R. Co.* (1887) 13 Vict. L. R. 896, 9 Austr. L. T. 76, the *ratio decidendi* was that the descriptive words were used in a descending order, according to rank, and therefore could not be construed as comprehending a class of employees higher than "clerks."

¹⁷ This part of the decision proceeded on the ground that the descriptive words were intended to include all the employees in the sole service of the debt-

or, and paid by salary or wages, as distinguished from those hired to work by the piece; and that these words were indicative of a division of employees into two main classes,—one consisting of those whose duties were mainly mental and clerical, the other composed of those whose duties were mainly manual and physical. *Ex parte Collier* (cited in note 10, *supra*) appears not to have been brought to the attention of the court.

¹⁸ In *Re Ridley*, Newfoundl. Rep. (1864–74) 351 ("skinners" and "cullers" allowed a preference under § 22 of the act).

existing enactment, it is perhaps open to question whether the English courts would now follow the doctrine, adopted with reference to the act of 1849, that a clerk paid by commission on goods sold by him was not entitled to a preference.¹⁹

For cases turning upon the question whether employees remunerated according to the amount of work performed by them, or by a share of the profits of their employer's business, are servants within the meaning of the act, see § 1973, notes 2, 3, 4, *post*.

e. Preference as dependent upon the fact of the employer's being a trader.—In order to entitle a claimant to the statutory preference, it is not necessary that the employer should have been a "trader" at the time when the contract of hiring took effect, but merely that he should have been a "trader" at the time of the commission.²⁰

f. Scotch act of sederunt, 1779.—The priority established by the act (a judicial ordinance promulgated by the Court of Session in the exercise of its statutory power to make rules concerning procedure) was restricted to farm servants. To such servants it was held to be applicable whether they are hired by the day to perform harvest work, or for a specific term.²¹

On the other hand, the courts refused to allow a privilege in respect of the remuneration of the overseer in an extensive distillery,²² of a "mashman" in a brewery,²³ and of an artisan employed by a wright.²⁴

1943.—under the United States bankruptcy acts.—a. Reasons for allowing the preference.—In a case decided with reference to the act of 1867, the court remarked that it was to be regarded as embracing those classes of employees who, under normal circumstances, are dependent for their subsistence upon their wages or salaries ex-

¹⁹ *Ex parte Simmons* (1858) 30 L. T. 311.

In *Victoria* it has been held that the words "clerk or servant" in the insolvency act 1871, § 113 (a provision worded similarly to the earlier English acts), do not include a commercial traveler paid by a percentage on his sales. *Ex parte Tomlins* (1885) 11 Vict. L. R. 304.

It may also be observed that in some American cases it has been held that the expression "wages" does not include remuneration paid in the form of commissions. See § 1943, note 5; § 1951, note 5.

²⁰ *Ex parte Gough* (1833) 3 Deacon & C. Bankr. Cas. 189, Mont. & B. Bankr.

417 (bankrupt had been an architect until about two months before the commission, and had then become a builder).

²¹ *Lockhart v. Paterson* (1804) 13 F. C. 405; *M'Glashar v. Duke of Atholl* (1819) 19 F. C. 765.

In *Melvil v. Barclay* (1779) Morison's Dict. p. 11,853, the wages of the farm servants of a tenant farm were treated as a preferable debt. But the case was decided solely upon proof of usage.

²² *Ridley v. Haig* (1789) Morison's Dict. 11,854.

²³ *Marshall v. Philp* (1828) 6 Sc. Sess. Cas. 1st series, 575.

²⁴ *White v. Christie* (1781) Morison's Dict. 11,853.

clusively, and whose probable necessities entitle them to special protection.¹

But in a case decided in the district court under the bankruptcy act of 1898, it was said that, in view of the decision in *Re Dexter*, (see note 5, *infra*), decided by the court of appeals, it could not be said that a traveling salesman was any the less within the meaning of the statute because he was receiving a salary of \$3,000, instead of receiving a comparatively small compensation for his services, and therefore presumably dependent upon his earnings for present support.^{1a}

b. Footing upon which these acts are to be construed.—The present writer has not found any explicit expression of opinion with regard to the question whether the provision in these acts regarding the priority of wages should be strictly or liberally construed. But as the Supreme Court of the United States has definitely adopted the doctrine that statutes creating specific liens for labor are to receive a liberal construction,² it may reasonably be assumed that the scope of the bankruptcy act, so far as it relates to the preference of the claim of servants, would also be ascertained on this footing.

c. Meaning attached to the specific expressions used to designate the preferred classes of employees.—The expressions, "workmen, clerks, or servants," as used in the existing act, have not been defined by the legislature,³ and so few cases involving their construction have as yet been decided that the scope which will ultimately be ascribed

¹ *Re Rose* (1899) 1 Am. Bankr. Rep. 68. The conclusion which the court deduced from the principle thus laid down was that an independent contractor is not within the purview of the statute. But this deduction may more properly be referred to the more general rule discussed in § 1972, *post*.

In *Re Caldwell* (1908) 164 Fed. 515, the court, in holding that musicians employed at regular wages are "servants," said: "I do not think the intent of Congress was so narrow, but rather that it took the broad view that every laborer, clerk, servant, or employee working for wages for the benefit of a master or employer, when such wages furnish the means of his livelihood, and where the relationship of master and servant exists within the well-known meaning of the law, shall have priority over ordinary creditors for the sum due him for such services, not to exceed three months' wages. Any other construc-

tion would do a great injustice to a large class of wage earners, to whom their daily earnings are absolutely necessary for their support and that of their families,—an injustice which I am not inclined to assume Congress intended to inflict on them."

^{1a} *Re Gay* (1910) 188 Fed. 392.

² *Flagstaff Silver Min. Co. v. Cullins* (1881) 104 U. S. 176, 26 L. ed. 704.

³ In two cases it has been held that the meaning of these words is not controlled by the definition of the expression "wage earner," which is given in § 1 (27), *viz.*, "an individual who works for wages, salary, or hire, at a rate of compensation not to exceed \$1,500 per year." That definition, it is considered, refers only to the section by which "wage earners" are excluded from the list of the parties against whom an involuntary petition may be filed. *Re Scanlan* (1899) 97 Fed. 26; *Re Carolina Coöperage Co.* (1899) 96 Fed. 950.

to them is a matter of great uncertainty. The application of the familiar rule with respect to the construction of statutory words derived from a foreign enactment would naturally lead American judges to treat the English cases as authorities, or at least of a strongly persuasive force, so far as regards the meaning of the words "clerks" and "servants." On the other hand, it is only to be expected that the Federal courts should be greatly influenced by the general trend of opinion in those state courts which have shown a disposition to affix to the words "servants" and "employees," as used in the statutes discussed in § 1949, *post*, a more restricted meaning than they have in England. The influence thus indicated is possibly accountable, in some degree, at least, for two decisions to the effect that a traveling salesman is not entitled to a preference.⁴ But by the act of June 15, 1906 (34 Stat. at L. 267, chap. 3333, U. S. Comp. Stat. Supp. 1907, p. 1034), the scope of the provision was extended so as to include "traveling or city salesmen."⁵

⁴ In *Re Scanlan* (1899) 97 Fed. 26, the broader meaning of the word "servant" was deliberately repudiated, and it was held that the petitioner was neither a "workman," "clerk," nor "servant." This decision is directly opposed to that in the English case of *Ex parte Neale*, cited in § 1942, note 5, *ante*.

The other decision excluding employees of this class from the benefits of the act is *Re Greenwald* (1900) 99 Fed. 705.

It has been held that the term "clerk" is not confined to its strict lexicographical meaning of a person employed to keep records or accounts, and that it includes also a salesman employed in a shop or store. *Re Flick* (1900) 105 Fed. 503. But in *Re Scanlan*, *supra*, the popular American sense of the term was considered to be inadmissible in construing the act.

⁵ In *Re Dexter* (1907) 89 C. C. A. 285, 158 Fed. 788, the claimant was employed by the bankrupt as a salesman under a contract which assigned him certain territory and cities throughout the country, in which he obligated himself to take proper care of the trade. He was paid entirely by a commission on sales made, and established an office in Boston at his own expense. A circular was sent out by the bankrupt announcing his employment as its special representative in the United States, and

directing that all orders be sent to his office. He exercised full discretion as to when and where he should travel and also received orders at his office. Held, that he was a traveling salesman.

In *Re Gay* (1910) 188 Fed. 392, it was held that the fact that a traveling salesman employed by bankrupts who were engaged in selling securities also had charge of a branch office in another city, conducted correspondence from such branch office, on the bankrupts' letter heads and in their name, had a junior salesman under him, received bulletins issued by the bankrupts sent to managers of the branch offices, and in his letter of resignation signed himself as "manager" of the branch office,—was not sufficient to prevent him from being a "traveling salesman" within the meaning of the act.

The amending statute included a clause stating that it should not affect pending legislation. It was accordingly held that an employee who was not entitled to a preference for wages under the original act at the time when the bankruptcy petition was filed or the adjudication entered could not obtain it by virtue of the amendment. *Re Photo Electrotpe Engraving Co.* (1907) 155 Fed. 684.

As to the quality of remuneration paid in the form of commission, see also § 1942, note 19, and § 1951, note 5.

In a case decided under the act of 1898, a priority was accorded to the wages of a bookkeeper. It was considered that his rights in this regard were not affected by the circumstance that he had been doing work for other employers besides the bankrupt.⁶ In an earlier case it had been held that a person employed for a temporary service in adjusting the books and accounts of a bankrupt was entitled to the preference given by the act of 1867.⁷

It has been laid down that the salaries of directors of companies who act as general managers are not entitled to priority. The position of such persons was considered to be that of representatives or vice principals, exercising a supreme authority over the corporate affairs, etc.⁸

Musicians employed at regular wages to play in a theater or other place have been held to be "servants."⁹

The manager of a branch office of a broker in another city is not a "workman, clerk, or servant."¹⁰

d. Scope of act considered with reference to the character of the remuneration.—It has been held that a claim for commissions by an employee engaged outside his employer's store in procuring customers, under an agreement for the payment of weekly wage and an additional sum for commissions, is not entitled to priority as "wages."¹¹

1944.—under other American statutes giving a priority to claims for wages. Generally.—*a. Scope of the statutes as indicated by the*

⁶ *Re Baumblatt* (1907) 156 Fed. 422.

⁷ *Ex parte Rockett* (1876) 2 Low. Dec. 522, Fed. Cas. No. 11,977.

⁸ *Re Grubbs-Wiley Grocery Co.* (1899) 96 Fed. 183 (directors and general managers of a mercantile corporation); followed in *Re Carolina Cooperage Co.* (1899) 96 Fed. 950 (president of a business corporation). The doctrine thus propounded is the same as that of the English courts. See § 1942, note 11, *ante*.

⁹ *Re Caldwell* (1908) 164 Fed. 515, the court said: "It is true that Congress might have added the word 'wage earner,' and thus removed all doubt; but it was probably thought that the word 'servant,' in view of the construction given to the word by the courts generally, was sufficiently broad to include all persons working for the benefit of a master or employer and dependent upon wages for their support. Employees of

carriers, mills and other establishments, are always designated as servants, and the employers as masters. A musician employed by the day, week, or month at regular wages, while not a 'menial servant' in any sense of the word, is still one who labors for the benefit of an employer. He is not in pursuit of an independent calling, and is subject to his master's commands, and must do as directed. The fact that his work is that of an artist does not deprive him of the benefit which the law intended to give to those working for wages for their living."

¹⁰ *Re Albert O. Brown & Co.* (1909) 171 Fed. 281.

¹¹ *Re Mayer* (1900) 101 Fed. 227. This decision is in harmony with the English and Colonial cases regarding employees remunerated by commissions. See § 1942, note 11, *ante*.

reasons for their enactment.—The considerations by which the legislatures are said to have been influenced in enacting these statutes have reference both to the welfare of the employee and that of the employer.

On the one hand, they are regarded as being intended to afford an additional security to those classes of employees who are the least able to protect themselves against loss,¹ and whose remuneration is, in a special sense, necessary for the support of themselves and their families.²

In *Stonewall Jackson Loan & Bldg. Asso. v. McGruder* (1871) 43 Ga. 9, it was observed that the provision of the Georgia Code by which liens are granted to laborers "is intended to secure to a large class of poor people, dependent for subsistence upon the safe and speedy collection of their wages, a speedy mode of enforcing their just claims;" that "these claims are generally small," and that they belong, for the most part, to persons who look solely to their daily wages for immediate subsistence, and who, if they lose that, are in want, and in danger of becoming a public charge. They are not "designed to give a preference to the salaries and compensation due to officers and the employees occupying superior positions of trust and profit."³

On the other hand, it has been stated that one of their objects is "to prevent those persons whose labor is indispensable to the continuance of the business of the employer from abandoning it," and thus obviate that "sudden and general desertion" which "would in many instances result in complete ruin to all concerned."⁴

¹ For cases in which the notion that the employee in question did or did not belong to a class which required protection was mentioned as a factor which operated in favor of or against his claim, see *Seventh Nat. Bank v. Shenandoah Iron Co.* (1887) 35 Fed. 436; *Pennsylvania & D. R. Co. v. Leuffer* (1877) 84 Pa. 168, 24 Am. Rep. 189; *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525.

² For allusions to the significance of this factor, see *American Casualty Ins. Co.'s Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.)* (1896) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778; *Palmer v. Van Santvoord* (1897) 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915; *Pennsylvania & D. R. Co. v. Leuffer* (1877) 84 Pa. 168, 24 Am. Rep. 189 and the case cited in the next note.

³ *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525.

⁴ *Lehigh Coal & Nav. Co. v. Central R. Co.* (1878) 29 N. J. Eq. 252. This language was quoted with approval in *Watson v. Watson Mfg. Co.* (1879) 30 N. J. Eq. 588.

See also *Bedford v. Newark Mach. Co.* (1863) 16 N. J. Eq. 117, where the court expressed the opinion that the New Jersey acts had been adopted "not only to secure remuneration to the operatives, but upon a principle of sound public policy to encourage manufactures by inducing the operatives to continue their labor, notwithstanding the inability, real or apprehended, of the employer to pay their wages."

b. Upon what footing they are construed.—The doctrine laid down in most of the cases in which the point has been specifically referred to is that statutes of this type are to be liberally construed.⁵ The standpoint of the New York court of appeals is indicated by the statement that, as “legislation of this character confers upon a class of persons having a specific contractual relation with corporations, new and unusual privileges and securities at the expense of other creditors whose distributive share of the assets is diminished, it is in derogation of the common law, and should not be extended to cases not within the reason as well as within the words of the statute.”⁶

c. Scope of statutes considered with reference to the character of the remuneration.—In New York, the court of appeals has taken the position that the expression “wages,” as used in a statute granting a preference to the “wages of employees, operatives, and laborers,” is to be regarded as connoting only such remuneration as is

⁵ For cases affirming this doctrine, see *Flagstaff Silver Min. Co. v. Cullins* (1881) 104 U. S. 176, 26 L. ed. 704; *Seventh Nat. Bank v. Shenandoah Iron Co.* (1887) 35 Fed. 436; *Heckman v. Tammen* (1900) 184 Ill. 144, 56 N. E. 361; *Bass v. Doerman* (1887) 112 Ind. 390, 14 N. E. 377; *McLaren v. Byrnes* (1890) 80 Mich. 275, 45 N. W. 143.

In *Palmer v. Van Santvoord* (1897) 133 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915, the court remarked that the New York statute granting preferences to employees of insolvent corporations “proceeds upon a broader policy as to the persons to be protected than has been attributed to the acts imposing liability upon stockholders.”

Similarly, in *Black's Appeal* (1890) 83 Mich. 513, 47 N. W. 342, the court, adverting to certain decisions cited by counsel, which involved the construction of enactments relating to the personal liability of stockholders for the debts of corporations, observed: “In all such cases a strict construction must be placed upon the statutes, because, although remedial, they are in derogation of the common law, and impose liabilities where none existed before. But the statute under consideration creates no new liabilities. It is merely a statute regulating the distribution of insolvent estates. It does not depend upon any constitutional provisions to authorize it.

It regards the remuneration of labor performed for an employer as more worthy of payment than mere merchandise debts or other unsecured claims against an insolvent debtor. Its merits are of the same nature as those which prefer debts due to the United States or to the state, and debts due for the last sickness and funeral expenses, in insolvent estates of deceased persons, and I think it should have a just and liberal construction.”

In two states, however, it has been categorically laid down that statutes creating liens are to be strictly construed. *Hinton v. Goode* (1884) 73 Ga. 233; *Flournoy v. Shelton* (1884) 43 Ark. 168.

A similar view seems to prevail in Maryland. See *American Casualty Ins. Co's Case* (*Boston & A. R. Co. v. Mercantile Trust & D. Co.*) (1896) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778, § 1949, note 7, *post*. But the expression of opinion in that case is not direct and explicit.

The rule of strict construction has also been adopted under the Civil Law. See §§ 1951b, 1952a, *post*.

⁶ *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525, referring to *People v. E. Remington & Sons* (1887) 45 Hun, 329, affirmed in (1888) 109 N. Y. 631, 16 N. E. 680.

paid for manual labor.⁷ On this ground it has been held that a preference could not be claimed for the fees paid to an attorney at law for services rendered under occasional retainers, nor to the commissions of a selling agent, nor to the remuneration of an employee performing work of such a character that the amount stipulated to be paid for it would, in ordinary parlance, be designated as "salary."⁸ In the case cited, the use of the word "wages" was treated as an element corroborating an inference which was also deduced from the collocation of the terms by which the preferred classes of claimants are described. See § 1948, *post*.

In a New Jersey case also the fact that the statute in question referred to "wages" as the subject-matter of the preference granted, and made no specific mention of "salaries," was mentioned as an element corroborating the inference, drawn on independent ground, that the statute did not cover the officers of a corporation.⁹

d. —to the fact that the employer is or is not a corporation.— Obviously, no preference should be allowed where the statute in question is by its terms applicable only to employees in the service of corporations, and the work on which the claim is founded was performed for an individual.¹⁰

⁷ *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525, affirming (1893) 73 Hun, 327, 26 N. Y. Supp. 209.

⁸ *People v. E. Remington & Sons* (1887) 45 Hun, 329, affirmed in (1888) 109 N. Y. 631, 16 N. E. 680.

Compare *Witman v. Miller* (1892) 12 Pa. Co. Ct. 363, where it was held by one of the inferior Pennsylvania courts that a traveling salesman paid by commission is not within the descriptive terms, "tradesman hired for wages or salary," in the Pennsylvania act of May 12, 1891.

The *Remington Case* was followed by *Gay v. Hudson River Electric Power Co.* (1910) 178 Fed. 499.

⁹ *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —. 29 Atl. 326. (See § 1948, *b*.)

¹⁰ That a bookkeeper employed by an individual engaged in the sawmill business is not within a statute which allows a lien to bookkeepers and other employees of "merchants, transportation companies, and corporations," was held in *Warburton v. Coumbe* (1894) 34 Fla. 212, 15 So. 769.

The phraseology of the statute may

be of such a restrictive character as to limit its application to the servants of corporations whose wages are regularly payable at the termination of certain specified periods. Thus it has been held, with reference to the California act of March 31, 1891, that the specified lien did not arise except in respect to persons whose wages were payable weekly or monthly. *Keener v. Eagle Lake Land & Irrig. Co.* (1895) 110 Cal. 627, 43 Pac. 14; *Ackley v. Black Hawk Gravel Min. Co.* (1896) 112 Cal. 42, 44 Pac. 330; *Spaulding v. Mammoth Spring Min. Co.* (1897) — Cal. —, 49 Pac. 183.

In *Kuschel v. Hunter* (1897) — Cal. —, 50 Pac. 397, in which this statute was also under construction, it was held (1) that an allegation that claimant "agreed to do work by the month" at the "agreed rate of \$100 per month" was not an allegation that the corporation agreed to pay him monthly, and (2) that a finding of the court that the corporation "promised" claimant "the sum of \$100 per month," and that it did not pay "its employees" the wages earned by them "weekly or monthly on a pay day in each week or month se-

e.—to the exhaustive character of the enumeration of the preferred classes of employees.—An application of the rule of statutory construction, *Expressio unius est exclusio alterius*, requires the conclusion that, if the enactment in question enumerates several classes of persons, the legislature did not intend that any other classes should be benefited.¹¹

f. Duration of the contract as an element.—In the absence of any decision on the point, it may perhaps be assumed, with regard to the American statutes, that, wherever they grant a lien or preference in general words, the employees belonging to the classes within their purview are entitled to a priority, irrespective of whether the hiring was by the year, month, week, or day, and of the length of the intervals between the dates at which the compensation is payable under the contract. Such an assumption, at all events, would appear to be reasonable, so far as regards the states which have adopted the doctrine that these enactments are to be liberally construed. It must be admitted that a different doctrine was laid down with relation to the earliest of the English bankruptcy acts in which a priority was allowed to wages (see § 1942, *c*, *ante*). But that doctrine was based upon the specific language of the act, and does not reflect any general conception which can be treated as a relevant factor in the construction of enactments framed in terms as broad as those with which we are here concerned.

g. Preference of employees of corporations who are also stockholders.—The effect of the decisions with regard to the preferential

lected by said company," was not equivalent to a finding that the corporation agreed to pay claimant monthly. It was urged in this case that the want of direct proof as to the nature of the hiring might be supplied by the operation of Civil Code, § 2011, which declares that, "in the absence of any agreement" as to the term of service, time of payment, or rate of wages, a servant is presumed to be hired by the month, at a monthly rate of wages, to be paid when the service is performed. The court, however, was of opinion that it was not permitted to add any fact to the findings by presumption, as would be the case should it presume that there was "the absence of any agreement." which must be shown as a condition precedent to giving effect to the statutory presumption.

¹¹ In *Thomas v. Washabaugh* (1900)

24 Pa. Co. Ct. 419, the court refused to allow a preference to a man performing services as the janitor and trainer of an athletic association, the *ratio decidendi* being that, in the Pennsylvania act of May 12, 1891, there was no mention of persons performing such services, and that the claimant could not be placed in any of the classes of employees which were specified.

In *Hester v. Allen* (1876) 52 Miss. 162, it was held that a man employed to overlook and supervise the work on a farm was not entitled to a lien on the crops, under Mississippi agricultural lien laws of 1872 and 1873, those statutes being intended to embrace only the classes enumerated therein; *viz.*, the employer and employee, the landlord and tenant, the cropper on shares, and the supply man and the party supplied.

rights of stockholders is, that an employee of a corporation, if he is otherwise within the purview of a statute of this description, will not be excluded from its benefits merely on the ground that he is also a stockholder,¹² or a director,¹³ or even a president.¹⁴

h. Preference of employees of receivers of insolvent estates.—In a case where the receiver of a coal mine, who had been appointed at a foreclosure sale, during the period of the equity of redemption, had, without any express authorization, hired one to operate the mine, it was urged that, as the property was *in custodia legis*, he was not entitled to a lien, for the reason that the court had not directly ordered the performance of the work in respect of which it was claimed. But the contention did not prevail.¹⁵

1945. Same subject, scope of the term "laborer."—*a. Generally.*—A class of employees which is commonly specified in statutes of this type is that composed of "laborers" or "persons performing labor." In its widest sense, the term "labor" may be said to embrace every form of human exertion, whether mental or physical. But, as commonly used in everyday language, it conveys the idea of work which is entirely or principally performed with the hands. Such is also the signification commonly ascribed to it by the courts.¹

In this point of view the benefit of a provision which grants a

¹² *Conlee Lumber Co. v. Ripon Lumber Mfg. Co.* (1886) 66 Wis. 481, 29 N. W. 285.

This general rule is, of course, not applicable in a case where the employing corporation has not been legally organized. *J. A. Fay & E. Co. v. Eagan* (1897) 96 Wis. 434, 71 N. W. 895.

¹³ *Consolidated Coal Co. v. Keystone Chemical Co.* (1896) 54 N. J. Eq. 309, 35 Atl. 157; *Re Armleder Plumbing Co.* (1900) 11 Ohio C. Dec. 320. The cases in which the claims of directors who were discharging the duties of general managers have been rejected indicate the limitations to which the doctrine is subject. See § 1942, note 11; § 1943, note 8, *ante*.

By § 2488 of Ky. Stat. 1894 and 1903, it is expressly provided that no president or other chief officer nor any director or stockholder of the insolvent company shall be deemed an "employee."

¹⁴ *Duryee v. United States Credit System Co.* (1895) — N. J. Eq. —, 32 Atl. 690.

¹⁵ *Traylor v. Barry* (1901) 96 Ill. App. 644 (decided with reference to Ill.

Laws 1895, p. 242, which gives a lien upon all the property used in "construction and operation").

¹ In *Hinton v. Goode* (1884) 73 Ga. 233, in discussing the meaning of the word as used in § 1974 of the Georgia Code, the court observed: "Laborers, as used in the statute, mean what were generally and universally known as laborers at the time of the passage of the act. A laborer is one who works at a toilsome occupation,—a man who does work requiring little skill, as distinguished from an artisan, sometimes called a laboring man. (Webster.) Clerks, agents, cashiers of banks, and all that class of employees whose employment is associated with mental labor and skill, were not considered laborers, and were not intended by the statute to be embraced therein as laborers, so as to have a lien for their wages."

The definition of the term by Webster was also adopted in *Dano v. Mississippi & R. River R. Co.* (1872) 27 Ark. 566, 567.

preference or lien in favor of a "laborer" can be claimed by such employees as the following: A person hired as a clerk, bartender, and boy of all work in a grocery and liquor store;² a mailing clerk in a newspaper office, whose work consists in addressing and despatching the papers to the subscribers, and in attending to their delivery;³ a driver of a milk wagon;⁴ a cook in a logging or mining camp;⁵ a blacksmith engaged in shoeing horses and repairing appliances used by the laborers in such a camp;⁶ a man employed to attend a bar, wash bottles, unpack goods, sweep out the barroom, and do everything that is required of him;⁷ a man employed to operate the machinery used for hoisting the materials for a building under construction.⁸

There is also explicit authority for the doctrine that a servant engaged to do work which is essentially manual is a "laborer," although the work may be such as cannot be performed without the exercise of special skill. In this point of view it is considered that a preference should be accorded to such employees as typesetters, cylinder feeders, and pressmen in a printing office.⁹

² *Oliver v. Boehm* (1879) 63 Ga. 172 (short judgment; no argument). See also *Blumthenthal v. Bennefield* (1907) 127 Ga. 444, 119 Am. St. Rep. 350, 56 S. E. 517, where the word was held to be applicable to a bartender whose duties were mainly manual, although, as a part of his duties, he was required to keep books.

³ *Michigan Trust Co. v. Grand Rapids Democrat* (1897) 113 Mich. 615, 67 Am. St. Rep. 486, 71 N. W. 1102.

⁴ *Wilbur v. Hankins* (1897) 19 Pa. Co. (t. 222 (Pa. act of May 12, 1891, granting a preference to "hand laborers, including farm laborers or any other kind of labor").

⁵ *Winslow v. Urquhart* (1875) 39 Wis. 260; *Breault v. Archambault* (1896) 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348. (cook and assistant cook entitled to lien). It should be observed that in these cases it was not disputed that the claimants fell under the generic description "laborers." The actual point upon which they turned was that they were engaged in a common enterprise with the men who handled the logs. They are in conflict with *McCormick v. Los Angeles City Water Co.* (1870) 40 Cal. 185, where it was held that a man hired to cook for men engaged in constructing a reservoir was

not entitled to a lien on it; and with *Clark v. Beyrle* (1911) 160 Cal. 306, 116 Pac. 739, where it was held that a cook for the laborers of a contractor engaged in constructing a tunnel was not entitled to a lien.

In a case where men were hired to work in making improvements on a mining claim at a certain sum per day and their board, one who devoted a part of his time to cooking for himself and the others was held to be entitled equally with the others to a lien for his wages. *Cascaden v. Wimbish* (1908) 88 C. C. A. 277, 161 Fed. 241.

⁶ *Breault v. Archambault* (1896) 64 Minn. 420, 58 Am. St. Rep. 545, 67 N. W. 348.

⁷ *Lowenstein v. Meyer* (1901) 114 Ga. 709, 40 S. E. 726. The mere fact that a part of his duties was the keeping of the books was deemed not to be sufficient to exclude him from the benefit of the statute.

⁸ *Tizzard v. Hughes* (1858) 3 Phila. 261.

⁹ *Heckman v. Tammen* (1900) 184 Ill. 144, 56 N. E. 361. The court said: "To so construe the statute as to limit its benefits to mere menial servants performing the lowest forms of labor, requiring no skill, would, we think, do violence to the meaning of the act, and

Labor expended for caring for horses in a mine is labor in a mining claim.^{9a}

On the other hand, a provision of this tenor is not applicable to a civil engineer;¹⁰ nor to a professional chemist in the employ of an iron company;¹¹ nor to the secretary and treasurer of a company;¹² nor to a clerk of a hotel;¹³ nor to a clerk in a mercantile establishment;¹⁴ nor to the editors and reporters of newspapers;¹⁵ nor to a man engaged in soliciting orders for and selling the products of a mine upon commission;¹⁶ nor to a man employed to disburse money and pay off workmen engaged in the building of a house.¹⁷ Nor to a scaler of logs.¹⁸ Having regard to these decisions, as well as the general trend of the authorities, it seems impossible to accept as correct the ruling that a traveling salesman is a "person performing labor."¹⁹

b. Applicability of term to supervising employees of the higher grades.—Several decisions may be said to proceed upon the general principle that the higher descriptions of supervising employees are not "laborers" in the statutory sense of the term. Thus the courts have refused to recognize the claims of the president of a company who was acting as its general manager;²⁰ of the manager and secre-

leave the evil intended to be cured to remain in existence, only slightly mitigated. While we are disposed to hold that the statute must be confined to those who perform manual services, still it cannot be confined to such services only that require no skill in the performance of them."

^{9a} *Gray v. New Mexico Pumice Stone Co.* (1910) 15 N. M. 478, 110 Pac. 603.

¹⁰ *Pennsylvania & D. R. Co. v. Leuffer* (1877) 84 Pa. 168, 24 Am. Rep. 189.

¹¹ *Cullum v. Lickdale Iron Co.* (1893) 5 Pa. Dist. R. 622.

¹² *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* (1896) 81 Fed. 439 (Va. Acts of March 21, 1877, and April 2, 1879).

¹³ *Ricks v. Redwine* (1884) 73 Ga. 273.

¹⁴ *Hinton v. Goode* (1884) 73 Ga. 233; *Oliver v. Macon Hardware Co.* (1896) 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403.

¹⁵ *Michigan Trust Co. v. Grand Rapids Democrat* (1897) 113 Mich. 615, 67 Am. St. Rep. 486, 71 N. W. 1102. The court remarked that the labor of this class of employees is intellectual rather than manual, "the work of professional

men rather than the work of laborers, giving that word its ordinary acceptance."

¹⁶ *Willauer's Estate* (1882) 1 Chester Co. Rep. 533.

¹⁷ *Edgar v. Salisbury* (1852) 17 Mo. 271.

¹⁸ *Meands v. Park* (1901) 95 Me. 527, 50 Atl. 706.

¹⁹ *Re Lawler* (1901) 110 Fed. 135 (statute of Washington state).

²⁰ *Seventh Nat. Bank v. Shenandoah Iron Co.* (1887) 35 Fed. 436 (Va. Acts of March 21, 1877, and April 2, 1879). The court said: "If the statute had intended to embrace presidents, vice presidents, general superintendents, general managers, and other like officials, it would doubtless have said so. The prominence of such officials in every company named in the statutes precludes the idea that their distinct existence and claims were overlooked, and that they were intended to be embraced in some of the designated classes of employees. They seem to have been purposely omitted; doubtless for the reason that this class of officials are, generally, in a position to protect their interests and secure their salaries; while the classes in-

tary of a company;²¹ of a mining engineer employed on account of his professional knowledge and executive capacity to manage a mine;²² of a man employed by a company to superintend its affairs at a place where it was erecting a building;²³ of the superintendent of an industrial concern whose duties consist in supervising the operations, conducting a store, and keeping books.²⁴ Such decisions reflect a doctrinal position essentially inconsistent with that which is exemplified in another group of cases in which it has been held that he is entitled to a lien if he superintended the work of construction.²⁵ The same remark is applicable to a case in which

cluded in the statute are not so situated, and are not able to protect themselves against loss."

Compare the cases cited in § 1942, note 10, *ante*; § 1943, note 4, *ante*; § 1948, note 5, *post*.

²¹ *Fidelity Ins. Trust & S. D. Co. v. Roanoke Iron Co.* (1896) 81 Fed. 439 (same statute); *Cox v. Fletcher* (1908) 5 Ga. App. 297, 63 S. E. 61 (holding that a "superintendent and general manager" are not within the statute); *Durkheimer v. Copperopolis Copper Co.* (1909) 55 Or. 37, 104 Pac. 895 (mine superintendents and managers not within the statute); *Alexander v. Farrow* (1909) 151 N. C. 320, 66 S. E. 209 (officers of corporation are not "laborers" or "workmen" so as to be entitled to priority in case of insolvency).

A stockholder and director and manager of a corporation in the hands of a receiver is not entitled to a preference. *Trust Co. v. Casey* (1909) 131 Ky. 771, 115 S. W. 780.

²² *Boyle v. Mountain Key Min. Co.* (1897) 9 N. M. 237, 50 Pac. 347.

²³ *Smallhouse v. Kentucky & M. G. & S. Min. Co.* (1876) 2 Mont. 443.

²⁴ *Moore v. American Industrial Co.* (1905) 138 N. C. 304, 50 S. E. 687, holding that the claimant was not a "laborer" within Const. art. 14, § 4, requiring the general assembly to enact legislation giving mechanics and laborers a lien on the subject-matter of their labor, and did not perform "labor" within Code, § 1255, which carries the provisions of the Constitution into effect.

²⁵ *Bank of Pennsylvania v. Gries* (1860) 35 Pa. 423. Alluding to the functions of the claimant, the court said: "This is work often done by the master mechanic, and is as essential to the due construction of a building as is

the purely mechanical part. . . . A mere naked architect, and who may be such without being an operative mechanic, who draws plans in anticipation of buildings usually, to enable the builder to determine the kind he will erect, could hardly be supposed to be within the act which provides a lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this is the case of a party employed to devote his entire time to a building, and who draws the plans for every part of the work, and directs its execution according to such plans and specifications. This is labor—mechanical labor of a high order—contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is this not entitled to be considered as meritorious as mere manual labor with the tools of a trade? Both are necessary to the accomplishment of the end in view, and both are necessary, or were deemed so to be in this case, to the progress of the building, and were performed in and about its construction."

In *Stryker v. Cassiday* (1879) 76 N. Y. 50, 32 Am. Rep. 262, reversing (1877) 10 Hun, 18, the court, discussing the effect of a statute granting a lien to "any person who should perform any labor," said: "This language is general and comprehensive, and its natural and plain import includes all persons who perform labor, in the construction or reparation of a building, irrespective of the grade of their employment, or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not

a person who planned and superintended the development work of a mine was declared to be entitled to a lien under a statute which covers

any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs, and applies the labor of others. . . . Looking at the whole act, it is plain that it was not passed simply for the protection of laborers, using that word in a restricted sense, as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' lien acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the act in question a lien may be created not only in favor of workmen employed by a contractor, but in favor of the contractor also."

For other cases in which architects who had performed services both in preparing the plans and specifications of a building, and also in superintending its construction, were held to be entitled to liens in respect of both descriptions of services, see *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.* (1895) 66 Fed. 683 ("any person who performs labor"); *Hughes v. Torgerson* (1892) 96 Ala. 346, 16 L.R.A. 600, 38 Am. St. Rep. 105, 11 So. 209 ("with any person who shall perform work or labor upon a building"); *Taylor v. Gilsdorff* (1874) 74 Ill. 354 ("any person who shall furnish labor for erecting"); *Mulligan v. Mulligan* (1866) 18 La. Ann. 20 ("mechanic, workman, or other person performing any work toward the erection, construction, or finishing of any building"); *Knight v. Morris* (1868) 13 Minn. 473, Gil. 438 ("any person performing labor"); *Wagansten v. Jones* (1895) 61 Minn. 263, 63 N. W. 717; *Von Dorn v. Mengedohrt* (1894) 41 Neb. 525, 59 N. W. 800 ("any person who shall perform any labor for the erection of a house or building"); *Johnson v. McClure* (1900) 10 N. M. 506, 62 Pac. 983 ("every person performing labor." Expression "labor" construed as comprehending labor skilled or unskilled, mental or physical, professional or mechanical); *Mutual Ben. L. Ins. Co. v. M. & S.* Vol. V.—380.

Roland (1875) 26 N. J. Eq. 389 ("any person who performs labor for the erection or construction of a house"); *Friedlander v. Taintor* (1905) 14 N. D. 393, 116 Am. St. Rep. 697, 104 N. W. 527, 9 Ann. Cas. 96 ("persons who perform any labor upon a building"); *Field v. Consolidated Mineral Water Co.* (1903) 25 R. I. 319, 105 Am. St. Rep. 395, 55 Atl. 757 ("any person who does work in the construction of a building"); *Arnoldi v. Gouin* (1874) 22 Grant, Ch. (U. C.) 314 ("mechanic, machinist, builder, miner, laborer, or other person who does work").

The position taken in Massachusetts is that an architect is entitled to a lien for services rendered in superintending a building for which he has made the plans and specifications, but that, if the contract is an entire one in respect of both these descriptions of work, he cannot claim a lien in respect of the supervision alone. *Mitchell v. Packard* (1897) 168 Mass. 467, 60 Am. St. Rep. 404, 47 N. E. 113; *Libbey v. Tidden* (1906) 192 Mass. 175, 78 N. E. 313, 7 Ann. Cas. 617. In the former case the court observed: "We are of opinion that the work of supervision which is done directly upon the building, and which is partly physical, but in its more important part mental, may be the subject of a lien under our statute, even if done by the same person who prepared the plans as an architect."

That an architect or superintendent of a building has no lien by reason of his services, under Kentucky mechanics' lien law of 1858 (Myers's Supp. p. 300), was held in *Foushee v. Grigsby* (1877) 12 Bush, 75. The words of the statute under review are not mentioned in the report, but presumably the essential term was "labor." If so, this decision is manifestly in conflict with those above cited, in so far as it may be supposed to deny the right of an architect to a lien in respect of superintendence. But the precise standpoint of the court is not apparent.

That a supervising architect is not entitled to a lien either under Milligen & V. Compilation of Laws of Tennessee, § 2739, which declares such lien in favor of a mechanic, undertaker, founder, or machinist who does any part of the

work or furnishes any part of the materials for the construction of a building, or under § 2740, which provides that the benefits of § 2739 shall apply to all persons doing any portion of the work or furnishing any portion of the building, was held in *Thompson v. Baxter* (1892) 92 Tenn. 305, 36 Am. St. Rep. 85, 21 S. W. 668. The *ratio decidendi* was that an architect is not included within any of the classes of employees specifically enumerated in the former of these sections.

For cases in which it was held that an architect is not entitled to a lien where he merely draws the plans and does not perform any functions of superintendence, see *Raeder v. Bensberg* (1879) 6 Mo. App. 445 (mechanics or other persons who perform any work or labor upon a building); *Rinn v. Electric Power Co.* (1896) 3 App. Div. 305, 38 N. Y. Supp. 345; *Bank of Pennsylvania v. Gries* (1860) 35 Pa. 425 (see quotation, *supra*); *Price v. Kirk* (1879) 90 Pa. 47; *Rush v. Able* (1879) 90 Pa. 153 (character of work must be set out in statement of claim; it is not sufficient merely to specify it as "architect's work").

For decisions to the effect that an architect who draws the plans and specifications for a building afterwards erected in conformity to them, but does not superintend its construction, is entitled to a lien under a statute which does not expressly purport to embrace skilled labor, see *Henry & C. Co. v. Halter* (1899) 58 Neb. 685, 79 N. W. 616.

For cases in which the lien of such an architect was allowed with reference to statutes which were, by their express terms, applicable to skilled labor, see *Fischer v. Hannah* (1896) 8 Colo. App. 471, 47 Pac. 303; *Gardner v. Leck* (1893) 52 Minn. 522, 54 N. W. 746 (approving *Knight v. Morris* (1868) 13 Minn. 473, Gil. 438, as being a correct decision under the earlier statute, which did not expressly embrace skilled labor).

In *Freeman v. Rinaker* (1900) 185 Ill. 172, 56 N. E. 1055, reversing (1899) 84 Ill. App. 283, it was held that an architect who draws plans and specifications for a building is entitled, even though he does not superintend its construction, to a mechanics' lien under the Illinois act of June 18, 1895, § 1, which is applicable to any person who shall furnish or specially prepare the mate-

rials for the purpose of, or in building a house, "or performs services as an architect for any such purpose."

On the other hand, it was held in *Adler v. World's Pastime Exposition Co.* (1888) 126 Ill. 373, 18 N. E. 809, that the services of an architect in keeping books, auditing accounts, and making settlements in behalf of the owner with various contractors engaged in the erection of a building were not lienable under this statute, chap. 82, § 1. As the services in question had been rendered under an entire contract which also covered the preparation of plans and specifications and the superintendence of the construction of the building, it was held that the contract could not be apportioned, and that he was not entitled to a lien for any of the services.

In *Buckingham v. Flummerfelt* (1906) 15 N. D. 112, 106 N. W. 403, the court held that, even supposing a lien may be claimed in respect of the making of plans alone (a point as to which no definite opinion was expressed), an architect cannot claim a lien in respect of such plans which eventually are not used at all in the erection of the building.

In *Foster v. Tierney* (1894) 91 Iowa, 253, 51 Am. St. Rep. 343, 59 N. W. 59, it was held that an architect who had made plans with a view to certain contemplated improvements on a building which were eventually not carried out was not entitled to a lien, although the preparation of the plans required some preliminary work upon the building. The *ratio decidendi*, however, was not the quality of the services, but the notion that the statute only gave a lien for work actually done upon the building.

In *Fitzgerald v. Walsh* (1900) 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717, it was held that an architect entitled, under Wis. Stat. 1898, § 3314, to a lien in respect of making plans, specifications, and estimates for a contemplated building, as the construction of the building pursuant to such plans had been commenced, although the owner ceased to use them before anything had been done except a part of the excavation for the basement. The court said that two things only are necessary to the lien: namely, indebtedness of the owner to the claimant for work done that the former knew, or ought to have

"all miners, laborers, and others who perform work or labor upon any mine." Such services were regarded as being similar to those of an architect.²⁶

c. Applicability of term to supervising employees of the lower grades.—Some of the decisions under this head may be said to reflect the broad conception that, for the purposes of these statutes, there is an essential distinction between employees whose functions are entirely or mainly confined to superintendence, and those who actually perform the work in question.²⁷ Thus it has been held that the benefit of the lien or preference cannot be claimed by an overseer of a farm, in respect of work connected with his functions of superintendence;²⁸ nor by the foreman of works at a tunnel;²⁹ nor by a man who has charge of a gang of laborers engaged in cutting and hauling logs, but does not perform any of the manual work.³⁰ On the other hand, the position was taken in one case that the ex-

known, the latter supposed was on account of the building presently or in the near future to be constructed. The *ratio decidendi* was that when the construction of the building was actually commenced according to the plans, the lien attached and could not thereafter be defeated. The court distinguished *Foster v. Tierney*, *supra*, upon the ground that the construction of the building was not commenced in that case, so that the lien necessarily could not attach. The general question whether a distinction should be made, in respect of lienable quality, between work done in preparing plans and work done in superintendence, was not adverted to.

Architects are entitled to a lien under the Civil Law. Domat, pt. 1, bk. 3, tit. 1, § 5, art. 9; under the Code Napoleon, art. 2103, cl. 4; and under the Quebec Code, art. 2013.

²⁶ *Rara Avis Gold & S. Min. Co. v. Bouscher* (1886) 9 Colo. 385, 12 Pac. 433.

²⁷ In *Pullis Bros. Iron Co. v. Boemler* (1901) 91 Mo. App. 85, it was observed: "The phrase 'wages for labor,' if we construe the words according to their ordinary meaning, defines compensation for either manual labor, or, at most, for any service rendered in performing a necessary detail of a company's business by the employee's personal exertion, rather than for work

performed by others under his supervision."

²⁸ *Flournoy v. Shelton* (1884) 43 Ark. 168 (decided on the ground that a statute, Gantt's Dig. §§ 4079-4097, giving a lien to "laborers," must be strictly construed); *Rust v. Billingslea* (1871) 44 Ga. 308 (act of 1879; the court remarking that the rule was subject to an exception in cases where the overseer worked as a common day laborer also); *Hester v. Allen* (1876) 52 Miss. 162; *Whitaker v. Smith* (1879) 81 N. C. 340, 31 Am. Rep. 503; *Isbell v. Dunlap* (1882) 17 S. C. 581.

In the case last cited the court said: "An overseer is one who is employed, not to labor himself, but to overlook and direct the labor of those who are employed to do the manual work of planting, cultivating and gathering a crop; and it would be a confusion of terms to call such a person a laborer."

²⁹ *Pratt's Appeal* (1885) 1 Sadler (Pa.) 12.

³⁰ *Meands v. Park* (1901) 95 Me. 527, 50 Atl. 706 (statutory expression is "whoever labors at cutting logs"). The court said: "The word 'labor' was undoubtedly employed by the legislature in its limited and popular sense to designate this class of workmen [*i. e.*, common laborers] who labor 'with physical force in the service and under the direction of another, for fixed wages.'"

To the same general effect. *Wentroth's Appeal* (1876) 82 Pa. 469.

pression "laborers" embraces a man employed as a general foreman of a mine to supervise the men . . . keep their time, and give them orders for their pay at the end of each month.³¹ In another case it was held that the so-called "superintendent" of a natural-gas company, who was not a general manager, nor a general agent, nor an officer of the company, but whose duties consisted principally in superintending the construction of trenches and the laying of gas pipes, was a "laborer."³²

d. Occasional performance of manual labor; differentiating import of.—Employees who, in respect to the other incidents of their positions, do not belong to the classes to which the term is applicable, cannot claim the benefit of the preference on the mere ground that they sometimes performed some manual work as an incident of the discharge of their duties.³³ Manual work so performed does not con-

³¹ *Capron v. Strout* (1876) 11 Nev. 304. The court refused to express an opinion regarding the right of a general superintendent to claim the lien; but remarked that the cases were, at all events, distinguishable. The latter of these views is sustained by the analogy of the decisions which relate to statutes in which the expression "work and labor" is used. See § 1947, *post*.

The *Capron Case* was followed in *Kritzer v. Truacy Engineering Co.* (1911) 16 Cal. App. 287, 116 Pac. 700. See also *Cullins v. Flagstaff Silver Min. Co.* (1878) 2 Utah, 219, 9 Mor. Min. Rep. 412, affirmed in (1881) 104 U. S. 176, 26 L. ed. 704.

A foreman at a mine, who saw that the work of mining was done in different places, framed timbers, helped the men, took part in the erection of a mill, and did other things generally to assist in the furtherance of the work, is entitled to a lien for services performed. *Washburn v. Inter-Mountain Min. Co.* (1910) 56 Or. 578, 109 Pac. 382, Ann. Cas. 1912C, 357.

³² *Pendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724.

³³ In *Oliver v. Macon Hardware Co.* (1896) 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403, the same court remarked: "Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a laborer. The President of the United States, the governor of this state, and the justices of this court, are all laboring men, in the

sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but at the same time they cannot properly be termed 'manual laborers,' either in the popular sense in which these words are used and understood, or in the sense in which the term 'laborers' was employed in the statutes under consideration." In that case the general principle here indicated was, in the headnote written by the court, expressed in the following language with reference to the particular facts under discussion: "Primarily, a clerk in a mercantile establishment is not a 'laborer,' in the sense in which that word is used in § 1974 of the Code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a laborer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a 'laborer.' In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its

stitute their normal employment, and, as a general rule, it is only when they have been hired to do that kind of work that they are deemed to be "laborers" within the meaning of these statutes.³⁴ But a person engaged for the specific purpose of performing manual labor as well as work of a higher quality is entitled to a preference, possibly in respect to the whole of his wages, irrespective of the

own particular facts and circumstances."

This decision and the arguments by which it was sustained seem to indicate some departure from the position taken in *Richardson v. Langston* (1881) 68 Ga. 658. There it was ruled that an affidavit to foreclose a laborer's lien, in which it was alleged that the defendants, merchants selling dry goods and groceries, were indebted to the deponent "for services rendered as clerk, laborer, and general service in said store," was not demurrable as not sufficiently setting out the fact that the plaintiff was a laborer. If a clerk in a store is "primarily not a laborer," as is laid down in the other case above cited, it would seem to follow that such an employee, if he seeks on special grounds to bring himself within the statute, should, as a matter of pleading, set forth those grounds in his statement of claim. It is submitted that this conclusion is the only one which is compatible with the doctrinal position indicated by the following passage in the opinion, which was quoted with approval in *Oliver v. Macon Hardware Co.*: "I do not understand that clerks, or persons doing general service, although they may labor, are therefore laborers, in legal contemplation. If they are to be included in the general term 'laborers,' then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employees, such as cashiers, tellers, and bookkeepers of banks, secretaries, treasurers, bookkeepers, salesmen, and superintendents of manufacturing companies, as well as all the officials of railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation by implication should not be the policy of courts, and especially so where *ex parte* summary remedies are allowed."

The superintendent of a brick company is not entitled to a lien, although he at times performs ordinary labor.

Lindale Brick Co. v. Smith (1909) 54 Tex. Civ. App. 297, 118 S. W. 568. The court said that employees of that class have no statutory liens, even though they may at times perform labor or services belonging to those employees who have.

An inspector of lumber, although his work requires him to perform a small amount of manual labor, is not a "laborer." *Re Sayles* (1892) 92 Mich. 354, 52 N. W. 637 (How. Anno. Stat. [Mich.] § 8749m). The court remarked that "what is compensated [in such a case] is not the labor, but the judgment and integrity of the inspector. The inspector is nothing less than an arbitrator between the parties, and to hold this class of services within the meaning of the statute would, we think, require that all professional services, as well as the services of the officers of the corporation, should be likewise protected."

See also *Pendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724, note 32, *supra*, and § 1948, *c. post*; *Meands v. Park* (1901) 95 Me. 527, 50 Atl. 706, note 18, *supra*.

³⁴ A man hired to work as general clerk and bookkeeper, and to make himself generally useful, during the reconstruction of a hotel, and afterwards as clerk and steward, was held not to be entitled to a laborer's lien under the North Carolina statute, although he occasionally did some manual work upon the building. *Nash v. Southwick* (1897) 120 N. C. 459, 27 S. E. 127.

A "woodsman" who superintended a large number of hands on a turpentine farm, and also worked as a clerk in the employer's commissariat department, was held not to be entitled to a lien as a "laborer," although he did a considerable amount of manual labor in the discharge of his duties. *Cole v. McNeill* (1896) 99 Ga. 250, 25 S. E. 402.

That an agent whose principal duty was to collect money due to his em-

nature of the services by which they were earned;³⁵ certainly in respect of such wages as are due on account of the manual labor alone.³⁶ It is also clear, both on principle and authority, that an employee who, if he were engaged to perform work of the descrip-

tioner for machines previously sold was not within a statute which prefers debts for "labor," although occasionally in performance of his duties he did some manual work upon the machines, was held in *Clark's Appeal* (1894) 100 Mich. 448, 59 N. W. 150.

That the Washington statute creating liens for labor does not cover manual labor performed as an incident to a person's connection with a corporation as stockholder and general manager, his actual incentive being his interest in the expected profits, was held in *Addison v. Pacific Post Mill. Co.* (1897) 79 Fed. 459. The allusion to the motive of the claimant in this case, however, seems to introduce a supererogatory factor.

³⁵ Thus it has been held that one who not only acts as overseer and assistant superintendent, but performs manual labor in the construction of a building, is within an act which gives a lien to "all persons" performing labor for the construction of a building. *Willamette Falls Transp. & Mill. Co. v. Renick* (1855) 1 Or. 169.

So also a superintendent or foreman of laborers who remains with them, directing their work, and sometimes working himself, is a "laborer." *Texas & St. L. R. Co. v. Allen* (1882) 1 Tex. App. Civ. Cas. (White & W.) 291.

In *Ricks v. Redwine* (1884) 73 Ga. 273, it was conceded that a hotel clerk would have been entitled to a lien if he had performed manual labor as a part of his duties. But this concession must be interpreted with reference to the general principle embodied in the cases cited in note 34, *supra*.

A practical miller who was employed by a corporation engaged in building flour mills and in manufacturing and selling milling machinery, and whose duty it was to go from place to place and start new mills or new machinery, erected by the corporation, for the purpose of showing the vendees the practical results obtainable, and procuring their acceptance of the mills and machinery, was held to be within a statute preferring debts for "labor" owing by

insolvents. *Black's Appeal* (1890) 83 Mich. 513, 47 N. W. 342 (How. Stat. § 8749m). The conclusion of the court was based upon the ground that statutes of this description are to be liberally construed, and that the claimant's functions involved "manual labor and practical demonstration in the operation of machinery to produce the required result,—the performance of such services as are usually performed in a flouring mill." But the opinion was also expressed that, if a strict construction should be placed upon the statute, the claim of petitioner would still come within the letter and spirit of the statute.

An employee whose duty required his personal supervision, and required him to perform personal manual labor upon the mining property, and who actually performed manual labor upon the mining claims for the benefit, development, and operation of the property, is entitled to a lien for his compensation, notwithstanding he was a superintendent and general manager. *Hahn v. Anaconda Gold Min. Co.* (1910) 26 S. D. 218, 128 N. W. 128.

³⁶ In *Lawton v. Richardson* (1898) 118 Mich. 669, 77 N. W. 265, it was held that the phrase "labor debts" (How. Stat. [Mich.] § 8749m) did not embrace a claim for work done by an employee in assisting the proprietor of a store to purchase goods for a store of which he expected to be manager after it was started, but that it covered his services rendered in unpacking the goods, marking them and putting them on the shelves, and in performing the ordinary work of a salesman in attending to customers, sweeping out the store, etc., during the time which elapsed before the store was closed by creditors. The *ratio decidendi* was that nearly all the labor performed after the purchase of the goods was not intellectual or professional in its character, but in the main manual.

That the same statute was applicable to the personal labor performed by the overseer and custodian of a mine, while in charge of the property of the cor-

tion indicated by his occupation or trade, would be treated as being outside the privileged classes, is entitled to claim the preference accorded to "laborers" if, as a matter of fact, he did perform manual labor.³⁷

Where such an employee as a clerk in a mercantile establishment seeks to obtain the benefit of a lien or preference, he assumes the burden of proving that the labor which he contracted to perform was mainly physical.³⁸

1946. —of other single terms primarily imputing manual work.—

a. "Workmen."—In one case the supreme court of Pennsylvania, adopting Webster's definition of this word, *viz.*, "one who is employed in any labor, especially manual labor," refused to hold that it was applicable to a civil engineer.¹

b. "Mechanics."—In its wider sense this term denotes an artisan, an artificer, or a person who follows a handicraft for his living; in its more restricted sense it is applied to employees of the above descriptions whose work is confined to the making and repairing of machinery.² Invariably, therefore, it imports the performance of some kind of manual work. Accordingly it is not applicable to a person who is employed by the owner of a factory to assist him in purchasing machinery, to superintend its erection, and to put the factory in working order, but who does no manual labor himself;³

poration, was held in *McLaren v. Byrnes* (1890) 80 Mich. 275, 45 N. W. 143.

³⁷ In *Adams v. Goodrich* (1875) 55 Ga. 233, this doctrine was applied with respect to a mechanic. There the court seems to have assumed that the term "laborers" was only applicable to persons performing unskilled labor,—a narrow construction of the term which is not borne out by the other authorities. But the general principle applied is plainly not open to any exception.

"In determining whether a particular clerk, or other employee, is really a 'laborer,' the character of the work he does must be taken into consideration. In other words, he must be classified, not according to the arbitrary designation given to his calling, but with reference to the character of the services required of him by his employer." *Oliver v. Macon Hardware Co.* (1896) 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403, 405.

As to the meaning of this word in the New Jersey Statutes, see § 1948, *b*, *post*.

³⁸ *Howell v. Atkinson* (1907) 3 Ga. App. 58, 59 S. E. 316, following *Oliver v. Macon Hardware Co.* (1896) 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403 (notes 33, 37, *supra*), where an intervention which alleged in general terms that the intervener was a clerk, and that as such clerk, he performed labor, but which failed to show that such labor constituted the larger part of the work pertaining to his employment, was held bad on demurrer.

¹ *Pennsylvania & D. R. Co. v. Leuffer* (1877) 84 Pa. 168, 24 Am. Rep. 189, reversing (1876) 11 Phila. 548. In the statute there under review, the words "workmen" and "laborers" are grouped together. The court, therefore, might have fortified its conclusion by invoking the rule, *noscitur a sociis*. But the scope of the word was not considered from this standpoint.

² Imperial Dict.; Century Dict.

³ *Cook v. Ross* (1895) 117 N. C. 193, 23 S. E. 252.

nor to a man engaged in soliciting orders for, and selling the products of, a mine upon commission.⁴

c. "*Operatives.*"—By lexicographers this term is defined as a "laboring man, artisan, or worker in manufactures."⁵ Like the words discussed in the two preceding subsections, therefor, it connotes manual work only. See subd. d, *post*. It has been held applicable to an artisan who makes boots at his own home, out of materials furnished by his employer.⁶

d. "*Persons performing labor as operatives.*"—The notion of a preference extended only to those classes of employees whose work is primarily and essentially of a manual character manifestly inheres in this form of words as in the simple term "labor." Accordingly it does not embrace a traveling salesman;⁷ nor the secretary of a manufacturing company, even though, as an incident of his duties as secretary, he manages the business and assists in packing and shipping goods;⁸ nor the superintendent of a brewing corporation.⁹ On the other hand, it is applicable to farm laborers,¹⁰ and to salesmen employed in a store.¹¹

e. "*Farm laborers.*"—The term "farm laborer" is used in a number of these statutes, and is generally held to include only such persons as are actually engaged in manual labor upon the land, and does not include other supervising employees or persons employed for other work, although such work may be connected with the farm work in some way.¹²

⁴ *Willauer's Estate* (1882) 1 Chester Co. Rep. 533.

⁵ Imperial Dict.; Century Dict.

⁶ *Thayer v. Mann* (1848) 2 Cush. 371 (insolvency act of 1838, chap. 163).

⁷ *Re Sloan* (1899) 60 Ohio St. 472, 54 N. E. 516; *Davis v. Greenlee* (1897) 13 Ohio C. C. 229, 7 Ohio C. D. 111.

⁸ *Green v. Weller* (1892) 3 Ohio C. D. 488.

⁹ *Hanner v. Maumee Brewing Co.* (1899) 6 Ohio N. P. 305, 8 Ohio S. & C. P. Dec. 399. This decision, however, is inconsistent with another, also rendered by a court of inferior jurisdiction, to the effect that a man employed to oversee and manage in all its details the work of a contractor engaged in the business of making streets, grading, etc., and who, when it was necessary, lent a helping hand, was entitled to a preference. *Re Engle* (1894) 1 Ohio N. P. 110, 1 Ohio S. & C. P. Dec. 101.

¹⁰ *Re Lowry* (1898) 7 Ohio S. & C. P. Dec. 282.

¹¹ *Re Dukme Co.* (1897) 6 Ohio S. & C. P. Dec. 448.

¹² One employed in making repairs upon a sugar grinding house and the machinery therein, on a sugar plantation, as well as acting as watchman, is not within the statute. *Saloy v. Dragon* (1885) 37 La. Ann. 71.

Nor is one who is employed by a sugar refining company to weigh and load sugar cane upon cars, and who hires others to do the labor connected therewith. *Fortier v. Delgado* (1903) 59 C. C. A. 180, 122 Fed. 604.

An overseer is not within a statute giving agricultural laborers a lien for labor. *Isbell v. Dunlap* (1882) 17 S. C. 581.

One who with his machinery and servants threshes grain for another, although present directing and assisting therein, is not within a statute giving

1947. —of groups of terms importing manual work.—*a. All persons doing any "work or labor."*—This phrase has been held to embrace such superior employees as a civil engineer who surveys routes for and superintends the construction of a railroad;¹ a foreman who directs the work of laborers in improving a railroad;² and an overseer in a mine who was under the orders of the general agent of the foreign company which owned the mine, and who personally superintended the manual labor of the miners and directed the development of the property.³

b. "Mechanics and laborers."—As both the words which are thus coupled together imply persons who perform manual work, it follows that the combination includes only employees whose work is exclusively or mainly of that character. It does not embrace a draughtsman,⁴ nor the general manager of a shop.⁵

For the cases relating to the California act of March 31, 1891,

a lien to any person who shall do labor upon any farm, etc. *Mohr v. Clark* (1888) 3 Wash. Terr. 440, 19 Pac. 28.

A woman employed in a family living upon a farm, who does ordinary housework and assists in cooking meals for laborers doing the farm work, is not a laborer within the meaning of N. D. Rev. Codes 1905, § 6277, giving a lien for wages of farm laborers. *Lowe v. Abrahamson* (1908) 18 N. D. 182, 19 L.R.A. (N.S.) 1039, 119 N. W. 241, 20 Ann. Cas. 355.

But one employed in making sugar upon a plantation is within a statute giving a lien to plantation laborers. *Saloy v. Dragon* (1885) 37 La. Ann. 71.

So, one employed to cut and stack hay is within a statute giving a lien to any person who shall do labor upon any farm, etc. *Beckstead v. Griffith* (1906) 11 Idaho, 738, 83 Pac. 764.

¹ *Van Frank v. St. Louis, C. G. & Ft. S. R. Co.* (1902) 93 Mo. App. 412, 67 S. W. 688. The theory of the court was that the phrase occurred in the general lien law of Missouri (Rev. Stat. 1899, § 4239), and that this was of a broader scope than another enactment (Rev. Stat. 1899, § 1006), which was intended to protect "laborers."

² *Sveem v. Atchison, T. & S. F. R. Co.* (1900) 85 Mo. App. 87.

³ *Cullins v. Flagstaff Silver Min. Co.* (1878) 2 Utah, 219, affirmed in (1881)

104 U. S. 176, 26 L. ed. 704. In its opinion the Supreme Court of the United States remarked: "His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor."

To the same effect is the decision in *Idaho Min. & Mill. Co. v. Davis* (1903) 59 C. C. A. 200, 123 Fed. 396 (Idaho Sess. Laws 1895, p. 48, § 1).

⁴ *Leinaw v. Albright* (1891) 10 Pa. Co. Ct. 171.

⁵ *Raynes v. Kokomo Ladder & Furniture Co.* (1899) 153 Ind. 315, 54 N. E. 1061.

granting a lien to "mechanics and laborers" in the service of corporations, see § 1944, note 10, *ante*.

c. "*Mechanics, workmen, and laborers.*"—The remark made in the preceding subsection is also applicable to this combination of terms. Accordingly it does not cover the manager and superintendent of a mining company,⁶ nor a bookkeeper;⁷ nor an attorney at law employed to secure options on certain property.^{7a}

d. "*Mechanics, laborers, and operatives.*"—These expressions all import the performance of manual work, and therefore do not embrace a civil engineer in the employ of a railway company.⁸

1948. —of groups of terms partly importing manual work.—a. "*Laborers or servants.*"—Two decisions with reference to this combination of expressions proceed upon the theory that they cover only persons who perform manual labor, and consequently do not confer a right to a preference upon a bookkeeper,¹ or a traveling salesman.² These rulings appear to be a very strong application of the doctrine, *noscitur a sociis*. The writer ventures to think that they are not correct.³ However this may be, there is no reasonable ground upon which the phrase can be restricted to persons who perform unskilled labor. Accordingly it is held that such employees as typesetters, cylinder feeders, pressmen, and a printer's bookkeeper are entitled to a preference.⁴

b. "*All persons doing labor or service of whatever kind.*"—By the New Jersey corporation act, § 63, as originally framed, only "laborers" were allowed a preference. It was not disputed that this expression connoted only persons who performed manual labor.⁵

⁶ *Smallhouse v. Kentucky & M. Gold & S. Min. Co.* (1876) 2 Mont. 443.

⁷ *Cochran v. A. S. Baker Co.* (1899: Sup. Ct.) 30 Misc. 48, 61 N. Y. Supp. 724. The provision in question (N. Y. Laws 1897, chap. 415, § 8) uses merely the word "employees." But in the definition clause (§ 2), this expression is declared to mean "mechanic, workman, or laborer."

^{7a} *Gay v. Hudson River Electric Power Co.* (1910) 178 Fed. 499 (same statute as that in preceding note).

⁸ *Gulf & B. Valley R. Co. v. Berry* (1903) 31 Tex. Civ. App. 408, 72 S. W. 1049.

¹ *Signor v. Webb* (1892) 44 Ill. App. 338, denying the applicability both of the act of June 15, 1887, 3 Starr & C. Anno. Stat. (Ill.) p. 828, ¶ 61 (settlement of insolvent estates), and

of the provision as to preferences in case of voluntary assignments in 1 Starr & C. Anno. Stat. (Ill.) p. 1305.

² *Eppstein v. Webb* (1892) 44 Ill. App. 341.

³ It must be admitted that they are sustained by the more recent decision in *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525, note 24, *infra*. But for the reasons explained in note 25, *infra*, the author considers that decision to be, both on principle and authority, erroneous.

⁴ *Heckman v. Tammen* (1900) 184 Ill. 144, 56 N. E. 361 (Ill. Laws of 1895, p. 242).

⁵ See the language used by the court in *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —, 29 Atl. 326 (note 6, *infra*).

In the amended act (P. L. 1869, p. 1448), there was inserted a definition clause, declaring that the word "laborers" was to be construed as including all "persons doing labor or service of whatever character for, or as workmen or employees in, the regular employ of such corporation." It has been held, with reference to these descriptive words, that neither a president nor a director is entitled to a preference in respect to remuneration due for services rendered in any of those capacities,⁶ but that the provision is applicable to the salary of a manager, although he also discharges the functions of a

⁶ In *England v. Daniel F. Beatty Organ & Piano Co.* (1886) 41 N. J. Eq. 470, 4 Atl. 307, the court argued thus: "The president of a corporation, under the act, is and must be a director. He is part and parcel of the organization. There must be employer as well as employed; and the question arises: Does the act authorize the organization, which is the employer, to employ itself? . . . I am well satisfied that to make favorites of this class would be against the true spirit of the act, as well as against a wise public policy. The spirit of the act is manifestly to pay 'laborers doing labor or service' . . . and not to give a preference to the individual members of the corporation, and not that they may employ themselves and maintain both attitudes, employer or employee, as their individual gain and the loss of creditors may dictate. And as to the public policy of so extending the construction as is urged, let it be considered how strong the inducement as well as how convenient for every director to be employed 'doing labor or service as a workman or employee' for his company; and let it also be considered what a prolific source of injustice and fraud such construction would prove to be. There are numerous considerations in this direction which will arise to the mind of the thoughtful."

In *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —, 29 Atl. 326, the court, after expressing the opinion that the true doctrine had been stated in *Lehigh Coal & Nav. Co. v. Central R. Co.* (1878) 29 N. J. Eq. 252, viz., that the preference given by this provision is in derogation of the right of creditors to be paid equally, and must not be extended by construction, proceeded thus: "Officers can only be

included in the phrase 'laborers and employees' by construction, and that, too, of a very strained character. It cannot be that the legislature, in any of its enactments respecting preferences, meant to include officers in the word 'laborers' or 'employees,' for there has been no period in the history of legislation upon this subject when these different classes have not been broadly distinguished. The first legislation upon this subject only provided a preference for laborers. By universal consent, this had reference only to those who performed manual labor, of whatever nature, and there was but little difficulty in determining those who were included. But it became manifest to the common understanding that there was another class who did equal service in the interests of corporations and of their creditors, whose vocation was of a different character from that of mere manual labor. There seemed to be no just reason for omitting the latter class from the preference, and the legislature extended the favor which it had given to laborers to this class, and designated them as 'employees.' Surely it cannot be, since the legislature proceeded in this very cautious manner, by advancing from the use of the word 'laborers' to that of 'employees,' that it meant also to include officers. Note again that the act provides for the payment of wages due to laborers and employees, for all service, of whatever nature, but makes not the slightest reference to salaries due to officers. The unmistakable difference in the true meaning and proper application of the words 'wages' and 'salaries,' and the exclusion of the latter from the original enactment, and especially from the amendment, render further discussion unnecessary."

president,⁷ and to the salary of a bookkeeper, although he is also a director.⁸ It has also been intimated that the secretary and treasurer of a company, if they are not directors, are entitled to a preference.⁹ From these decisions it is clear that the insertion of the definition clause is considered by the courts of this state to have brought within the purview of the statute classes of employees who, even under the most liberal construction of the simple term "laborers," have never been regarded as favored claimants.

With reference to the more recent statute, it has been held that the rights of a workman who allows his wages to accumulate, under an agreement that he is to be paid at the end of his apprenticeship, are not more extensive than those of other workmen in the regular employment of the insolvent corporation.¹⁰

c. "*Laborers and employees.*"—Two cases which involve the construction of this combination of terms imply an acceptance of the view that the use of the expression "employee" imports an extension of the scope of the statute beyond that which would be ascribed to it if only "laborers" were mentioned. In one of these cases an employee of a natural gas company who was designated superintendent, but who was neither an officer of the company, nor its general manager, was held to be entitled to a preference.¹¹ In the other a preference was allowed by one of the inferior courts of Ohio to traveling

⁷ See *Duryee v. United States Credit System Co.* (1895) — N. J. Eq. —, 32 Atl. 690. The court relied upon the earlier case of *Weatherby v. Saxony Woolen Co.* (1894) — N. J. Eq. —, 29 Atl. 326, in which a similar claim had been allowed. It is to be observed, however, that the fact of the allowance is not mentioned in the report of that case, and that the enforceability of the claim was not, so far as appears, discussed. With these decisions may be contrasted the English one cited in note 11 to § 1942, *ante*. But the words under construction in the two cases are so diverse that the different conclusions arrived at in them do not necessarily betoken any actual conflict of views.

⁸ *Consolidated Coal Co. v. Keystone Chemical Co.* (1896) 54 N. J. Eq. 309, 35 Atl. 157.

⁹ *England v. Daniel F. Beatty Organ & Piano Co.* (1886) 41 N. J. Eq. 479, 4 Atl. 307.

¹⁰ *Mingin v. Alvah Glass Mfg. Co.* (1897) 55 N. J. Eq. 463, 37 Atl. 450.

The case of *Bedford v. Newark Mach. Co.* (1863) 16 N. J. Eq. 121, was distinguished on the ground that the phraseology of the earlier statute there under construction was different.

¹¹ *Pendergast v. Yandes* (1890) 124 Ind. 159, 8 L.R.A. 849, 24 N. E. 724. The duties of the claimant were thus stated by the court: "He was himself responsible directly to the company, and had no immediate superior officer except the president and vice president. His duty was almost wholly confined to superintending the employees under his control, and in the discharge of which duty he was required to do a great deal of walking along the pipe lines; and, when testing gas wells, it was necessary for him to handle wrenches and other tools for a few minutes. But, beyond this, the discharge of his duties did not make it necessary for him to do any physical or manual labor other than such as is ordinarily incident to the superintendency of the employees engaged in such work, although he did occasionally, of his own volition, when

salesmen employed by a manufacturing corporation at a monthly salary and a commission.¹² On the other hand, it has been laid down that these words, as used in the Oregon statute, are synonymous and relate to a class of persons who earn a livelihood by their own manual labor.¹³

In Arkansas it has been held that this combination of terms does not include an attorney employed on a yearly salary, payable monthly.¹⁴ But it is not apparent from the language of the court whether it regarded the act in question as being applicable exclusively to employees who perform manual labor.

d. "*Laborers, servants, and employees.*"—With reference to a statute in which the preferred classes of employees are thus designated, a priority was held to have been properly accorded to the wages of a drayman and to the salary of the manager of a lumber and manufacturing company.¹⁵

e. "*Employees and other operatives.*"—It has been held that the indefinite term "employees," as used in this construction, takes its color from the more precise expression, "operatives;" and consequently that it does not embrace a general superintendent of a company.¹⁶

work was pressing, and there was scarcity of hands, do some physical labor in the handling of gas pipes, and other work incident to the laying and fitting of them. His salary or compensation was \$100 per month. His duties kept him constantly with the men who were engaged in the manual labor of laying the pipes, and doing the other work herein specified, to see that such work was done properly, and with proper mechanical skill; and, as these men were often separated into different gangs, it was necessary for him to travel back and forth from one gang to another. There is nothing in the articles of association or by-laws of said company specifying such an officer as that of superintendent."

¹² *Lewis v. Dawson* (1892) 6 Ohio C. C. 243, 3 Ohio C. D. 436.

¹³ *Johnston v. Barrills* (1895) 27 Or. 251, 50 Am. St. Rep. 717, 41 Pac. 656. The actual decision in this case was that an independent contractor was not entitled to a preference; but the language used by the court is clearly indicative of a doctrine different from that embodied in the two cases last cited.

¹⁴ *Latta v. Lonsdale* (1901) 52 L.R.A.

479, 47 C. C. A. 1, 107 Fed. 585 (Sandels & H. Dig. [Ark.] §§ 1425, 1426). The court presumably out of a due regard for the dignity of the profession, insisted that the statute could not have been enacted in the interests of a class of persons so well able to protect themselves as lawyers.

¹⁵ *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.* (1886) 66 Wis. 481, 29 N. W. 285. The court said that the right to the preference in this case of the former of these employees was clear, and that the claim of the superior employee should be allowed on the ground that the words "servants" and "employees" meant something more and different than the word "laborers," and that they were used for the purpose of enlarging the scope of the statute. Compare the Wisconsin case cited in § 1954, note 24, *post*, and the English and colonial cases cited in § 1942, notes 9, 15, *ante*.

¹⁶ *Pullis Bros. Iron Co. v. Boemler* (1901) 91 Mo. App. 85, following *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525 (see next subsection).

f. "*Employees, operatives, and laborers.*"—This particular grouping of terms occurs only in the New York enactments which relate to the disposition of the assets of insolvent corporations. All the courts of that state are agreed that, in spite of its generality, the expression "employees" is to some extent narrowed in its meaning by its association with the word with which it is coupled, and that it does not include every person in the employment of a corporation, irrespective of the nature of their service.¹⁷ In this point of view it is considered that a superintendent or manager of a corporation is not entitled to a preference.¹⁸ Such a functionary is regarded as being substantially an officer; ¹⁹ or, as it is expressed in another case, he is the representative of the corporation in respect to the conduct of its business.²⁰ Nor do these words include an agent for the sale of goods in a foreign country, on a salary and commissions.²¹ There is, however, a conflict of opinion concerning the scope of the expression with relation to the lower grades of servants.

One view is that it "includes persons employed by a corporation in comparatively subordinate positions who cannot correctly be described either as operatives or laborers; such, for example, as bookkeepers, clerks, salesmen, and agents engaged at a regular compensation in soliciting orders for goods." ²² This statement summarizes the effect of some of the earlier decisions.²³ The essence of that doc-

¹⁷ *Palmer v. Van Santvoord* (1897) 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915. The court said: "If the legislature intended, by the act of 1885, to prefer all debts owing by a corporation (other than an insurance or moneyed corporation), of which a receiver should be appointed, to 'employees,' using the word in its largest sense, the words 'operatives and laborers,' with which it is associated, are superfluous. The use of these associated words indicates that the word 'employees,' by which they are preceded, was used in a restricted and limited sense."

¹⁸ *People v. E. Remington & Sons* (1887) 45 Hun, 329, affirmed in (1888) 109 N. Y. 631, 16 N. E. 680; *Re Strucker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525, affirming (1893) 73 Hun, 327, 26 N. Y. Supp. 209.

¹⁹ *Palmer v. Van Santvoord* (1897) 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915, per Andrews, Ch. J., referring to the first of the cases cited in the preceding note.

²⁰ *Re American Lace & Fancy Paper*

Works (1898) 30 App. Div. 321, 51 N. Y. Supp. 818.

²¹ *People v. E. Remington & Sons* (1887) 45 Hun, 329, affirmed in (1888) 109 N. Y. 631, 16 N. E. 680.

²² *Re American Lace & Fancy Paper Works* (1898) 30 App. Div. 321, 51 N. Y. Supp. 818.

²³ In *Brown v. A. B. C. Fence Co.* (1889) 52 Hun, 151, 5 N. Y. Supp. 95, it was held that a man employed to assist the general manager in keeping the books of a company, and to clean the office and show room, and assist in putting together, taking apart, and shipping the manufactured products, was entitled to the preference. The language used in the opinion shows that, even if the duties of the claimant had been confined to those of a bookkeeper, he would still have been treated as being within the protection of the statute.

In a later decision by the same court, the right of a bookkeeper to a preference was explicitly affirmed. *People v. Beveridge Brewing Co.* (1895) 91 Hun, 313,

trine is that the term "employees," although to some extent it takes its color from the other expressions with which it is coupled, should be regarded as bearing a distinct and independent significance which serves to extend the scope of the statute beyond the specific limits imported by those expressions.

In its latest decisions on the subject, however, the court of appeals has definitely committed itself to the doctrine that the statute is not intended to secure a preference for claims due to the clerical force engaged in transacting the business of a company, nor to its superintendent, foremen, or any officers of the corporation who are compensated by a fixed yearly salary.²⁴ The present writer has no hesita-

36 N. Y. Supp. 525. The court disapproved *Re Stryker* (1893) 73 Hun, 327, 26 N. Y. Supp. 209, which was afterwards affirmed by the court of appeals in (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525. See next note.

The position thus taken was approved by the court of appeals in *Palmer v. Van Santvoord* (1897) 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915. The effect of the decision was that a preference should be allowed to an employee hired to sell the machines of his employers, and to go from place to place and set them up for the purchasers. As stated in *Re Stryker* (see next note), the work which this claimant performed was so largely manual that he might, without impropriety, have been classed among "laborers" and "mechanics." But the actual standpoint of the court is indicated not merely by its remark, made *arguendo*, to the effect that a "bookkeeper or person employed to make sales of merchandise or property" is entitled to a preference, but also by the general course of its reasoning, which distinctly shows that it regarded the expression "employees" as being intended to cover a class of servants engaged in the performance of work different from, and higher than, that implied by the terms "operatives" and "laborers." The following passage may be quoted: "The word 'employees' in the statute of 1885 is a word of larger import than the words 'operatives and laborers' which follow it (*Gurney v. Atlantic & G. W. R. Co.* [1874] 58 N. Y. 358); and while it may embrace the latter classes, it is not confined to those who perform manual labor only: and to construe in the narrowest sense as embrac-

ing those classes only would violate one of the accepted canons of construction to which we have referred,—that each word used in an enumeration in a statute of several classes or things is presumed to have been used to express a distinct and different idea. It is doubtless true that, from the lack of technical accuracy and precision in the framing of statutes, a word of large import is often followed by words of narrower meaning, expressing what is included in the larger term; but this does not justify a restriction of the scope and meaning of the larger term to what is expressed in the words which follow, unless the context points to such a construction."

This decision was relied on in *Re Smith* (1899; Sup. Ct.) 59 N. Y. Supp. 799, and in *Re Fitzgerald* (1896) 21 Misc. 226, 45 N. Y. Supp. 630, as an authority for granting a preference to a commercial traveler who sold goods in a particular territory, selected by the employer, and whose remuneration consisted exclusively of commissions. These decisions, like those above mentioned, are in effect overruled by *Re Stryker*.

The same remark is applicable to a decision by which a preference was allowed to a salesman in a store. *Re Luston & B. Co.* (1898) 35 App. Div. 243, 54 N. Y. Supp. 778.

²⁴ *Re Stryker* (1899) 158 N. Y. 526, 70 Am. St. Rep. 489, 53 N. E. 525. The employees whose claims were rejected in this case were a clerk and bookkeeper, the superintendent, the shop foreman, and the draughtsman of a manufacturing company. The court reasoned thus: "The most important

tion in saying that, in his opinion, the view at first taken by the court is the correct one. Under the doctrine finally adopted the group of expressions used by the legislature becomes tautological to an almost inconceivable degree.²⁵

word in the statute is the word 'wages.' It was wages that the legislature intended to prefer in the distribution of the assets of the insolvent corporation, not salaries, nor earnings, nor compensation. It was not intended to prefer the claims of all employees, but it was manifestly intended to limit the preference to the particular class whose claims would be properly expressed by the use of the word 'wages.' This word is applied in common parlance specifically to the payment made for manual labor, or other labor of menial or mechanical kind, as distinguished from salary and from fee, which denotes compensation paid to professional men. (Century Dict.). In its application to laborers and employees it conveys the idea of subordinate occupation which is not very remunerative, of not much independent responsibility, but rather subject to immediate supervision. This was the construction which this court placed upon the statute in the case of *People v. E. Remington & Sons*, *supra*,

. . . although the word employees is used, yet the purpose of the statute was to protect mechanics, operatives, or laborers from loss of their wages in the event of the insolvency of the corporation. It is significant to note that insurance and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact, well known, that they do not employ labor, in the ordinary sense of that word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employees, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employees could protect themselves, whereas the common laborer, operative, or mechanic would be left by the failure of the business in a much more helpless condition. The wages of laborers, mechanics, and do-

mestic servants have in modern times become the subject of protective legislation in this and many other countries, and whenever the law has been extended beyond these classes, so as to include the claims of parties performing clerical duties or work of a like character, it was by judicial construction, based upon language much broader than is to be found in the enactment in question." The court stated that the views thus expressed were not in conflict with the case of *Palmer v. Van Santvoord*, *supra*. This assertion was justifiable if only the facts of that case are adverted to. (See last note.) But it seems to be scarcely possible to escape the conclusion that the two cases reflect essentially different conceptions regarding the scope of the term "employees." In *Cochran v. A. S. Baker Co.* (1899; Sup. Ct.) 30 Misc. 48, 61 N. Y. Supp. 724, the opinion was expressed that the later decisions had overruled the earlier.

²⁵ There does not appear to be any adequate authority for the broad proposition upon which the decision in the *Stryker Case* is largely based,—*viz.*, that the term "wages" has been by common usage so definitely restricted to the classes of servants whose work is entirely or principally manual, that, for the purposes of statutory construction, this may justifiably be assumed to be the extent of its meaning. In order to be consistent, a court which adopts such a theory must go to the length of holding that the remuneration of such servants as foremen hired to supervise artisans, and laborers engaged in erecting a house, is not "wages." Yet it can scarcely be doubted that, whatever may be the appropriate expression in the case of an extensive work of this description, such a foreman would, under ordinary circumstances, be said to be in the receipt of "wages." This single illustration is sufficient to show that the court has laid an undue stress upon the use of that word in the statute. Not less unwarranted appears to be the weight ascribed to the consideration that the "clerical force" in the service of corporations are better able

g. "Employee, laborer, or other person who may aid by his labor, etc."—These words as used in the section (1360) of the Mississippi Code, regarding liens on crops, have been held to embrace the overseer of a farm. The *ratio decidendi* was that the addition of the word "employee" to the previous enactments *in pari materia*, and the broadening of their language in other respects, justified the inference that the alterations were made for the purpose of enlarging, *quoad personas*, the scope of the lien.²⁶

1949. —of words, single or grouped, not specifically importing manual work.—a. "Employees."—In its most extended signification this term is applicable to any person employed by another. In statutes of the type under discussion it is invariably associated with other expressions which serve to show more or less precisely the meaning which the legislature intended to attach to it. But there is some authority for the doctrine that, even if it were used alone, it should not be construed as including a person occupying so high a position as that of manager or superintendent of an entire concern.¹ This doc-

to protect themselves, in the event of an insolvency, than laborers, mechanics, etc. The assumption that servants belonging to the former class are, as a whole, more favorably situated in this regard, runs counter to the most patent facts. It seems to be little short of preposterous to assert that a poorly remunerated clerk stands, when an insolvency occurs, in a more advantageous position, or that he has any better means of securing the payment of his remuneration, than a mechanic or an artisan. But the most fatal defect in the reasoning of the court is that it proceeds upon the supposition that the rule *noscitur a sociis* is controlling, and that no attempt is made to deal with the essential and all-important question, whether the scope of the word "employees" should not rather be determinable with reference to the rule invoked in the *Palmer Case*, viz., that "each word used in an enumeration of classes or things is presumed to have been used to express a distinct and different idea." It is clear that a choice must be made in this instance between the conflicting conceptions reflected in those rules, and that no argument can be accepted as satisfactory which does not cope with the problem thus presented. That problem, it may be admitted, is by no means an easy one.

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But it is submitted that the order in which the group of descriptive expressions is arranged constitutes what may fairly be regarded as a decisively preponderating consideration in favor of the doctrine adopted in the *Palmer Case*. If the word "employees" stood second in the group, there would doubtless have been cogent, if not conclusive, ground for construing the provision with reference to the rule, *noscitur a sociis*. But the circumstance that the term for which a meaning is to be found is placed before the terms which bear a definite significance may well be deemed, not merely to justify, but to require the conclusion that the former term was intended by the legislature to apply to a category different from that covered by the other two. If this view be correct, it must follow that as both the terms of ascertained meaning are descriptive of classes of servants whose work is manual, the remaining term of the group should be construed as connotative of classes of servants whose work is not of that character.

²⁶ *Weise v. Rutland* (1894) 71 Miss. 933, 15 So. 38.

¹ In *Pullis Bros. Iron Co. v. Boemler* (1901) 91 Mo. App. 85, the court expressed the opinion, *arguendo*, that the popular use of the term is confined to

trine, however, is directly opposed to at least one American decision.² It is also inconsistent with some English and Colonial decisions.³

The meaning of the term "employee" is sometimes restricted by the words of the title of the statute in which it occurs. Thus it has been held that, when used in the body of an act of which the purpose is to provide "laborers" liens for wages, it should be regarded as being equivalent to "laborers," and therefore not applicable to the superintendent of a mining company.⁴

b. "*Clerks.*"—This expression has been held not to be applicable to a general manager,⁵ nor to a man engaged in soliciting orders for and selling the products of a mine upon commission.⁶

c. "*Clerks, servants, and employees.*"—In a Maryland case an insurance adjuster who received an annual salary and his expenses, but did not devote his whole time and services to his employers, was held not to be entitled to a preference under a statute containing this combination of words.⁷

"clerks or laborers who work for a salary or wages."

Reference may also be made to a case in which it was held that the secretary of a railroad company is not a "servant" or "employee" within a foreclosure decree directing the payment of sums due to "any servant or employee." *Wells v. Southern Minnesota R. Co.* (1880) 1 McCrary, 18, 1 Fed. 270. The *ratio decidendi* was that the secretary is an "officer."

² See § 1948, note 15, *ante*.

³ See § 1942, notes 10, 15, *ante*.

⁴ *Malcomson v. Wappoo Mills* (1898) 86 Fed. 192.

⁵ *The Short Cut* (1881) 6 Fed. 630 (construing the special Pennsylvania act of April 20, 1858, as to boats navigating certain rivers).

⁶ *Willauer's Estate* (1882) 1 Chester Co. Rep. 533.

⁷ *American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.)* (1896) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778. Referring to the functions of the claimant, the court observed: "It was his duty and the duty of other adjusters when an accident occurred to ascertain all the facts and circumstances in connection with such accident,—how it happened, whether it was through the fault of the insured corporation, the nature and extent of the injury, and to make report thereof to the company. All this involved the

exercise of judgment and discretion and required some familiarity with the principles of law relating to the legal liability of the insured. Now, it is clear, we think, that the word 'employee,' as used in the statute, was intended to have a limited meaning, and that it cannot be applied in its broadest sense, or as including everyone in the service or employment of a corporation or individual. The object of the statute was to provide for the payment of the wages and salaries due a certain class of persons to whom such wages or salaries were deemed always necessary for their support and maintenance. The statute first provides for the payment of the wages and salaries of clerks,—persons rendering mere clerical services,—then, of servants or employees. The statute did not mean by employees persons rendering services of a higher degree than clerks. The duties of an adjuster being, as far as we are able to discover, of the character we have described, these officers, whilst in a general sense employees, cannot by any fair rule of construction be considered employees in the limited and restricted meaning of that term as used in the statute. To hold otherwise would result in the inclusion of a large class of persons in the service of a company or individual as preferred creditors though they are obviously not within the scope, purpose, and object of the Code, under which

d. "Bookkeepers, clerks, agents, reporters, and other employees."—In the only state where this combination of words has been used by the legislature, it has been held that they include an employee who used his own team to haul logs for a sawmill, at a stated sum *per diem*.⁸ No general principle, however, was invoked by the court.

1950. Employees within the scope of statutes granting a preference to wages in the administration of decedent's estates.—*a. Scope of statutes as indicated by the reasons for their enactment.*—The statutes by which it is provided that, in the administration of the estates of deceased persons, the wages of their servants shall be treated as priority, have, like others of an analogous character, been induced by "motives of compassion towards a class of people whose . . . poverty renders them not very well able to bear the loss of any part of the pittance they may have earned."¹

b. On what footing construed.—It has been laid down that these statutes are to be liberally construed.²

c. Classes of employees covered by the word "servants."—By the courts of Pennsylvania the doctrine has been adopted that a statute of this description which uses only the expression "servants" is applicable only to those engaged in household duties.³ In this point of

provision is made for a preference." The court undertook to distinguish the decisions from that rendered in *Moore v. Heaney* (1859) 14 Md. 558, by pointing out that, in the earlier case, a wide and liberal meaning was given the word "employees," so as to bring as large a class of persons as possible within the range of an exemption granted laborers and other employees from the stringent terms of the attachment law, and from the equally harsh effects of attachment levied by way of execution on wages. The explanation seems to show that the rationale of the decision as to the adjuster was that, in the view of the court, statutes granting preferences to the wages of employees are to be construed strictly,—a doctrine which is certainly opposed to the weight of authorities.

⁸ *First Nat. Bank v. Kirkby* (1901) 43 Fla. 376, 32 So. 881.

¹ *Boniface v. Scott* (1817) 3 Serg. & R. 351. Compare also the remark in the later case, *Martin's Appeal* (1859) 33 Pa. 395, that the purpose of the act was to afford protection to a class of persons which especially needs it.

² *Martin's Appeal* (1859) 33 Pa. 395.

³ The leading case is *Ex parte Meason* (1812) 5 Binn. 167, in which three carefully written opinions were delivered. It will be useful to give some extracts from that of Yeates, J.: "The great difficulty of this case is to affix a correct and precise meaning to the words 'servants' wages' in this law. Upon all hands it is agreed that they cannot be confined to slaves, or indentured servants, who are not entitled to wages; and that they cannot be extended to the relation of master and servant in the general legal sense of those terms, where one acts under the direction or command of another, because no reasonable ground of preference can be assigned to the character of servants in such large and comprehensive acceptance. The ancient common law was highly favorable to the demands of servants in the order of administration, inasmuch as it said they were to be paid among the first debts. Bracton, lib. 2, chap. 26, Fleta, lib. 2, chap. 57, § 10. By those authors they are called *servitia servientium et stipendia famulorum*." The learned judge then referred to the significance of the fact that, in the statute under discussion (act of

view it is clear that priority cannot be claimed by a person who only worked as a clerk in a counting house,⁴ nor by a person engaged exclusively in farm work.⁵ But the decisions as to claimants whose duties were partly domestic and partly of another character are not entirely consistent. On the one hand the statute has been held to be applicable to a barkeeper in a country tavern, the *ratio decidendi* being that, under such circumstances, the concerns of the tavern were blended with those of the family,⁶ and also to a man whose work was principally in a slaughterhouse and store, but who lived in the decedent's family and performed domestic duties when he was required to do so.⁷ On the other hand, priority has been refused to the wages of a man whose main duties were those of a farm laborer, but who occasionally discharged some domestic offices.⁸

The supreme court of Kansas has declared to follow the Pennsylvania doctrine, and held that a clerk is a "servant."⁹

1951. Persons entitled to privileges under statutory provisions in civil law jurisdictions. Louisiana.—a. Scope of provisions as indicated by the reasons for allowing the preference.—In one Louisiana case it was observed that most of the claims mentioned in art. 3191 (3158) of the Code are of a class which the lawgivers have thought proper to favor from considerations of humanity and public order. "Servants" and "clerks" are a class of persons who are usually dependent for their support upon their "wages or salaries."¹

April 19, 1794, § 14), the provision of the earlier statute of 1705, by which the wages of "workmen and servants" were placed upon an equal footing, had been altered by the omission of the reference to "workmen." His conclusion was that the word "servant" should be "restricted to its common and usual sense, as understood by householders. It signifies a hireling, one employed for money to assist in the economy of a family, or in some other matters connected therewith. I count it of no moment that the party hired does not sleep or eat within the walls of the house. I denominate a gardner, coachman, footman, etc., who live out of the family, as servants within the true meaning of the act. Not so of a clerk or bookkeeper, who, however meritorious his services might be, would scorn to be placed in the rank of servitude. Nor can I conceive the smallest propriety in calling those persons who were employed by James Ashman in his lifetime in the

manufacture of iron and business incident thereto, servants, and therefore entitled to a preference as such. They would justly be styled workmen, under the operation of the act of 1705."

⁴ *Boniface v. Scott* (1817) 3 Serg. & R. 351, (*arguendo*). See also the preceding note.

⁵ *Re Seble* (1877) 1 Chester Co. Rep. 52.

⁶ *Boniface v. Scott* (1817) 3 Serg. & R. 351.

⁷ *Re Miller* (1828; Orphans Ct.) 1 Ashm. (Pa.) 323. The court took the broad position that partial employment as a domestic servant was enough to bring a claimant within the act.

⁸ *Re Ralston* (1843) 2 Clark (Pa.) 224.

⁹ *Cawood Bros. v. Wolfley* (1896) 56 Kan. 281, 31 L.R.A. 538, 54 Am. St. Rep. 590, 43 Pac. 236.

¹ *Guion v. Brown* (1851) 6 La. Ann. 112.

b. Footing on which these provisions are construed.—It has been laid down that privileges are *stricti juris*, and only to be allowed in cases expressly provided for by law.²

c. Meaning attached to specific terms.—The description “clerks, secretaries, and persons of that kind,” in art. 3191 (3158) of the Code, has been held not to embrace editors, reporters, carriers, printers, and compositors of a newspaper;³ nor a foreman in a job printing office;⁴ nor an agent employed on a monthly salary and commissions to solicit sales of the goods of his employer’s manufactory;⁵ nor a person engaged in selling goods under a contract that he shall receive half the profits and bear half the losses of the business;⁶ nor a teacher in a school kept by the insolvent.⁷

By the express terms of art. 3205 (3172) of the Code, the “servants” who are accorded a privilege by art. 3191 (3158) are defined as those who receive wages, and stay in the house of the person paying and employing them, for his service or that of his family. Such are valets, footmen, cooks, butlers, and others who reside in the house. A tailor’s foreman has no privilege under this provision.⁸

Upon the broad ground that the claimants did not belong to any of the classes of employees to whom privileges have been granted by the express terms of the Code, and the right to a privilege cannot be predicated by implication (see subsec. *b*, *supra*), the courts have refused to allow a priority to the wages of daily and monthly laborers employed in a sawmill,⁹ and to an engineer on a plantation.¹⁰ In another case persons engaged to do the current work of keeping in proper order the grounds and buildings of one of the Departments of the New Orleans Exposition were not entitled to a privilege either as “servants” or as “domestics” or as “artisans” for labor or movables

² *Barbour v. Duncan* (1841) 17 La. 439; *Guion v. Brown* (1851) 6 La. Ann. 112.

³ *Stevens v. Sawyer* (1848) 3 La. Ann. 428.

⁴ *Lewis v. Patterson* (1868) 20 La. Ann. 294.

⁵ *Weems v. Delta Moss Co.* (1881) 33 La. Ann. 973. Compare the decisions cited in § 1943, note 5; § 1944, note 7.

⁶ *Brierre v. Their Creditors* (1891) 43 La. Ann. 423, 9 So. 640.

⁷ *Labat v. Labat* (1824) 2 Mart. N. S. 652.

⁸ *Lauran v. Hotz* (1823) 1 Mart. N. S. 140. The court took the position that the word “servant” is used in the

same restricted sense as the phrase “gens de service,” in the French law, and includes only “domestic servants.” *Pandectes Francaises*, vol. 15, 102; *Pothier, Traité des hypothèques*, 1809 ed. app. p. 448. Reference was also made to the similar doctrine of the Spanish law.

⁹ *Barbour v. Duncan* (1841) 17 La. 439.

¹⁰ *McRae v. His Creditors* (1861) 16 La. Ann. 305. In that case it was held that the fact of the claimant’s having seized a portion of a certain hogshead of sugar which he had assisted in manufacturing did not enlarge his rights so as to entitle him to a privilege therein.

in their possession.¹¹ In the same case the court refused to accept the contention of counsel that such persons were within the purview of the statute relating to workmen employed by contractors in the construction or repairing of buildings.¹²

It has been held that a person who superintends the construction of a building is within the statute which gives a lien to "every mechanic, workman, or other person doing or performing any work towards the erection of a building."¹³ This decision is in line with those cited in § 1945, note 25. But there seems to be some difficulty in reconciling it with the principle that "privileges" are *stricti juris*.

1952. Quebec.—*a. Footing on which the enactments in this province are construed.*—It is held, as in Louisiana, that privileges are *stricti juris*.¹

b. Meaning attached to specific terms.—In one case the court, applying the rule of strict construction, held that a commercial traveler was not a "clerk" within the meaning of act 2006 of the Code. It was considered that the phraseology of this provision showed that it was intended only for the benefit of employees whose services were required in the "store, shop, or workshop" which contained the "merchandise" subjected to the privilege.² In a later case the court of first instance proceeded upon the ground that the general term "commis," which in the English version of the Code is translated by the word "clerk," might fairly be regarded as including "commis-voyageur." The consideration adduced for the purpose of justifying this construction was that the older French law regarded the privilege with favor.³ The appellate court expressed a doubt as to the correctness of this view, but did not definitely determine the question.⁴ The modern French doctrine is that such an employee has no privilege;⁵ but this doctrine has relation to the scope, not of the term "commis," but of the phrase "gens de service," as used in art. 2101 of the Code Napoleon.

¹¹ *World's Industrial & C. Centennial Exposition v. North, C. & S. A. Exposition* (1887) 39 La. Ann. 1, 1 So. 358.

¹² See La. Acts 1880, No. 134. The fact that they were doing "current" work of the kind mentioned was considered to be fatal to the contention thus put forward.

¹³ *Mulligan v. Mulligan* (1866) 18 La. Ann. 20.

¹ *Ross v. Fortin* (1881) 8 Quebec L. R. 15, 11 Rev. Leg. 337.

² *Ross v. Fortin* (1881) 8 Quebec L. R. 15, 11 Rev. Leg. 337.

³ *Harris v. Hayneman* (1885) Montreal L. Rep. 1 S. C. 191, 8 Legal News (L. C.) 102.

⁴ *Heyneman v. Harris* (1886) Montreal L. Rep. 2 Q. B. 466.

⁵ See Beauchamp's Quebec Civ. Code Ann., notes to art 2006.

The French authorities are divided upon the question whether that phrase embraces such employees as the professors attached to an educational institution, secretaries, librarians, etc.⁶

A man employed from day to day has no privilege under art. 2006 of the Code.⁷

1953. Employees within the purview of statutes imposing upon shareholders in companies a personal liability for wages.—*a. Scope of statutes, as indicated by the reasons for enacting them.*—The motive which has induced the legislatures to impose the special liability created by these statutes is, broadly speaking, the same as that which has led to the enactment of the laws discussed in the preceding sections; viz., “to throw a special protection around that class of persons who actually perform the manual labor of the company.”¹ This protection is accorded for the reason that they are “not well qualified to protect themselves,—men who usually labor for small compensation, and who are regarded, to a certain extent, as in the power of their employers,—men who usually take no security for their services, who would generally be dismissed for requiring it, and therefore never make the attempt.”²

b. Rule of construction applied in determining the scope of these statutes.—In one state it has been held that these statutes should receive a liberal construction in favor of employees.³ But the view sustained by the preponderance of authority is that they should be strictly construed, for the reason that, although remedial in character, they

⁶ See Beauchamp's Quebec Civ. Code Ann., notes to art. 2006.

⁷ *Vanalstyne v. Gray* (1879; Super. Ct.) 2 Legal News (L. C.) 302. The French Commentators on art. 2101 of the Code Napoleon are divided upon the question whether such a servant has a privilege, the preponderance of authority being against according him priority. See Beauchamp's Quebec Civ. Code Ann., notes to art. 2006. Those jurists are, upon the whole, in favor of the view that an engagement for an entire year is not a necessary condition of the privilege. *Ibid.*

¹ *Coffin v. Reynolds* (1868) 37 N. Y. 640.

² *Ericsson v. Brown* (1862) 38 Barb. 390. Compare the remarks in *Coffin v. Reynolds*, *supra*, that the purpose of the

act was “to furnish additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers.”

“The obvious intent and policy of this and other similar acts is to make provision for those who are the workmen . . . on the road [*i. e.*, of a railway company] and who are usually persons of small pecuniary means, not able to lose their daily earnings.” *Boutwell v. Townsend* (1860) 37 Barb. 205.

³ *Day v. Vinson* (1890) 78 Wis. 198, 10 L.R.A. 205, 47 N. W. 269; *Clokus v. Hollister Min. Co.* (1896) 92 Wis. 325, 66 N. W. 398.

are in derogation of the common law and impose new liabilities; ⁴ or, as it is expressed in one case, because they are penal in their nature.⁵

1954. Same subject. Construction of specific words and phrases.—

a. "Laborers."—As employed in statutes of the description now under consideration, this word, whether it be used alone or in combination with other descriptive terms, may be said, broadly speaking, to carry the same significance as when it occurs in enactments which create liens and preferences. That is to say, it is applicable to "a class of servants who obtain their living by coarse manual labor."¹ It does not include employees who hold positions of such a nature that the manual labor which they are required to perform in the course of their duties is an incident rather than the principal part of the service.² In other words, the occasional performance of manual labor by an employee who, apart from that circumstance, would not be considered as a "laborer," does not entitle him to the benefit of the statute.³ In this point of view it is not applicable to an assistant chief engineer of a railroad company;⁴ nor to a traveling salesman;⁵ nor to the secretary and bookkeeper of a manufacturing corporation.⁶

⁴ *Black's Appeal* (1890) 83 Mich. 513, 47 N. W. 342; The court also laid stress upon the consideration that, as regards their liability for corporate debts, in this the stockholders stood in the relation of sureties, to the company, and that sureties are only liable according to the strict terms of their undertaking.

For other cases affirming the doctrine of strict construction, see *Palmer v. Van Santvoord* (1907) 153 N. Y. 612 (argued, p. 618) 38 L.R.A. 402, 47 N. E. 915; *Moyer v. Pennsylvania Slate Co.* (1872) 71 Pa. 293; *Cooking v. Ward* (1898) — Tenn. —, 48 S. W. 287; *Hand v. Cole* (1890) 88 Tenn. 400, 7 L.R.A. 96, 12 S. W. 922.

⁵ *Bristow v. Smith* (1899) 158 N. Y. 157, 53 N. E. 42.

¹ *Ericsson v. Brown* (1862) 38 Barb. 390.

² See case cited in last note.

³ *Dean v. DeWolf* (1878) 16 Hun, 186.

⁴ *Brockway v. Innes* (1878) 39 Mich. 47, 33 Am. Rep. 348, decided on the ground that the work was "mostly direction and scientific work, involving much more superintendence than personal exertion in manual labor."

In this connection reference may be made to a case in which it was held that a member of an engineering corps

is not within an act appropriating money to pay "laborers" of a railroad company. *State ex rel. Peck v. Rusk* (1882) 55 Wis. 465, 13 N. W. 452.

⁵ *Jones v. Avery* (1883) 50 Mich. 326 15 N. W. 494. The court observed that the claimant "had no part in carrying on the establishment, nor in the manufacture. He was a mere outside agent, or representative of the company, to bring business to it, upon a salary. As regards the present question, his position was nearer the position of an officer of the corporation than that of a laborer."

⁶ *Viele v. Wells* (1881) 9 Abb. N. C. 277, a case in which the claimant had performed services in New York for a Michigan corporation. It was held that the term "labor" should be construed in accordance with the law of Michigan, that the judgment contemplated by the act was a judgment of a Michigan court, and that under the law of neither state were plaintiff's services embraced within its meaning.

The decisions cited in this and preceding notes seem to embody a doctrine different from that indicated by the decision of one of the inferior courts of Pennsylvania, that a mine boss, working himself to instruct others, performing actual bodily labor as well as exer-

b. "*Laborers and operatives.*"—In a case cited in the preceding subdivision the court expressed the opinion that the word "operative," though of nearly the same signification as the word "laborer," has a somewhat more comprehensive scope. But this conception regarding the connotation of the two words seems to be wanting in accuracy. The more correct doctrine, it is submitted, is to consider the word "laborer" as being the appropriate description of an unskilled workman, and the word "operative" as being designative of a skilled workman or artisan.⁷ But in any event it is obvious that neither word can be construed as including the services of a professional man, such as a consulting engineer of a steamship company.⁸

c. "*Laborers and servants.*"—These words, which are used in the New York railroad act, have been declared to be applicable to "all persons employed in the service of the company who have not a different, proper, and distinctive appellation, such as "officers" and "agents" of the company. The engineer, the master mechanic, the conductor, is as fully entitled to its benefits as is the man who shovels gravel. The latter is, in law, no more and no less a servant of the company than either one of the former."⁹ In the case cited a civil engineer was held to be within the statute,—a ruling which, if it is to be regarded as being still good law, indicates that the enactment is not so restricted in its operation as the one considered in the following subsection. But having regard to the general trend of the more recent decisions in New York—not merely those which relate to statutes of the type now under discussion, but also those which involve the extent of preferences and other special remedial rights affecting the recovery of wages (see § 1944, *ante*),—it is very probable that at the present time a narrower scope than that indicated by the passage quoted above would be attributed to the words in question.

d. "*Laborers, servants, and apprentices,*" and "*laborers, servants, or employees other than contractors.*"—These descriptive words in the former of these groups were used in § 18 of N. Y. Laws 1848, chap. 40, relating to manufacturing companies. That act is now superseded by § 54 of the stock corporation law of 1892, in which the privileged classes of claimants are designated as "laborers, servants, or employees other than contractors." But the alteration thus made

cising supervision, may enforce a stockholder's liability for labor debts to "miners, quarrymen, and others" (act March 27, 1854, § 2, *supp. Purd.* 1082); *Thomas v. Bevans* (1862; C. P.) 2 Luzerne Leg. Obs. 99.

⁷ See the dictionaries, *sub voce*.

⁸ *Ericsson v. Brown* (1862) 38 Barb. 390, construing the special New York act of April 11, 1849, § 10.

⁹ *Conant v. Van Schaick* (1857) 24 Barb. 87.

is clearly unimportant, so far as the questions here under discussion are concerned, and as a matter of fact, the cases decided with reference to the repealed statute are still cited as controlling authorities.¹⁰ The footing upon which that statute was construed by the court of appeals is indicated by the following extract from the opinion in a leading case: "In common parlance, it [*i. e.*, the term 'servant'] is understood to relate and apply only to a person rendering service of a subordinate, but not necessarily of a menial, character to an employer, varying in its nature, according to the business or occupation in which it is rendered, and not to extend to and include every employee or party who does work for another. The context in which it is used, in the section referred to, being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time and render his service in the performance of work similar in its general character to that done by those employees."¹¹ The doctrinal position thus adopted is suggestive of two criteria with reference to which the right of an employee to avail himself of the statutory remedy may, according to circumstances, be considered. One of those criteria is indicated by the statement that the employees—for whose protection the enactment is designed are "those engaged in manual labor, as distinguished from officers of the corporation, or professional men engaged in its service."¹² On this

¹⁰ See *Bristor v. Smith* (1899) 158 N. Y. 157, 53 N. E. 42.

¹¹ *Hill v. Spencer* (1874) 61 N. Y. 274.

In a later case it was observed: "To the language of the act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give color and expression to each other. Therefore, although the word 'servant' is general, it must be limited by the more specific ones, 'laborer' and 'apprentice,' with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. It would violate this rule to hold that the intermediate, or second class, represented a higher grade than the class first named." *Wakefield v. Fargo* (1882) 90 N. Y. 213.

¹² Bacon, J., in *Coffin v. Reynolds* (1868) 37 N. Y. 640. Grover, J., observed that "the design of the stat-

ute was to afford protection to a class of employees of the company known as laborers, servants, and apprentices, and not as officers and agents of the company. It was deemed proper by the legislature to leave the latter class to their remedy against the company only. Section 5 of the act provides for the appointment of a president and subordinate officers of the company. Had the statute designed to include these officers, it would have used terms embracing them; but they are in the last section called officers, and not servants of the company. Again, the officers of the company are not within the same reason for special protection as the laborers. The latter are occupied with their labor, and have no means of knowing anything of the pecuniary condition of the company, while the former are usually better acquainted with that than the general creditors." Bacon, J., in his opinion, referred with approval to the following remarks of Selden, J., in the earlier case of *Aikin v. Wasson* (1862) 24 N. Y. 482: "In some very

ground it has been held that the personal liability of stockholders cannot be enforced by the secretary of a company; ¹³ nor by an employee intrusted by a mining company with full power to control its property and manage its financial affairs in a foreign country; ¹⁴ nor by a per-

extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants; and yet no one, I apprehend, would contend that the provision was intended for their benefit. The word "servants" is qualified, and, to some extent, limited, . . . by its association with the word 'laborers,' according to the familiar maxim, *Noscitur a sociis*."

The limiting words in the text which exclude professional men from the purview of the statute would seem to have destroyed the authority of a case in which it was held that a man who was employed by a manufacturing corporation as its civil engineer and traveling agent, at an annual salary, and who, in the performance of his duties, was bound to follow the directions of the company, was a "servant." *Williamson v. Wadsworth* (1867) 49 Barb. 294 (not specifically mentioned in *Coffin v. Reynolds*).

Having regard to that limitation, it seems to be also impossible to accept as correct a decision of later date than *Coffin v. Reynolds*, in which it was held that a newspaper reporter and city editor, if he is not an officer of the employing company, is a "servant" *Harris v. Norwell* (1876); Sup. Ct. Spec. Term) 1 Abb. N. C. 127. The theory thus adopted, that all employees who are not officers are servants, is manifestly inconsistent with the language used by the court of appeals.

In a still later case it was held that a bookkeeper, not an officer of the corporation, and not charged with any duty of superintendence, nor with any other duties than such as usually pertain to the position, was a "servant." *Chapman v. Chumar* (1889) 4 Silv. Sup. Ct. 199, 7 N. Y. Supp. 230. The more extended assumption upon which the court here proceeded, *viz.*, that the word "servant" included all employees who were neither officers nor persons exercising supervisory powers, ignores that part of the statement in the text which treats professional men as being outside the purview of the act. That such

men may be working under circumstances which place them outside the two classes of employees thus excluded is manifest. It is no doubt questionable whether a bookkeeper can be said to be a "professional man," as that phrase is intended. But if the description is not applicable to him in such a sense as to bring him within the operation of the rule laid down by the court of appeals in *Coffin v. Reynolds*, *supra*, it seems clear that the more general doctrine stated by that court in the cases cited in note 11, *supra*, is incompatible with the allowance of the right of action to such an employee.

¹³ *Coffin v. Reynolds* (1868) 37 N. Y. 640, overruling the decision to the contrary effect in *Richardson v. Abendroth* (1864) 43 Barb. 162.

¹⁴ *Hill v. Spencer* (1874) 61 N. Y. 274, reversing (1872) 2 Jones & S. 304. The court accepted, as a correct proposition, the statement of plaintiff's counsel, that the word "servants" must be taken to have been used "not in its broadest, most comprehensive, nor in its most limited and restricted sense, but according to the general and ordinary use of the term." The court also conceded that "to use it in its most comprehensive sense would include the president and other officer of a corporation; while its use in a limited and restricted sense would only indicate a domestic, a person employed in the house or family, or a menial who labors in some low employment; and that the term was not intended to extend to the former, nor to be limited or restricted to the latter class." It was also admitted that counsel had correctly asserted that, "unless it be when domestic or menial servants are referred to, there is no sense or use in which the word 'servant,' by its own force, indicates a mere bodily or manual service." But it was pointed out that this circumstance failed to show that the plaintiff's services were those of a servant, "according to the general and ordinary use of the term,"—the sense for which the claimant's counsel had himself contended.

This decision was followed, with re-

son employed to take the place of the superintendent of a mine in a foreign country during his temporary absence;¹⁵ nor by a person employed as bookkeeper and general manager;¹⁶ nor by an attorney employed to attend the legal affairs of a company.¹⁷

spect to an employee holding a similar position, in *Krauser v. Ruckel* (1879) 17 Hun, 463.

¹⁵ *Daan v. DeWolf* (1878) 16 Hun, 186, affirmed in (1880) 82 N. Y. 626. The court treated *Hill v. Spencer*, *supra*, as a controlling authority, and refused to allow any differentiating import to be attached to the circumstance that the claimant had sometimes performed manual labor in the course of the performance of his duties.

¹⁶ *Wakefield v. Fargo* (1882) 90 N. Y. 213. The court said: "It is plain, we think, that the services referred to are menial or manual services,—that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job, under the direction of a superior. . . . A general manager is not *ejusdem generis* with an apprentice or laborer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant."

In *Kincaid v. Dwinelle* (1875) 59 N. Y. 548, the sole question directly discussed was whether the claimant, the superintendent of a manufacturing company, had fulfilled the requirements of procedure which would entitle him to recover under the statute. For the purpose of its argument the court seems to have assumed that such an employee was within the purview of the statute. This position, if the language used is to be regarded as importing the adoption of it, is manifestly inconsistent with the cases cited in this and the preceding notes.

¹⁷ *Bristor v. Smith* (1899) 158 N. Y. 157, 53 N. E. 42, affirming (1898) 29 App. Div. 624, 52 N. Y. Supp. 1138, which affirmed (1897) 22 Misc. 55, 49 N. Y. Supp. 404. The court said: "To the ordinary reader of the language of this statutory provision [the amended

act]. I doubt that it would ever occur that the word 'employees' had any wider significance than to define, in a general way, such classes of persons as were engaged in serving the corporation in subordinate capacities; but when we apply the rules of construction to the case, any other definition of the word becomes unreasonable, if not impossible, than that it means persons sustaining such relations to the corporation as do laborers and servants. The statute was a continuation of previous legislation, which had for its object the protection of those who earned their living by manual labor, and not by professional services, and who were supposed to be the least able to protect themselves. To such persons, and to all who become employed in subordinate and humble capacities, and to whom the hardship would be great if their wages or salaries were not promptly paid, the legislative policy is to afford the protection of a recourse to the stockholders of a company, upon the latter's default. . . . When, in § 54 of the stock corporation law, the general word 'employees' was added after the words 'laborers' and 'servants,' it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser. Indeed, the appellant would be utterly without any reason in claiming the protection of the statute, if he could not pretend that his agreement with the company made him its employee. But the only effect of that agreement, so far as it bore upon their relations, was to secure to each permanency in the relation of attorney and client, and certainty as to the measure of compensation. The lawyer does not lessen the dignity and independence of his position towards his client, or in the community, by making such an agreement. He does not thereby descend into that inferior and subordinate class of persons who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under

Another criterion is furnished by the language which has been used in contrasting the positions of supervising and subordinate employees. "Laborer" or 'apprentice' are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service, performed, as before suggested, without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant should be of no higher grade than those enumerated as laborers or of lesser quality. A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive: '*specialia generalibus derogant.*'"¹⁸ The particular decision by which, in the case cited, a general manager was excluded from the purview of the enactment, may be referred to the consideration that he was an "officer" of the company within the meaning of the statement already adverted to. But the unqualified nature of the phraseology by which supervising employees are placed in a class by themselves would seem to indicate that, in the view of the court, the lower as well as the higher grades of such employees are outside the scope of the enactment. How far the current of authority may ultimately run in this direction remains to be seen. All that need be observed in this place is that some decisions of the inferior courts of New York can scarcely be treated as correct, unless it is assumed that the broad differentiation which is propounded in the passage just quoted between employees who do, and employees who do not, exercise control, is subject to some limitations.¹⁹

the orders of the managers of the corporation, are usually regarded as its servants or employees."

The above case was followed in *Hallett v. Metropolitan Messenger Co.* (1901) 35 Misc. 659, 72 N. Y. Supp. 370; judgment modified (1902) 69 App. Div. 258, 74 N. Y. Supp. 639.

¹⁸ *Wakefield v. Fargo* (1882) 90 N. Y. 213, 219.

¹⁹ In the opinion delivered in *Wakefield v. Fargo*, *supra*, it was intimated that the ruling in *Hovey v. Ten Broeck* (1865) 3 Robt. 316, to the effect that an employee who supervised the other servants, managed his master's property, and kept the books of the establishment, but also performed manual labor in company with his subordinates, was as to some matters a laborer, and as to

others a servant, was incorrect, in so far as it treated him as being within the statute in respect to his functions as a servant.

This criticism is also applicable to another case (not specifically referred to in *Wakefield v. Fargo*) in which a sort of engineer, or foreman in a mine, who showed the men how to work and worked with them, took the place of the superintendent when he was absent, and sometimes kept the time of the men, was held to be a "servant" within the statute (*Vincent v. Bamford* [1871] 1 Jones & S. 506, 42 How. Pr. 109, 12 Abb. Pr. N. S. 252); and also to a case in which it was held that the statute covered an employee who acted as foreman, helped to manufacture stone, kept the time of the hands, solicited orders,

e. "*Laborers, servants, apprentices, and employees.*"—The word "employee," as used in this connection in the Indiana statute with regard to manufacturing and mining corporations, has been held not to be applicable to a corporation aggregate.²⁰

f. "*Laborers, servants, or clerks.*"—It has been held that the Tennessee enactment which contains this combination of descriptive terms does not enure to the benefit of the superintendent of a mining company,²¹ or of the manager of a hotel company.²²

g. "*Laborers, servants, clerks, and operatives.*"—A provision which contains this combination of words has been held to be applicable to the services of a salaried employee whose time was spent partly in discharging the duties of a traveling salesman and collector, and partly in shipping and receiving goods, moving and handling stock, etc., in his employer's store, or making sales and collecting bills in the city where that store was situated.²³

h. "*Clerks, servants, and laborers.*"—It has been held that a superintendent of a mining company, although he does not perform manual labor, is within the purview of a statute in which these expressions are employed. The *ratio decidendi* was that the use of the word "clerk" showed that "it was intended to secure the benefit of the act to servants and laborers who are not usually termed either menial servants or manual laborers in the ordinary sense of these terms." ²⁴

1955. Employees within the purview of statutes which render directors of companies personally liable for wages.—In the Ontario statute to this effect the expressions used are "laborers, servants, and apprentices." This group of words has received a construction virtually the same as that which has been ascribed to it by the New York court of appeals. See preceding section, subsec. d. It has been declared

and did whatever told to do by the superintendent (*Short v. Medberry* [1883] 29 Hun, 39). (No reference was made to *Wakefield v. Fargo*, which had been decided in the preceding year.)

²⁰ *Dukes v. Love* (1884) 97 Ind. 341, applying the rule *Noscitur a sociis*.

²¹ *Cocking v. Ward* (1898) — Tenn. —, 48 S. W. 287.

²² *Wilson v. Patton* (1894; Tenn.) MSS. opinion referred to in *Cocking v. Ward*.

²³ *Hand v. Cole* (1890) 88 Tenn. 400, 7 L.R.A. 96, 12 S. W. 922 (Tenn. gen. incorp. act 1875, § 11).

²⁴ *Sleeper v. Goodwin* (1887) 67 Wis. 577, 31 N. W. 335. The court distinguished *Wakefield v. Fargo* (1882) 90 N. Y. 213 (subsection d, notes 11, 16, *supra*), on the ground that a wider scope was given to the Wisconsin statute by the inclusion of the word "clerks" in place of the expression "apprentices," which is found in the New York enactment. Compare the Wisconsin case cited in § 1948, note 15, *ante*. The English and Colonial cases cited in § 1942, notes 9, 15, *ante*, may also be referred to as illustrative of a similar point of view.

not to be applicable to a person holding the position of a foreman who hired and dismissed employees, made out pay rolls, received and paid out moneys for wages, and performed no manual labor, and received wages fortnightly for his own services, with additional compensation for the use of machinery and horses.¹

1956. —of statutes imposing upon principal employers liabilities for the wages of persons performing labor for contractors.—*a. Footing upon which these statutes are construed.*—It has been laid down that statutes of this description, although they are remedial, must be strictly construed, as being in derogation of the common law, and imposing new burdens upon the persons subjected to liability.¹ See further on this subject, § 782, *a, ante*.

b. Employees entitled to sue as "laborers."—In all the American statutes the class of employees for whose benefit they are enacted is designated by the word "laborers." This term is construed as including all persons who are hired on the footing of servants for the performance of manual labor;² but it does not embrace employees hired as clerks, timekeepers, and foremen;³ nor a superintendent of bridge

¹ *Welch v. Ellis* (1895) 22 Ont. App. Rep. 255. Osler, J. A., said: "The object [of the act] evidently was to protect, not the officers and agents, and servants of a superior class, but the inferior and less important class. . . . Taking 'laborer' on the one side, and 'apprentice' on the other, we are driven to conclude that the word 'servant' was not intended to include the higher grades of employment, but is controlled by the word which precedes it. . . . The servant, we must hold, intended by the act, is one of a humbler character, who does work similar to that required by a laborer,—a word which, in common parlance, imports one who is engaged in manual toil,—one who works, chiefly, at all events, with his hands, and not with his head,—and does not properly describe a person occupying the trusted and responsible position of the plaintiff. . . . I do not forget that the plaintiff's remuneration is called wages, and not salary, that it is reckoned by the day and payable at short intervals; but, taking all the circumstances together, this is not to justify us in holding that he is a laborer or servant, under the meaning of the act."

¹ *Atcherson v. Troy & B. R. Co.*

(1856) 1 Abb. App. Dec. 13, 6 Abb. Pr. N. S. 329; *Dudley v. Toledo, A. A. & N. M. R. Co.* (1887) 65 Mich. 657, 32 N. W. 884; *Chicago & N. E. R. Co. v. Sturgis* (1880) 44 Mich. 538, 7 N. W. 213; *Blanchard v. Portland & R. F. R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

² *Atcherson v. Troy & B. R. Co.* (1856) 1 Abb. App. Dec. 13, 6 Abb. Pr. N. S. 329 (where the question upon which the decision actually turned, and which was answered in the negative, was whether the remuneration due under an entire contract embracing the labor of the claimant, a teamster, and his assistant, could be apportioned so as to enable the claimant to recover for his own labor. See § 786, note 6); *Mann v. Burt* (1886) 35 Kan. 11, 10 Pac. 95 (similar decision; see same note).

The above New York case overrules a prior decision of the supreme court (which was not referred to in the opinion). *Warner v. Hudson River R. Co.* (1851) 5 How. Pr. 454, where it was laid down that the term "laborers" was applicable not only to those who personally perform labor, but also to those who do so by their servants and agents.

³ *Missouri, K. & T. R. Co. v. Baker* (1875) 14 Kan. 563.

building; ⁴ nor members of the engineer corps, nor the assistant general manager.⁵

c. —as “workmen.”—The scope of this term, as used in the statutes which have been enacted in some of the British colonies, appears to be somewhat wider than that of the word “laborers” in the American enactments.⁶

Having regard to the essential object of these acts, it is clear that they are not applicable to persons hired directly by the principal employer, without the intervention of a contractor,⁷ nor to persons who merely contract for the supply of articles, and perform no labor.⁸

1957. —of statutes affecting the exemption of wages. Construction generally.—The accepted doctrine with regard to statutes which, by their specific terms, cover classes of employees whose work is entirely or principally manual, is that they should be liberally construed, *quoad personas*.¹ Considering the essentially remedial character of enactments of this type, it may safely be asserted that this rule is also applicable to enactments which are not exclusively applicable to such employees. See § 798, *a, ante*.

As to the scope of the word “wages,” see § 786, *ante*.

1958. Same. Statutes. Scope of terms, single or grouped, importing manual work.—a. “Laborers.”—The word “labor,” in the New Hampshire statute, has been held to cover the official services of a

⁴ *Blanchard v. Portland & R. F. R. Co.* (1895) 87 Me. 241, 32 Atl. 890.

⁵ *State ex rel. Peck v. Rusk* (1882) 55 Wis. 465, 13 N. W. 452. The statute here under review was a special one, providing for the payment of the claims of laborers, subcontractors, etc., for work done in constructing the railroad of a company whose land grant had been revoked.

⁶ In New South Wales it has been held that a subcontractor is entitled to sue a contractor under the act. *Ex parte Walker* (New South Wales, 1885) 2 W. N. 112.

In § 2 of the New Zealand workmen's wages act 1893, the term “workmen” is defined as “any person in any manner engaged in manual labor, or in work of any kind, whether his remuneration is to be according to time or by piecework, or at a fixed price, or otherwise howsoever.” Persons who did work under a written contract, and were paid by the cubic yard, and not by wages, were held

to be “workmen” within the earlier act of 1871. *Guinan v. Pell*, 2 New Zealand L. R. N. S. (S. C.) 91.

In the Manitoba builders' and workmen's act, the term “workmen” is defined as including persons who are employed “by the day or piece.” That this description is not applicable to persons employed by the hour was quite likely held in *Dunn v. Sedziak* (1908) 7 West. L. Rep. 563. This decision is clearly correct. But it is reasonably certain that in the statute, the words “by the day” were used, through inadvertence, in place of the more comprehensive phrase “by time.”

⁷ *Cash v. Chaffer* (1897) 15 New Zealand L. R. (S. C.) 416.

⁸ *Jones v. Conlon*, Tarl. (New South Wales) 45.

¹ *Claghorn v. Saussy* (1874) 51 Ga. 576; *Rustad v. Bishop* (1900) 80 Minn. 497, 50 L.R.A. 168, 81 Am. St. Rep. 282, 83 N. W. 449.

mayor of a city.¹ But other cases in which this expression as used singly for the purpose of designating the privileged class of employees, has been construed are in harmony with the commonly accepted doctrine with regard to its signification, *viz.*, that it includes only persons whose work is entirely or mainly physical. As used in the Scotch statute, it has been held to include a lamplighter of a burgh, although the given contract of hiring required him to employ two assistants during the winter.² On the other hand, the Quebec statute has been declared not to be applicable to a person engaged in painting or engraving flowers or patterns on wall paper.³

With reference to the original Minnesota statute, it was held that the remuneration of a person employed to sell goods by sample was not that of a "laboring man."⁴ But a later provision which exempted the wages of "any person" was held to enure to the benefit of a telegraph operator, although the statute which contained it was entitled, "An Act to Fix the Amount of the Wages of Laborers Exempt from Attachment, etc."⁵

The word "laborers" in the Louisiana Code of Practice has been held to apply to a switchman on a railway,⁶ but not to locomotive engineers, mechanical engineers, electrical engineers, clerks, cashiers, bookkeepers, and other classes of employees whose employment is associated with mental labor and skill.⁷

¹ *Robinson v. Aiken* (1859) 39 N. H. 211. Whether this decision would be treated as a binding precedent in a case involving similar facts is perhaps doubtful, in view of the language used in *Weymouth v. Sanborn* (1861) 43 N. H. 171, 80 Am. Dec. 144. But it was not explicitly overruled.

² *M'Murphy v. Emslie* (1888) 15 Sc. Sess. Cas. 4th series, 375, 25 Scot. L. R. 282.

³ *Brown v. Gordon* (1884) Quebec C. C. 7 Legal News, 354. The court treated the word "laborer" in the statute as being equivalent to the French term "journalier," or "homme de peine;" and in this point of view denied its applicability to "les hommes de profession, les artistes, les artisans, ou hommes de metier."

⁴ *Wildner v. Ferguson* (1889) 42 Minn. 112, 6 L.R.A. 338, 18 Am. St. Rep. 495, 43 N. W. 794, Gen. Stat. chap. 66, § 310 [11]).

⁵ *Boyle v. Vanderhoof* (1890) 45 Minn. 31, 47 N. W. 396. The court said: "The act is intended to exempt, in M. & S. Vol. V.—382.

general, wages earned by persons standing in the relation of servants or employees, and it is not limited to toil-some and unskilled labor merely, to which the term 'laborer' is more strictly and accurately applicable. The title is not carefully worded, but we think the word 'laborer,' as used in connection with 'wages,' may, in a general sense be applied to employees other than working men engaged in manual labor, consistently with the provisions of the act." It was remarked that the constitutional provision with regard to expressing the subject of a statute in its title was to be liberally construed, and that the words "wages of laborers" might, by giving them this broad interpretation, be made consistent with the body of the act.

⁶ *Schroeder v. Collins* (1904) 113 La. 778, 37 So. 722, art. 644, as amended by Laws 1876, No. 79.

⁷ *State ex rel. I. X. L. Grocery Co. v. Land* (1902) 108 La. 512, 58 L.R.A. 407, 92 Am. St. Rep. 392, 32 So. 433. The court said: "Such and similar stat-

In a Mississippi case a debtor was held to be entitled to an exemption under an answer of the garnishee which alleged that the claimant was a laborer in his employ, being engaged as a clerk in his store. The *ratio decidendi* was that "where physical toil is the main ingredient of services rendered, although directed and made more valuable by skill, the person performing them is a laborer within the meaning of the statute."⁸ It seems very questionable, however, whether, in the absence of specific averments and evidence regarding the nature of the duties of such an employee, this criterion of privilege can justifiably be applied in his favor.

b. "*Mechanics and other laboring men.*"—It has been held that these terms, which are found in the Tennessee statute, are not applicable to a commissioner in partition proceedings,⁹ but that they embrace a house and sign painter,¹⁰ and an iron puddler paid by the piece, but required to work at certain hours.¹¹

c. "*Journeyman, mechanics, and day laborers.*"—These expressions, which are used in the Georgia statute, are manifestly such as would be treated in most jurisdictions as comprehending only employees whose work is substantially of a manual character, and who occupy subordinate positions. But by its earlier decisions the supreme court committed itself to a theory regarding the scope of the word "laborers" which seems to be justifiable only on the hypothesis that the legislature intended to afford protection to all classes of employees (except, possibly, general managers and superintendents), provided that their earnings were required for the support of their families. In the first case in which the statute was construed, an exemption was allowed to an overseer of a plantation, on the broad ground that his wages were, by the terms of his agreement, to be paid weekly, in order to enable him to supply his family with the necessities of life.¹² Proceeding upon the same principle, the court subsequently held that the statute was applicable to clerks of various descriptions;¹³ to a teacher employed by the board of education of a

utes are presumably intended to protect a class of men who are ill-fitted to protect themselves,—men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families; and that they should not be extended by forced construction so as to include a class of men who are competent to take care of themselves, and need no such protection."

⁸ *Williams v. Link* (1887) 64 Miss. 641, 1 So. 707 (Code 1880, § 1244).

⁹ *State use of Porter v. Cobb* (1880) 4 Lea, 481.

¹⁰ *Waite v. Franciola* (1891) 90 Tenn. 191, 16 S. W. 116.

¹¹ *Adcock v. Smith* (1896) 97 Tenn. 373, 56 Am. St. Rep. 810, 37 S. W. 91.

¹² *Caraker v. Mathews* (1853) 25 Ga. 571 (dissenting, Benning, J.)

¹³ *Claghorn v. Saussy* (1874) 51 Ga. 576 (forwarding clerk employed by a railroad company under a contract which entitled it to discharge him at

city for the scholastic year of ten months, at monthly wages;¹⁴ and to an employee hired on a monthly salary, but not for any definite period, to perform the duties of an amanuensis, stenographer, and private secretary, including the keeping of books, etc.¹⁵

The effect of these rulings was to attach to the term "laborers" a wider meaning than that which had been ascribed to it in cases which turned upon the scope of the constitutional and statutory provisions with respect to liens.¹⁶ The explanation offered for this inconsistency is by no means convincing.¹⁷

The test with reference to which the question whether the protec-

any time); *Smith v. Johnston* (1883) 71 Ga. 748 (employee of agent for a line of railroad); *Lamar v. Chisholm* (1886) 77 Ga. 306 (employee of merchant); *Cox v. Bearden* (1890) 84 Ga. 304, 20 Am. St. Rep. 359, 10 S. E. 627.

In *Butler v. Clark* (1872) 46 Ga. 468, where the employee was a shipping and receiving clerk in a mercantile establishment, paid at the rate of so much a month, but subject to discharge at any time, the court, citing the definition of a "journeyman" as a "day laborer," a "hired workman" (Zell's Encyclopedia), remarked that, if the employee was not a day laborer, he was certainly a hired workman, and added: "If an overseer's wages, which are usually paid (in great part, at least) yearly, are not subject to garnishment, it would seem to follow, *a fortiori*, that a clerk's wages, payable monthly, are not; still less, the wages of one payable at even shorter intervals of time."

¹⁴ *Hightower v. Slaton* (1875) 54 Ga. 108, 21 Am. Rep. 273. The extremely wide scope which the court accorded to the statute is apparent from the remark that "it is difficult to say that a teacher in a private or public school, who faithfully performs his or her duty, is not as much a day laborer, within the meaning of the statute, as an overseer," and from the following notable but scarcely convincing piece of argument: "Teachers in the public schools of the state, as a general thing, belong to that class of persons who are dependent on their earnings in that capacity for the support of themselves and families. There is no class of persons in the state whose services are more important to the welfare of the people thereof than the industrious, competent teachers of

the children of the country. But if their wages, on which they and their families are dependent for support, are liable to process of garnishment, the public will be deprived of their services, because they cannot afford to engage in a business which must necessarily, if they perform their duty, occupy their whole time, and they cannot labor in their vocation without meat and bread and wherewithal to be clothed. The children of the state cannot be educated without competent teachers, and competent teachers cannot be obtained if they are to be deprived of their wages for the support of themselves and families, by process of garnishment."

¹⁵ *Abrahams v. Anderson* (1888) 80 Ga. 570, 12 Am. St. Rep. 274, 5 S. E. 778. To the same general effect, *Empire Invest. Co. v. Sullivan* (1909) 133 Ga. 391, 65 S. E. 882; *Cohen v. Aldrich* (1909) 5 Ga. App. 256, 62 S. E. 1015.

¹⁶ See § 1945, note 28, *ante*.

¹⁷ In *Butler v. Clark* (1872) 46 Ga. 468, one of the cases in which the exemption statute was laxly construed, the court remarked: "One may not be a laborer or mechanic within the meaning of those terms as used in the Constitution, and yet be entitled to have his earnings exempted from garnishment. The words of the Constitution were evidently intended to apply to manual laborers and mechanics, whose claims are usually small, and, owing to the necessities of the laborer, promptly enforced. Otherwise a host of unrecorded and secret liens for large amounts would fasten themselves upon much of the property in the state. Such parasites would tend to the destruction of the value of property by preventing its easy alienation." The inconvenient consequences

tion of the statute can be claimed is now considered is that which was defined in a case where the actual point determined was that an employee is or is not entitled to a laborers' lien, according as he is engaged to perform ordinary manual labor or "work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties."¹⁸ With this theory some of the decisions which were rendered before it was enunciated are in accord. On the one hand, it was held that the statute covered the wages of a locomotive engineer;¹⁹ of a laborer in a factory;²⁰ of a night watchman;^{20a} and of a person employed to labor on a farm at a stipulated price for six months, but entitled, by the terms of his contract, to call at any time for such portion of his earnings as he might require to supply his necessities;²¹ on the other hand, the position was taken that the exemption could not be claimed by the director of an entire department of an extensive factory, who hired and discharged subordinates to the number of one hundred and fifty, who received a monthly salary of \$100, payable at the end of every two weeks, and who was not required to do manual labor, but was expected, from his skill and intellectual fitness, to direct the work of the operatives under him;²² nor by a school-teacher employed at a certain *per diem* for each

upon which stress is thus laid may possibly have operated as one of the reasons which induced the lawmakers to restrict the benefit of the provisions regarding liens to the class of employees commonly designated as "laborers." But it is difficult to see upon what principle such a consideration can justifiably be treated as a ground for attributing to that term, as used in another statute to which that consideration is not applicable, a more extended meaning than that which it ordinarily bears.

¹⁸ Lumpkin, J., in *Oliver v. Macon Hardware Co.* (1896) 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403. The criterion thus propounded is virtually the same as that which has been applied in determining the scope of the expression "workmen" in the English statutes discussed in § 1968, *post*.

Whether a particular employee is a "laborer" is generally a question of fact, "dependent upon whether his duties are mainly physical or mental." *Buchanan v. Echols & Nix* (1911) 8 Ga. App. 565, 70 S. E. 28.

¹⁹ *Sanner v. Shivers* (1886) 76 Ga. 335. The wages of the claimant were

declared to be exempt on the somewhat singular ground that he was a "day laborer," not an officer of the railway company. It is not apparent why the court should have relied upon so strained a reason, when the employee in question was clearly entitled to protection as a "mechanic." See *Century Dictionary*, in which one of the definitions of the word is, "one engaged in operating machines." For later cases in which the wages of locomotive engineers were held to be exempt see note 30, *infra*.

²⁰ *Swift Mfg. Co. v. Henderson* (1896) 99 Ga. 136, 25 S. E. 27.

^{20a} *McAdams v. Ellis* (1908) 5 Ga. App. 262, 62 S. E. 1001.

²¹ *Prothro v. Grubbs* (1883) 71 Ga. 863. It was considered that the remuneration was, as a result of the privilege specified, brought within the scope of the phrase, "daily, weekly, and monthly wages."

²² *Kyle & Co. v. Montgomery* (1884) 73 Ga. 337. The court remarked that the meaning of the statutory terms was sufficiently enlarged when they were made to embrace the overseer of a plantation, who not only directed the oper-

pupil;²³ nor by a railway conductor, employed for the purpose of exercising a general control over a passenger or freight train;²⁴ nor by a commercial traveler whose business it is to travel and sell goods for his employer;²⁵ nor by a person who was hired and worked by the day, whose duties consisted of laying out work and seeing that it was executed according to plans and specifications, assorting and measuring timber and lumber, driving stakes with his own hands to determine the extent of excavations, handling the surveying instruments used in locating buildings, and who did not hire or discharge men, but directed them.²⁶

In cases decided since the theory was propounded, and in several instances avowedly with reference to it, the wages of the following employees have been treated as privileged: A clerk in a retail store, engaged for one half his time in "drudgery and hard work," and for the other half in attending the customers;²⁷ a skilled mechanic employed as a subforeman in a planing mill, to run the machinery, adjust it to cut patterns, repair it, and to perform various other duties involving manual work;²⁸ a street railway conductor, whose duties were to keep the car in general order, collect fares, and give transfers, keep the lights dusted and in repair, attend to the trolley, and help

ations of the hands employed, but labored with them, and also clerks employed in stores; and added: "Were the application of this provision to overseers on plantations and to clerks in stores an original question, we should hesitate long before giving them the benefit of it. To this extent the court has already gone, and we feel obliged to follow the precedents thus set; we can, however, make no others by what we consider an extremely liberal, if not a loose, construction of the terms in question."

²³ *Bates v. Bates* (1884) 74 Ga. 105.

The precise ground upon which this case is to be distinguished from *Hightower v. Slaton*, note 14, *supra*, is not apparent from the report. The mere fact that the remuneration was not computed upon the same footing in the two cases does not seem to afford an adequate ground for a differentiation

²⁴ *Miller v. Dugas* (1886) 77 Ga. 386, 4 Am. St. Rep. 90. Answering the contention that the debtor was either a "day laborer" or "journeyman," the court said: "Unless, however, he performs manual labor, and is employed

for that purpose, rather than on account of his skill or intellectual qualifications to discharge important functions in overlooking and directing the operations of others engaged in running and managing the train of their common employer, and is one of them, and not above them in authority, he is not, according to the case of *Kyle & Co. v. Montgomery* (1884) 73 Ga. 343, *supra*, either one of the persons embraced in this section of the Code, whose wages are exempt from garnishment."

See also *Robinson v. McWilliams-Rankin Co.* (1909) 6 Ga. App. 203, 64 S. E. 717.

²⁵ *Briscoe v. Montgomery* (1894) 93 Ga. 602, 44 Am. St. Rep. 192, 20 S. E. 40 (not a "day laborer," though his wages were paid by the day).

²⁶ *McPherson v. Stroup* (1897) 100 Ga. 228, 28 S. E. 157 (finding that employee was not a "laborer" held correct).

²⁷ *Pike v. Sutton* (1902) 115 Ga. 688, 42 S. E. 58.

²⁸ *Stothart v. Melton* (1903) 117 Ga. 460, 43 S. E. 801.

passengers on and off, etc.;²⁹ a locomotive engineer;³⁰ a brakeman on a railway;³¹ an employee engaged in building cabs and pilots for railway locomotives;³² and a molder employed by a manufacturer who supplied the materials required for the work.³³

On the other hand, the statute has been held not to be applicable to a clerk in a railway office;³⁴ nor to a general salesman in a clothing store;³⁵ nor to a watchman employed to perform police duty, to make arrests when necessary, preserve order, and supervise the safety and security of his employer's property.³⁶ Having regard to the doctrinal position indicated by these later decisions, it is clear that several of the cases referred to under the preceding paragraph are no longer good law in Georgia.

It has been laid down that where the contract provides for work which depends on the power of the employee to perform manual work, he is within the purview of the statute, although he has the control of other employees engaged in similar work,³⁷ or is paid in proportion to the quantity of work done by him.³⁸

In all the reported cases the court has confined its attention to the meaning of the words "laborer" and "day laborer." But three of the rulings which proceeded upon the ground that a locomotive engineer was a "laborer" might, it is apprehended, have been referred to the notion that he was a "mechanic."³⁹

The same remark is applicable to a ruling with regard to a subforeman in a planing mill, who had charge of the machinery.⁴⁰

1959. Same. Statutes. Scope of groups of terms partly importing manual work.—a. "Laborers and employees."—It has been laid down that the president of a railroad company is not within the purview

²⁹ *Stuart v. Poole* (1900) 112 Ga. 818, 81 Am. St. Rep. 81, 38 S. E. 41.

³⁰ *Smith v. Walker* (1904) 119 Ga. 615, 46 S. E. 831; *Johnson v. Hicks* (1904) 120 Ga. 1002, 48 S. E. 383. See also note 19, *supra*.

³¹ *Franklin v. Southern R. Co.* (1904) 119 Ga. 855, 47 S. E. 344.

³² *Prather v. Pantone* (1906) 125 Ga. 808, 54 S. E. 663.

³³ *Moultrie v. Crocker* (1906) 125 Ga. 82, 54 S. E. 197.

³⁴ *Hunter v. Morgan* (1899) 108 Ga. 409, 33 S. E. 986; *Boynton v. Pelham* (1899) 108 Ga. 794, 33 S. E. 876; *Kline v. Russell* (1901) 113 Ga. 1085, 39 S. E. 477 (forwarding and shipping clerk whose duty it was to see that freight was properly loaded on

cars by truck hands working under his direction, to check the freight as it is loaded, and to make written reports to the local freight agent).

³⁵ *Ensel v. Adler* (1900) 110 Ga. 326, 35 S. E. 334 (precise nature of duties not stated).

³⁶ *Tabb v. Mallette* (1904) 120 Ga. 97, 102 Am. St. Rep. 78, 47 S. E. 587.

³⁷ *Stothart v. Melton* (1903) 117 Ga. 460, 43 S. E. 801.

³⁸ *Swift Mfg. Co. v. Henderson* (1896) 9 Ga. 136, 25 S. E. 27; *Johnson v. Hicks* (1904) 120 Ga. 1002, 48 S. E. 383; *Prather v. Pantone* (1906) 125 Ga. 808, 54 S. E. 663. (See generally, cases cited in § 1973, note 2, *post*.)

³⁹ See notes 19, 30, *supra*.

⁴⁰ See note 28, *supra*.

of a statute by which the "wages of laborers and employees" are exempted from garnishment.¹ The decision proceeded upon the ground that the words used to designate the persons covered by the statute conveyed the idea of subordinate occupations, and that the term "wages" was connotative of an inconsiderable remuneration; but it might more appropriately have been referred simply to the notion that the word "employee," in the sense in which it is ordinarily understood, is not applicable either to the president or any other of the directors of a company, and that those officials are *a fortiori* not within the scope of the less comprehensive expression, "laborers."²

b. "*Laborer or other employee.*"—With reference to a statute in which this combination of words is used, it has been held that a person who had contracted to erect, superintend, and otherwise direct the construction of a building for a percentage of the cost is an "employee" in the receipt of "wages or hire."³

c. "*Laborer or any person in public or private employment.*"—It would seem that, so far as their own earnings are concerned, all classes of employees who are engaged as servants, in contradistinction to independent contractors, are deemed to be within the protection of the Pennsylvania statute which contains this combination of words. That enactment has been held to enure to the benefit of a person in a church choir;⁴ of a traveling salesman, paid by commission;⁵ of a person employed to gather evidence for the defendant in a lawsuit;⁶ and of skilled laborers, such as a miner who, by his own labor, mines coal at so much a ton, and employs a common laborer

¹ *South & North Ala. R. Co. v. Falkner* (1873) 49 Ala. 115 (act of 1868).

² See the cases cited in § 1942, note 11; § 1943 note 8; § 1945, note 20.

³ *Moore v. Heaney* (1859) 14 Md. 558. The court argued thus: "A laborer, when engaged in service, under contract for compensation, is an employee; but after saying a 'laborer' there is added, 'or other employee.' Surely, in this was meant more than a laborer, or else, why, after using that word, add those which follow? If they only mean persons who are included within the meaning of the word 'laborer,' they are mere tautology and useless."

⁴ *Catlin v. Ensign* (1857) 29 Pa. 264.

⁵ *Hamberger v. Marcus* (1893) 157 Pa. 133, 37 Am. St. Rep. 719, 27 Atl. 681. The only point seriously disputed was whether the claimant was a broker, because of being paid by commissions.

⁶ *Hartman v. Mitzel* (1898) 8 Pa. Super. Ct. 22. Referring to the words "wages and salary," as used in the statute, the court observed that, taken together, these terms are "broad enough to cover all compensation for services rendered in whatever occupation or capacity, no matter how extended or short the period of employment, or how large or small the amount." It was also observed that "the earlier adjudications were aimed principally at the exclusion of contractors and others who performed none of the labor themselves, . . . while the later cases extend the purpose of the act as given in *Heebner v. Chave* (1847) 5 Pa. 115, to more important employments, requiring superior skill, training, and mental equipment."

at daily wages to assist him; ⁷ and a master carpenter who performs work with his own hands and also supervises workmen hired by him.⁸

d. "*Servant, laborer, or workman.*"—It has been held that the salary of a secretary of a company is not within the purview of the English statutes in which the privileged classes of employees are designated by these expressions.⁹ These words, as used by the Nebraska statute, have been held to include a traveling salesman.¹⁰

e. *Mechanic, workman, laborer, servant, clerk, or employee.*"—The Ontario statute, which contains this combination of expressions, was in one case held not to be applicable to a medical health officer appointed by a municipal council.¹¹

1960. Same statutes. Applicability to public employees.—Although the subject does not properly fall within the scope of this treatise, it may be mentioned that the doctrine usually adopted in the United States, on grounds of public policy, is that the remuneration of such persons is not subject to garnishment, whether they are within the express terms of the exemption statutes or not.¹ In some jurisdictions, however, special provisions have been enacted with regard to the attachment or garnishment of their salaries or wages.²

⁷ *Pennsylvania Coal Co. v. Costello* (1859) 33 Pa. 241. The court said: "The miner is not a contractor who stands off and appropriates the profits of other men's labor, but he leads the way into the subterranean chamber, directs every arrangement and movement, and performs the efficient labor with his own hands."

⁸ *Smith v. Brooke* (1865) 49 Pa. 147.

⁹ *Gordon v. Jennings* (1882) L. R. 9 Q. B. Div. 45, 51 L. J. Q. B. N. S. 417, 46 L. T. N. S. 534, 30 Week. Rep. 704, 46 J. P. 519 (33 & 34 Vict. chap. 30). The court observed that the statute is intended to apply to persons of small means,—to servants, such as laborers and workmen receiving small wages at short periods; persons who would be likely to be deprived of their daily means of subsistence by having their earnings attached in the hands of their employers.

¹⁰ In *William Deering & Co. v. Ruffner* (1891) 32 Neb. 845, 29 Am. St. Rep. 473, 49 N. W. 771, the court said: "It is true that the beneficiaries of this statute are designated as laborers, mechanics, and clerks, but I do not think that those terms are terms of limitation merely but that by the use of them

the legislature intended to designate all such persons as earn their living by wages, and whose compensation is measured by the day, week, month, or year; of course, not including the employees of the government, state, county or city."

¹¹ In *Macfie v. Hutchinson* (1887) 12 Ont. Pr. 167. The court proceeded on two grounds: (1) that the term "employee" was applicable only to occupations *ejusdem generis* with those connected by the preceding word; and (2) that this term imports an employee whose whole time and services are engaged.

¹ See note to *Dickinson v. Johnson*, 54 L.R.A. 566.

² For the American decisions concerning these provisions, see same note at p. 570.

In Quebec it has been held that an employee of the government, working at so much a day, is not an employee whose salary is in part attachable under the Quebec statute, 38 Vict. chap. 12 (Code Civ. Proc. 1890, art. 628, Code Civ. Proc. 1897, art. 599), which authorizes the seizure of the salary, due and to become due, of any public officer or employee, in certain proportions.

1961. Same statutes. Applicability to seamen.—On the ground that the United States enactment under which the wages of “seamen” are excepted from attachment or arrestment forms a part of the title of the Revised Statute which treats of “merchant seamen,” and that “seamen” have been distinguished from “fishermen” in all Federal legislation, it was held in one case that the privilege so declared could not be asserted in respect of the wages of a man who had shipped for a fishing voyage at a rate of remuneration computed with relation to the number of fish which he should catch and unload.¹

1962. —of statutes permitting claims for wages to be enforced against exempt property.—*a. Claims or debts for “labor.”*—See also the cases cited in § 1972, note 5, subd. e, *post*).—In the few cases which bear upon the subject, the word “labor” has been treated as being applicable only to the services of those employees “who subsist by physical toil, in distinction from those who subsist by professional skill.”¹

b. “Laborer or servant.”—It has been held with reference to a statute in which this combination of words occurs, that the term bears the meaning which is commonly attached to it in other enactments relating to the wages of servants; *viz.*, that of an employee whose work is entirely or principally manual; and that this meaning controls that of the word “servant” with which it is coupled.² On this ground it has been held that the scope of the statute is not so en-

Lepine v. Gauthier (1879) 5 Quebec L. R. (C. C.) 217.

Nor does that act apply to the salaries of school-teachers under the control of the board of school commissioners. Accordingly their salaries are exempt from seizure. *Lovejoy v. Campbell* (1884) 7 Legal News 397, Montreal L. R. 1 S. C. 77.

¹ *Telles v. Lynde* (1891) 47 Fed. 912.

² *Weymouth v. Sanborn* (1861) 43 N. H. 171, 80 Am. Dec. 144. The actual point involved in the case cited was that a physician was not entitled to claim the privilege. The decision in *Robinson v. Aiken* (1859) 39 N. H. 211, in which the salary of a mayor of a city had been held to be exempt from garnishment was not overruled, but was referred to in terms which evince considerable doubt as to its correctness.

In North Carolina it has been enacted that mortgages of incorporated companies shall not operate so as to exempt their property from execution for the satisfaction of judgments for “labor performed.” Strictly speaking this pro-

vision does not come within the scope of the present section; but it may be mentioned, by way of illustration, that in a case decided with reference to it, a person hired to conduct a store, to keep books, and to superintend a mill, was held not to be entitled to its benefits, for the reason that he did not perform any manual work. *Moore v. American Industrial Co.* (1905) 138 N. C. 305, 50 S. E. 687.

² In *Dickinson v. Rahn* (1901) 98 Ill. App. 245, it was held that, as the record did not show the nature of the services, the debtor had not brought himself within the protection of the statute, and was consequently precluded from claiming any exemption. The court said: “What is meant by laborer, under the statute, is one who performs manual labor, not requiring special knowledge or skill; and a servant is understood to be one who is employed to perform an inferior and menial service. It was only for the benefit of such persons that the statute was enacted.”

larged by the insertion of the latter word as to cover such employees as traveling salesmen.³

But, in view of the essentially remedial character of statutes of this type, the construction thus adopted would, it may be, be regarded in some jurisdictions as unwarrantably strict.

c. "*Laborers or mechanics.*"—A statute in which the combination of terms is used has been held to cover only the remuneration earned by "physical toil."⁴

d. "*Laborer, mechanic, and clerk.*"—The word "laborer," as used in the Nebraska statute in which this combination of terms occurs, has been held to import a person hired to perform "manual or menial labor."⁵

1962a. —of the truck acts and other statutes designed to secure the payment of the full amount of the wages.—a. *English acts.*—In the truck act of 1831, § 25, the general expression "artificer" was used to describe the class of workmen within its scope, and it was declared that this term should be deemed to include "all workmen, laborers, and other persons in any manner engaged in the performance of any work, employment, or operation of whatsoever nature, in or about the several trades and occupations" previously enumerated. Domestic servants and servants in husbandry were expressly excepted. The object of this statute, as a whole, was declared to be the affording of protection to "a class of persons not very able to protect themselves."¹ So far as it can be said to have any specific bearing upon the scope of such a statute, *quoad personas*, the circumstance thus adverted to

³ *Epps v. Epps* (1885) 17 Ill. App. 196. In the opinion of the present writer the correctness of this decision is very questionable. Conceding that the scope of the word "servants" is restricted by its association with the word "laborer" it seems difficult to suppose that the former is not intended to bear a meaning different from, and somewhat wider than, the latter.

⁴ *Paddock v. Balford* (1891) 2 S. D. 100, 48 N. W. 840. There it was held that an allegation that the claimant's judgment was "for labor" was not equivalent to an allegation that it was for a "laborer's" or "mechanic's" wages within the meaning of the statute. The court observed that "a party invoking the protection of a proviso or exception, to avoid the effect of a general law, must show himself clearly within the terms of the exception."

⁵ *Henderson v. Nott* (1813) 36 Neb. 154, 38 Am. St. Rep. 720, 54 N. W. 87 (Code, § 531). The actual point decided was that the employee, being an independent contractor, could not claim the benefit of the statute. In the absence of that objection it would seem that, as his contract was to make brick with the assistance of other workmen hired by himself, to keep in repair and oil the machinery, and feed a team furnished by the employer, he might have made good his claim, as being a "mechanic."

In this point of view the limitation of the scope of the enactment to "manual or menial labor" seems to be somewhat out of place.

¹ Maule, J., in *Sharman v. Sanders* (1853) 13 C. B. 166, 3 Car. & K. 298, 22 L. J. C. P. N. S. 86, 17 Jur. N. S. 765, 1 Week. Rep. 152.

seems to be merely corroborative in respect of the conclusion which would otherwise be deducible from the use of the term "artificer," and of the expressions by which that term is defined; viz., that the act was intended to apply only to servants whose work was largely of a manual description. The effect of the cases decided on this point of view is stated in § 1968, *f. post*.

b. American acts.—The persons falling within the purview of the truck acts which have been passed in the United States are variously described as "employees,"² "wage earners,"³ and "laborers."⁴ In some jurisdictions the application of these acts is restricted to persons working for certain classes of employers.⁵

1963. —of statutes regulating the times at which wages are to be paid.—The generality of the expression "employees," which is used in the New York statute, is deemed to be somewhat restricted by the use of the word "wages" as descriptive of the character of the remuneration. That word is distinguished from "salary" and treated as covering only the pay of laborers entitled to be compensated on the footing of the services actually rendered, and not that of public officers or clerks who receive salaries not due till the end of the year.¹

1964. —of statutes affecting the rights of discharged servants.—It has been laid down that the provision of the Louisiana Code relating to the dismissal of "laborers" without any serious ground of complaint (see § 859, *ante*) is to be strictly construed.¹ But the decisions rendered with regard to its applicability to various classes of employees are difficult to reconcile upon any reasonable footing with the doctrinal standpoint indicated by this statement.

In one case the provision was said to embrace all persons who hire

² Kansas statute 1897, chap. 145; Maryland statute 1880, chap. 273.

³ Kentucky Const. § 244; Missouri Laws 1895, p. 206.

⁴ Mo. Rev. Stat. 1889, § 2058; Rev. Stat. 1899, § 8142; Anno. Stat. 1906, § 8142.

⁵ The purview of Kansas truck act (Laws 1897, chap. 145, §§ 1, 4) is restricted to corporations or persons that employ ten or more persons. See *State v. Hawn* (1898) 7 Kan. App. 509, 54 Pac. 130.

The Indiana statute (after eliminating the part that has been held void because not expressed in the title) is confined to merchants. *Dixon v. Poe* (1902) 159 Ind. 492, 60 L.R.A. 308, 95 Am. St. Rep. 309, 65 N. E. 518.

¹ *People ex rel. Van Valkenburg v. Myers* (1890; Sup. Ct.) 25 Abb. N. C. 368, 33 N. Y. S. R. 18, 11 N. Y. Supp. 217 (Laws 1890, chap. 388). See also *People v. Buffalo* (1890) 57 Hun, 577, 11 N. Y. Supp. 314, where it was laid down that the word "employees," when read in connection with the word "wages," and with reference to the considerations which induced the enactment of the statute, is to be taken as being limited to laborers and workmen, and therefore is not applicable to a clerk in the office of the mayor of a city, a secretary or treasurer of a park commission, a member of a fire department, a police patrolman, or a school-teacher.

¹ *Trefethen v. Locke* (1861) 16 La. Ann. 19.

out their services for a fixed period, except the menial servants specified in art. 2718 [2747], these being subject to dismissal without cause.² In another it was stated that any person whose labor, skill, or industry is hired is a "laborer," irrespective of whether the given services can be performed by another as well as by him.³ In applying to particular cases the doctrines thus laid down, the court has allowed the claims of salesmen;⁴ of clerks;⁵ of overseers of plantations;⁶ of a pilot;⁷ of an engineer employed to operate a cotton press;⁸ of a person employed to superintend a cotton press;⁹ of a person employed by the year and for at least one year, as city manager of an insurance agency under guaranty of a certain sum per annum;¹⁰ of an architect employed to superintend a building;¹¹ of a manager of a dairy;¹² of an attorney at law employed by an insurance company as its general attorney upon a specified annual salary;¹³ of a party contracting with another to assist him in recovering an inheritance, for a certain sum to be paid out of it;¹⁴ and of a person employed as a sugar broker, who had agreed to accept a fixed annual salary in lieu of commission, and to effect sales of a certain commodity in behalf of his employer exclusively, and had also obligated himself to exert all his personal efforts to promote the interests of his employer, to write letters concerning the business for his employer, and to make out all account sales in transactions by him;¹⁵ of the secretary and treasurer of a company.¹⁶ It has also been held that an apprentice is entitled to sue under this section.¹⁷

² *Shoemaker v. Bryan* (1857) 12 La. Ann. 697.

³ *Tete v. Lanaux* (1893) 45 La. Ann. 1343, 14 So. 241.

⁴ *Decamp v. Hewitt* (1845) 11 Rob. (La.) 290, 43 Am. Dec. 204; *Shea v. Schlatre* (1842) 1 Rob. (La.) 319; *Taylor v. Kehlror* (1874) 26 La. Ann. 369; *Alba v. Moriarty* (1884) 36 La. Ann. 680.

⁵ *Lartigue v. Peet* (1843) 5 Rob. (La.) 91; *Bormann v. Thiele* (1871) 23 La. Ann. 495; *Madden v. Jacobs* (1900) 52 La. Ann. 2107, 50 L.R.A. 827, 28 So. 225.

⁶ *Chevalier v. Borie* (1832) 3 La. 299; *Hays v. Marsh* (1837) 11 La. 369; *Word v. Winder* (1861) 16 La. Ann. 111; *Perret v. Sanchez* (1856) 12 La. Ann. 687; *Jones v. Jackson* (1870) 22 La. Ann. 112; *Woodward v. Gross* (1872) 24 La. Ann. 109; *Leche v. Claverie* (1873) 25 La. Ann. 308; *Sharp*

v. McBride (1907) 120 La. 143, 45 So. 41.

⁷ *Shoemaker v. Bryan* (1857) 12 La. Ann. 697.

⁸ *Sherburne v. Orleans Cotton Press* (1840) 15 La. 360.

⁹ *Beckman v. New Orleans Cotton Press Co.* (1838) 12 La. 67.

¹⁰ *Woods v. Shumard* (1905) 114 La. 451, 38 So. 416.

¹¹ *De Puilly v. Church of St. Louis* (1852) 7 La. Ann. 443.

¹² *Thurmond v. Skannal* (1907) 118 La. 6, 42 So. 577.

¹³ *Orphan Asylum v. Mississippi M. Ins. Co.* (1835) 8 La. 181.

¹⁴ *Angelloz v. Rivollet* (1847) 2 La. Ann. 652.

¹⁵ *Tete v. Lanaux* (1893) 45 La. Ann. 1343, 14 So. 241.

¹⁶ *Daspit v. D. H. Holmes Co.* (1907) 120 La. 86, 44 So. 993.

¹⁷ *Hand v. West* (1876) 28 La. Ann. 145.

The provision in art. 2747 (2718), to the effect that "a man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for doing so," has been declared to have no application to attorneys and counselors at law.¹⁸ The Arkansas statute has apparently not been discussed with reference to its scope *quoad personas*.

1965. —of statutes regulating the hours of work.—a. Public work.

—The questions upon which the few reported cases regarding public work have turned are—

(1) Whether the person who was performing the given work belonged to the class or classes of employees specified in the enactment under discussion. In this point of view it has been held that a driver in the street-cleaning department of a city is within the purview of the New York labor law of 1897, as amended in 1897, which, by its express terms, comprehends "mechanics, workmen, and laborers."¹ But this and other similar enactments are not applicable to persons who hold regular offices, by election or appointment, and receive a stated salary.²

(2) Whether the work in which the employee participated was of the character to which the enactment is applicable.

It has been held that the masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel are not "laborers or mechanics" engaged upon "public work" within the meaning of the United States act which forbids contractors upon such work to permit or require employees belonging to those classes to work more than eight hours in each day.³

The eight hour law of Kansas has been held to be applicable to a person working on the streets of a city, under an ordinance requiring the performance of two days' work, or the payment of a poll tax.⁴

¹⁸ *Orphan Asylum v. Mississippi M. Ins. Co.* (1835) 8 La. 181.

¹ *McNulty v. New York* (1901) 60 App. Div. 250, 70 N. Y. Supp. 133. The court was of opinion that the terms "workmen" and "laborers" were both applicable to the employee.

² So held with reference to Kansas Laws 1891, chap. 114, in which the same classes of employees are enumerated as in the New York labor law. *State ex rel. Ives v. Martindale* (1891) 47 Kan. 150, 27 Pac. 852.

While the eight hour law of New

York, Laws 1870, chap. 385, which embraced "mechanics, workmen, or laborers," was in force, the opinion was expressed by the law officers of the state that it did not apply to town or other officers. *Sickels's Ops. Atty. Gen.* (N. Y.) 504.

³ *Ellis v. United States* (1906) 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589 (act of Aug. 1, 1892).

⁴ *Re Ashby* (1898) 60 Kan. 101, 55 Pac. 336 (Kansas Laws 1891, chap. 114).

b. Private work.—The question whether the statutes relating to private employments are applicable to servants permanently engaged, or only to those who are hired for a day or other short period, depends upon the phraseology used by the legislature, and the primary and essential purpose of the enactment in question. Provisions induced merely by sanitary considerations are perhaps usually to be regarded as including only servants who are steadily employed.⁵ On the other hand, some of those which may be supposed to be chiefly intended to regulate the relations of employers and employees in a financial point of view have been construed as being designed for the benefit only of persons who perform casual labor.⁶ In one statute of this latter type there is an express exception of monthly labor.⁷

The scope of these statutes in respect of the quality of the services rendered is illustrated by decisions to the effect that train despatchers are within the protection of an enactment which limits the number of consecutive hours that "employees" may remain on duty;⁸ and that a woman who manages a mercantile establishment at a fixed weekly salary, with a percentage of the profits of the business, superintends the business generally, buys the goods therefor, and is mistress of her own hours, coming and going as she pleases, is "employed" by the proprietor within the meaning of the English factory act.⁹ And that the employment of a boy whose work is partly inside the shop of a news agent and partly away from it, in fetching and delivering newspapers, is "in and about the shop" within the mean-

⁵ The provision in Mass. Stat. 1874, chap. 221, § 1, as amended by Stat. 1880, chap. 194, § 1, by which the hours of labor of minors and women "employed in laboring" in a manufacturing establishment are regulated, has been held to be applicable only to such persons as are permanently therein employed. *Com. v. Osborn Mill* (1880) 130 Mass. 33 (information which alleged that a manufacturing corporation employed a certain woman without having posted a printed notice, in a conspicuous place in the room where she was employed, stating the number of hours' work required of such persons on each day of the week, was held to be insufficient).

⁶ It has been held that only laborers employed by the day are within the Indiana act of 1889, p. 143. *Helpenstine v. Hartig* (1892) 5 Ind. App. 172, 31 N. E. 845.

Similarly it has been held that Michi-

gan act No. 137, Laws of 1885, making ten hours a legal day's work, does not apply to a contract with an expert in taking, finishing, and retouching photographs. *Schurr v. Savigny* (1891) 85 Mich. 144, 48 N. W. 547. The court laid down the general rule that the statute was not intended to cover employment under a hiring by the week, month, or year.

⁷ See *Bachelor v. Bickford* (1872) 62 Me. 526, where it was held that an employment under a contract to work in a gristmill at a certain rate per day, to be paid weekly, was not within the exception.

⁸ *Atchison T. & S. F. R. Co. v. United States* (1910) 100 C. C. A. 534, 117 Fed. 114.

⁹ *Graves v. Duncan* (1899) 1 Sc. Sess. Cas. 5th series, 72, 2 Adam, 711, 36 Scot. L. R. 490, 6 Scot. L. T. 391 (Just. Cas.).

ing of the English shop hours act 1892.¹⁰ A page boy in a hotel, who sleeps on the premises, and who is principally employed as a messenger, but partly also in assisting to dust the reception rooms, is not within the exemption, in § 10 of the same act in favor of "any person wholly employed as a domestic servant."^{10a}

In the interpretation clause of the New Zealand shops and office act 1904, No. 52, a portion of which is concerned with the hours of work, the term "shop assistant" is thus defined: Any person (whether a member of the occupier family or not), who is employed in and about the business of the shop, and includes (a) Apprentice and improvers, and, (b) All persons in the occupier's employment who are engaged in selling or delivering his goods or canvassing for orders for his goods, whether such persons are at any time actually employed inside the shop or not.

The terms in which these statutes are usually drawn are such as to show unmistakably that they are not intended to apply to services of an official character,—such as those performed by deputy sheriffs appointed to aid in preserving the peace.¹¹

1966. —of statutes enabling servants to recover attorneys' fees in suits for wages.— In construing a statute which, by its terms, is for the benefit of "mechanics, artisans, miners, laborers, and servants," the Illinois court of appeals proceeded upon the theory that the word "servants" included only employees *ejusdem generis* with those specifically enumerated, and refused to allow attorneys' fees to a traveling salesman.¹

But fees are allowable to a person employed as transit man and topographer.²

1967. —of statutes relating to the place where wages are to be paid.— In the English payment of wages prohibition act 1883, § 3, it is declared that the expression "workman" means "any person who is a laborer, servant in husbandry, journeyman, artificer, handicraftsman, or is otherwise engaged in manual labor," but does not include a "domestic or menial servant."

¹⁰ *Collman v. Roberts* [1896] 1 Q. B. 457, 65 L. J. Mag. Cas. N. S. 63, 74 L. T. N. S. 198, 44 Week. Rep. 445, 18 Cox, C. C. 273, 60 J. P. 184.

^{10a} *Savoy Hotel Co. v. London County Council* [1900] 1 Q. B. 665, 69 L. J. Q. B. N. S. 274, 64 J. P. 262, 49 Week. Rep. 351, 82 L. T. N. S. 56, 16 Times L. R. 148.

¹¹ *Christian County v. Merrigan* (1901) 191 Ill. 484, 61 N. E. 479, affirming (1900) 92 Ill. App. 428 (Hurd's Rev. Stat. 1899, p. 840, § 1).

¹ *Standard Fashion Co. v. Blake* (1894) 51 Ill. App. 233.

² *Goodridge v. Alton* (1908) 140 Ill. App. 373.

1968. English employers and workmen act 1875, and earlier statutes of a similar character. Employers' liability act 1880. Truck acts.—
a. Generally.—The definition clause (§ 10) of the existing statute, the employers and workmen act 1875, runs as follows:

The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labor.

This provision has been incorporated by reference in the employers' liability act 1880 (see § 8), and in the truck acts (see 50 & 51 Vict. chap. 46, § 2). It has also been adopted with some important modifications in some of the Colonial employers' liability acts. See §§ 1662, 1663, *ante*, and in this chap. § 1969, *post*.

In the following subsections in which the scope of the various descriptive words used in this provision is considered, the writer has, for the purposes of illustration, stated the effect of many cases which involved the construction of the repealed master and servant acts.¹ Some cases decided with respect to statutes having no relation to the contract of services have also been cited.² The list of authorities has been further enlarged by the inclusion of some cases in which no statute was under review. With regard to the inapplicability of the employers' liability act 1880, to seamen, see § 1728, *ante*.

b. "Domestic or menial servant."—Apparently none of these terms has been the subject of judicial construction. Presumably their meaning will be defined, when occasion arises, upon the same footing as it has been determined with relation to other descriptions of enactments. (See also subsec. *d*, note 11, *infra*.) According to a standard text-book, domestic or menial servants are "those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family, or his

¹ The act of 20 Geo. II. chap. 19, was applicable to servants in husbandry, artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, or other laborers." The act of 6 Geo. III. chap. 25, added to this enumeration "calico printers," but omitted "servants in husbandry." The last-mentioned class of servants was re-

stored to the list in 4 Geo. IV., chap. 34.

² In this connection, however, it is not amiss to recall the remark of Erle, J., that "it is a matter of common knowledge that words in one act of Parliament may have a meaning which they would not have in another." *Wilson v. Zulucta* (1849) 14 Q. B. 405.

guests, and, who, for this purpose, become part of the master's residential or quasi-residential establishment."³ Whether or not a servant is a domestic or menial servant is primarily a question of fact for the jury.⁴

c. "Laborer."—The generic word "laborer" denotes a man who digs and does other work of that kind with his hands.⁵ In one sense every man who works or labors may be called a "laborer;" but the word, as used in the statute, has a more restricted meaning, being applicable only to a person whose work is essentially manual. It does not embrace an omnibus conductor,⁶ nor the care taker of goods seized under a fi. fa.,⁷ nor a carpenter, nor a bailiff, nor the clerk of a parish.⁸ In one case it was remarked that artificers, handicraftsmen, miners, etc., do not necessarily or properly fall under the denomination of "laborers."⁹ But this distinction is not material in the present connection.

The word "laborer" in the special provision of the stamp act by

³ Roberts & Wallace on Liability of Employers, 3d ed. p. 214. This definition was recently mentioned with marked approval by Collins, J., in *Pearce v. Lansdowne* (1893) 62 L. J. Q. B. N. S. 441, 69 L. T. N. S. 316, 57 J. P. 760, where a potman in a public house was held to discharge duties which were substantially of a menial nature.

In actions where the question involved was whether the rule was applicable, that domestic servants are only entitled to a month's warning when the contract of hiring is terminated, it has been held that the phrase "menial servants" includes a huntsman hired to take charge of a pack of foxhounds (*Nicoll v. Greaves* [1864] 17 C. B. N. S. 27, 33 L. J. C. P. N. S. 259, 10 Jur. N. S. 919, 10 L. T. N. S. 531, 12 Week. Rep. 961); and a head gardener living in a cottage situated on his master's property (*Nowlan v. Ablett* [1835] 2 Crompt. M. & R. 54, 1 Gale, 72, 5 Tyrw. 709, 4 L. J. Exch. N. S. 155); but not a governess (*Todd v. Kerrich* [1852] 8 Exch. 151, 22 L. J. Exch. N. S. 1, 17 Jur. 119); nor the housekeeper of a large hotel (*Lawler v. Linden* [1876] Ir. Rep. 10 C. L. 188); nor an employee who combines the functions of a steward and gardener (*Forgan v. Burke* [1861] 12 Ir. C. L. Rep. 495).

The statement of Blackstone that the word "menial" is derived from *mœnia*, M. & S. Vol. V.—383.

this class of servants being conceived of as *infra mœnia*, dates from the antediluvian period of philology, and is one of the many absurdities of that sort which are still allowed to disfigure legal treatises. The word is really derived, according to the best modern authorities, from the Saxon *meine*, *mesnie*, that is, a household, or family. See Collins, J., in *Pearce v. Lansdowne*, *supra*, and Skeat's Etymological Dict., *sub. voc.*

⁴ *Pearce v. Lansdowne* (1893) 62 L. J. Q. B. N. S. 441, 69 L. T. N. S. 316, 57 J. P. 760, per Williams, J.

⁵ Brett, M. R., in *Morgan v. London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

⁶ Day, J., in *Morgan v. London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416.

⁷ *Bramwell v. Penneck* (1827) 7 Barn. & C. 536, 1 Mann. & R. 409 (4 Geo. IV. chap. 34).

⁸ Brett, M. R., in *Morgan v. London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

⁹ Lord Ellenborough in *Lowther v. Radnor* (1806) 8 East, 113, p. 124 (with reference to 20 Geo. II. chap. 19).

which agreements for the hire of a "laborer" are admissible in evidence, even if they are unstamped, is not confined to a mere hedger and ditcher.¹⁰

d. "*Servant in husbandry*."—This description applies to a dairy-maid upon a farm, who, by her contract, is also to assist in harvesting, if so required, and to act as a servant of all work in her master's household;¹¹ to a servant engaged by a farmer to act as "kitchen woman and byre woman;"¹² to a wagoner;¹³ and to a "man employed to dig the ground;"¹⁴ but not to a person engaged by a farmer to weigh out the food for the cattle, to set the men to work, and in all things to carry out the orders given to him.¹⁵

e. "*Journeyman*."—In a treatise of authority the following definition of this word "journeyman" is suggested: "One who, being neither a foreman nor an apprentice, and working not on his own account for the public, but under a master, works with his hands in an occupation of a constructive kind, requiring skilled knowledge, which skilled knowledge he possesses."¹⁶ Etymologically considered, a "journeyman" is one who is employed by the day, but that is not the sense in which the term is ordinarily used, for, in most of the trades in which journeymen are employed,—as, for an instance, in the business of butchers, bakers, and tailors,—they are hired and paid by the week.¹⁷

f. "*Artificer*."—An "artificer," according to Brett, M. R., is a "skilled workman."¹⁸ The word has been held applicable to a frame-

¹⁰ *Reg. v. Wortley* (1851) 21 L. J. Mag. Cas. N. S. 44, 2 Den. C. C. 333, 15 Jur. 1137, 5 Cox, C. C. 382, Temple & M. 636, holding that a man engaged to take charge of glebe land at a fixed salary and a third of the net profits was not a "menial servant," but a "laborer."

¹¹ *Ex parte Hughes* (1854) 23 L. J. Mag. Cas. N. S. 138, 18 Jur. 447, 2 Week. Rep. 465, 2 C. L. Rep. 1542 (4 Geo. IV. chap. 34).

¹² *Clarke v. McNaught* (1845) Arkley (Sc.) 33 (4 Geo. IV. chap. 34).

¹³ *Lilley v. Elwin* (1848) 11 Q. B. 742, 17 L. J. Q. B. N. S. 132, 12 Jur. 623 (4 Geo. IV. chap. 34).

¹⁴ Brett, M. R., in *Morgan v. London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. 832, 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

¹⁵ *Davies v. Berwick* (1861) 7 Jur. N. S. 410, 3 El. & El. 549, 30 L. J.

Mag. Cas. N. S. 84, 9 Week. Rep. 334, 3 L. T. N. S. 697 (4 Geo. IV. chap. 34). Crompton, J., pointed out that his chief duty was to keep the general accounts belonging to the farm, and this fact indicated that his position was rather that of a steward than that of a "servant."

¹⁶ Roberts & Wallace on Liability of Employers, 3d ed. p. 221.

¹⁷ *Morgan v. London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416, per Day, J., who remarked that the term would not be applied in common parlance to an omnibus conductor. In the same case in the court of appeal, as reported in (1884) 53 L. J. Q. B. N. S. 352, Brett, M. R., said: "A 'journeyman' is a man who is working for a master, such as a carpenter." This passage is not in the Law Reports.

¹⁸ *Morgan v. London General Omnibus Co.* (1884) 53 L. J. Q. B. N. S. 352,

work knitter who manufactured stockings;¹⁹ to a stuff presser or a stuff finisher of Italian goods;²⁰ to a riveter employed to plate a vessel;²¹ to a journeyman machinist employed by a newspaper company;²² to a laborer engaged in loading boats with iron, and in unloading coal used in ironworks;²³ and to the stoker of a steamer.²⁴ It is not confined to occupations which require merely manual labor, but embraces such workmen as a calico pattern designer, engaged to serve for a term of years;²⁵ and the overseer of a printing office;²⁶ or the superintendent of looms in a factory, whose time is divided between the supervision and manual labor.²⁷ On the other hand, it has been held that a foreman at a slate quarry, who had charge of the men and the conduct of the work, with power to hire or dismiss subordinate workmen, was not an "artificer," although it was his duty to assist those workmen when operations were "falling backwards."²⁸

g. "Handicraftsman."—The meaning of the word "handicraftsman" is essentially the same as that of the word "artificer,"—that is to say, he is a "skilled workman."²⁹

h. "Miner."—By § 7, subsec. 2, of the recent English workmen's

51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

¹⁹ *Moorhouse v. Lee* (1864) 4 Fost. & F. 354 (truck act).

²⁰ *Whiteley v. Armitage* (1864) 13 Week. Rep. 144 (4 Geo. IV. chap. 34).

²¹ *Lawrence v. Todd* (1863) 14 C. B. N. S. 554, 32 L. J. Mag. Cas. N. S. 238, 11 Week. Rep. 835, 8 L. T. N. S. 505, 10 Jur. N. S. 179 (4 Geo. IV. chap. 34, § 3).

²² *Glasgow v. Independent Printing Co.* [1901] 2 I. R. 312 (truck act).

²³ *Millard v. Kelly* (1858) 32 L. T. 123, 7 Week. Rep. 12.

²⁴ *Wilson v. Zulueta* (1849) 14 Q. B. 405, 19 L. J. Q. B. N. S. 49, 14 Jur. 366 (stamp act).

²⁵ *Ex parte Ormrod* (1844) 1 Dowl. & L. 825, 1 New Sess. Cas. 38, 13 L. J. Mag. Cas. N. S. 73, 8 Jur. 495 (decision on master and servant act, 4 Geo. IV. chap. 34, § 3).

²⁶ *Bishop v. Lettz* (1858) 1 Fost. & F. 401 (stamp act).

²⁷ In *Leech v. Gartside* (1885) 71 L. T. N. S. 427, 1 Times L. R. 391, an action under the employers' liability act 1880, such an employee was held entitled to recover for an injury caused by defective machinery, though he was engaged in supervision when the accident occurred.

²⁸ *Phillips v. M'Innes* (1874) 2 Sc. Sess. Cas. 4th series, 224, 12 Scot. L. R. 161.

²⁹ Brett, M. R., in *Morgan v. London General Omnibus Co.* (1884), as reported in 53 L. J. Q. B. N. S. 352, 51 L. T. N. S. 213, 32 Week. Rep. 759, 48 J. P. 503.

A hairdresser is not a "handicraftsman." *Reg. v. Justices of Louth* [1900] 2 I. R. 714. As to this case, see also note 35, *infra*.

By § 4 of the workshop regulation act 1867 (30 Vict. chap. 146), since repealed by 41 Vict. chap. 16, schedule 6, it was declared that "handicraft" shall mean any manual labor exercised by way of trade or for purposes of gain, in or incidental to the making of any article, or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article." This definition has been held to include an employee engaged in making straw plait. *Beadon v. Parrott* (1871) L. R. 6 Q. B. 718, 40 L. J. Mag. Cas. N. S. 200, 19 Week. Rep. 1144 (breach of act in employing a child under eight years of age).

compensation act of 1897, the word "mine," as used therein, means a mine to which the coal mines regulation act of 1887, or the metalliferous mines regulation act of 1872, applies. In the absence of any express declaration in the employers and workmen act of 1875, it may perhaps be assumed that the rule of construction thus indicated would be followed in determining whether a workman was a "miner" for the purposes of the employers' liability act.³⁰

With respect to the distinction between "mines" and "quarries," it has been held that workers in underground quarries of slate are entitled to the protection provided for miners under the metalliferous mines act.³¹ For some purposes it is clear that a surface quarry is not a "mine."³² But the question whether a workman employed in such a quarry is or is not a "miner" is not material in the present connection. Quarrymen of all descriptions are at all events within the purview of the general clause, "otherwise engaged in manual labor."³³

i. Persons "otherwise engaged in manual labor."—Conformably to a familiar principle of statutory construction, this general phrase is held to refer to labor *ejusdem generis* with the specific kinds previously mentioned.³⁴

There is some difficulty in defining the line beyond which a person will fail to come within the definition of a "workman" as defined by this clause. In some cases the true conclusion will be indicated by the fact that the legislature has used the word "labor," not "work." Various occupations may be said to involve "manual work," and not

³⁰ In the employers' liability act of the Australian state of Victoria, it is expressly provided that the term "workman" shall not be applicable to any person within the purview of the mines act 1890, pt. III.

³¹ *Sim v. Evans* (1875) 23 Week. Rep. 730; *Jones v. Cwmorthin Slate Co.* (1879) 41 L. T. N. S. 576, L. R. 5 Exch. Div. 93, 49 L. J. Exch. N. S. 110, 28 Week. Rep. 237, 44 J. P. 168.

³² In a case where a lease was under construction it was held that the expression "mines" did not comprise "quarries," and it was said that a quarry is distinguished from a mine as being "a place upon or above or not under ground." Turner, L. J., in *Bell v. Wilson* (1866) L. R. 1 Ch. 303, 35 L. J. Ch. N. S. 337, 12 Jur. N. S. 263, 14 L. T. N. S. 115, 14 Week. Rep. 493,

17 Eng. Rul. Cas. 422, 10 Mor. Min. Rep. 415.

³³ See *Devonshire v. Rawlinson* (1864) 28 J. P. 72 (case under stat. 4 Geo. IV. chap. 34, § 3, in which a servant's wages were forfeited for absence from work).

³⁴ Day, J., in *Morgan v. London General Omnibus Co.* (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416. In the court of appeal (1884) 53 L. J. Q. B. N. S. 352, Brett, M. R., said that this phrase meant "any person engaged in the same way as all the others are engaged, although they do not go by the same names."

To the same effect, see remarks of Smith, J., in *Cook v. North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 476, 35 Week. Rep. 577, 51 J. P. 630.

manual labor.³⁵ In other cases a "satisfactory distinction may be drawn between those whose labor is continuous and requires no application of thought, and those whose labor requires the application of a certain amount of thought and skill."³⁶ But the most generally serviceable test is furnished by the doctrine that the essential question to be answered in each instance is whether the duties performed by the servant were mainly mental or mainly physical, and that the act applies only where his duties belong to the latter category.³⁷ This doctrine involves the corollary that the mere use of the hands in matters incidental to a man's employment does not constitute him a manual laborer within the meaning of the act.³⁸ Following out this conception the courts have held that the phrase is not applicable to a person employed by a firm of manufacturers "to assist the firm, as a practical working mechanic, in developing ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm;³⁹ nor to an omnibus conductor;⁴⁰ nor to a driver of a tram car;⁴¹ nor to a gro-

³⁵ *Cook v. North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683, 56 L. J. Q. B. N. S. 309, 56 L. T. N. S. 448, 57 L. T. N. S. 476, 35 Week. Rep. 577, 51 J. P. 630, per Smith, J., who illustrates the distinction by referring to the case of a person engaged in telegraphing or in writing.

A "hairdresser" has been held not to be a "workman," on the ground that, although he is a "handicraftsman," he is not engaged in a "manual labor." *Reg. v. Justices of Louth* [1900] 2 I. R. 714.

³⁶ *Grantham, J., in Cook v. North Metropolitan Tramways Co.* (1887) L. R. 18 Q. B. Div. 683.

³⁷ *Pollock, B., in Hunt v. Great Northern R. Co.* [1891] 1 Q. B. 601, 60 L. J. Q. B. N. S. 216, 64 L. T. N. S. 418, 55 J. P. 470.

³⁸ *Bound v. Lawrence* [1892] 1 Q. B. (C. A.) 226 (reversing decision of Q. B. D.). "It is difficult," said Fry, L. J., "to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort. If, then, the words 'manual labor' are to have the full significance which could be put on them, they would be extended to every kind of employment. That

cannot be the true meaning of the statute, but some more confined interpretation must be arrived at. I agree that this must be done by looking to the nature of the substantial employment, and not to matters that are incidental and accessory."

³⁹ *Jackson v. Hill* (1884) L. R. 13 Q. B. Div. 618, 49 J. P. 118 (employers' liability act 1880).

⁴⁰ *Morgan v. London General Omnibus Co.* (1884) L. R. 13 Q. B. Div. (C. A.) 832, affirming (1883) L. R. 12 Q. B. Div. 201, 50 L. T. N. S. 687, 32 Week. Rep. 416 (employers' liability act 1880). The decision in *Wilson v. Glasgow Tramways Co.* [1878] 5 Sc. Sess. Cas. 4th series, 981, 15 Scot. L. R. 656, where it was held by Lords Moncrieff and Gifford, with some expression of doubt, that a tramway conductor was within the act, was disapproved. A conductor, said Brett, M. R., "does not lift the passengers into and out of the omnibus. It is true that he may help to change the horses; but his real and substantial business is to invite persons to enter the omnibus, and to take and keep for his employers the money paid by the passengers as their fares; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty."

⁴¹ *Cook v. North Metropolitan Tram-*

cer's assistant;⁴² nor to a waiter at a restaurant;⁴³ nor to a skilled engineer in charge of the machinery of a ferryboat;⁴⁴ nor to a guard of a goods train, whose main duty is to guard and conduct the train and marshal the cars, but who is also required to assist at times in coupling and uncoupling the cars and unloading.⁴⁵

On the other hand, the phrase has been held to embrace a man in the service of a wharfinger, whose duties were to drive a horse and trolley and load and unload the trolley;⁴⁶ a man engaged as "potter's printer, overlooker, and mixer;"⁴⁷ a driver of a motor omnibus, who, when operating it, has to execute such repairs as may be necessary, and is provided with the necessary tools for that purpose;⁴⁸ a stage

ways Co. (1887) L. R. 18 Q. B. Div. 683 (employers' liability act 1880). "I cannot see," said Smith, J., "the distinction between driving and other occupations which involve no manual labor, though they do involve manual work. Had the legislature intended to include coachmen, they would have included them among the specific instances."

⁴² *Bound v. Lawrence* [1892] 1 Q. B. (C. A.) 226 (employers' liability act 1880). Lord Esher, M. R., said: "It appears that the appellant was employed as a grocer's assistant in a shop, and his business was to take orders from the customers and to carry them out. In doing this he may have to show goods, and if the customers take away the goods he has to make up the parcels. In doing this he has to use his hands, and the question is whether that makes him a manual laborer. There can be no manual labor without the user of the hands; but it does not at all follow that every user of the hands is manual labor, so as to make the person who does it a manual laborer. Now, the principal part of the appellant's employment is selling to the customers across the counter. That is his substantial employment, and if he has to do other things which involve physical exertion, we must see whether that is not incidental to his real employment. In this case I cannot doubt that that is so. The findings of fact seem to me to negative the idea that the work described was any part of his real and substantial employment." Brett, M. R., also laid stress upon the fact that, in the occupation of the appellant, the knowledge and skill re-

quired in selling the goods to customers was more important than the manual work that he did, and that the latter was an incident of his employment.

⁴³ *Smithwhite v. Moore* (1898) 14 Times L. R. 461 (employers' liability act 1880).

⁴⁴ *Froy v. Balwain Steam Ferry Co.* (1886) 7 New So. Wales L. R. (L) 147 (claimant was injured by the starting of the machinery while he was making some repairs).

⁴⁵ *Hunt v. Great Northern R. Co.* [1891] 1 Q. B. (C. A.) 601, 60 L. J. Q. B. N. S. 216, 64 L. T. N. S. 418, 55 J. P. 470 (truck act).

⁴⁶ *Yarmouth v. France* (1887) L. R. 19 Q. B. Div. 647 (employers' liability act 1880) 17 Eng. Rul. Cas. 217. Lord Esher said (p. 651): "He is a man who drives a horse and trolley for a wharfinger. We must take into account what his ordinary duty was. He has to load and unload the trolley. That is manual labor. His duty may be compared to that of a lighterman who conducts a barge or lighter up and down the river. The driving the horse and the trolley and the navigating the lighter form the easiest part of the work; his real labor, that which tests his muscles and his sinews, is the loading and unloading of the trolley or the lighter."

⁴⁷ *Grainger v. Aynsley* (1880) L. R. 6 Q. B. Div. 182, 50 L. J. Mag. Cas. N. S. 48, 43 J. T. N. S. 608, 29 Week. Rep. 242, 45 J. P. 142 (employers' liability act 1880).

⁴⁸ *Smith v. Associated Omnibus Co.* [1907] 1 K. B. 916, 23 Times L. R. 381, 76 L. J. K. B. N. S. 574, 71 J. P. 239, 96 L. T. N. S. 675 (employers'

manager of a theater, who is required, as a part of his duties, to act as a stage hand, with three other employees of that description, and to shift the furniture and side scenes;⁴⁹ an assistant skirt hand who works at a sewing machine, and heats irons on a stove and irons materials;^{49a} and a stevedore working on a ship attached to a wharf.⁵⁰

j. "*Working under a contract with an employer.*"—The contract of employment to which this phrase points is, as the subject-matter of the act indicates, one of service as distinguished from one which is entered into with an "independent contractor." Accordingly, although the work of the employee in question may have been of such a character as to bring him prima facie within one of the descriptive terms used for the purpose of defining the word "workman," yet he cannot sue under the act, if it appears that his agreement merely bound him to produce certain specified results, and did not place him under his employer's control with respect to the means by which, or the manner in which, those results were to be attained.⁵¹

k. *Application of the rule of ejusdem generis.*—The effect of two cases in which the scope of two of the repealed master and servant acts was determined with reference to this rule is stated below.⁵²

1969. Colonial master and servant acts.—a. *Quebec.*—The by-laws of the cities of Montreal and Quebec, the tenor of which is similar to that of the English master and servant acts, are applicable to the following classes of employees:

Every domestic servant, servant, journeyman, or laborer, engaged

liability act 1880), distinguishing *Cook v. North Metropolitan Tramways Co.* note 37, *supra*.

⁴⁹ *Rushbrook v. Grimsby Palace Theatre* (1909) 25 Times L. R. (C. A.) 258, 100 L. T. N. S. 253, affirming (1908) 24 Times L. R. 617, 99 L. T. N. S. 19. It was remarked by Cozens-Hardy, M. R., that the post of stage manager in some theaters involved important duties, but that the terms must be considered in connection with the actual duties which the employee was called upon to perform.

^{49a} *Maynard v. Robinson* (1903) 89 L. T. N. S. 136, 19 Times L. R. 492.

⁵⁰ *Hallen v. King* (1896) 17 New South Wales L. R. (L) 13.

⁵¹ See cases cited in § 1972, note 5, subd. (i) and (j); § 1973, notes 2, 4, 6, 8, 10, 11.

⁵² In *Lowther v. Radnor* (1806) 8 East, 113, it was held that 20 Geo. II., chap. 19, giving the magistrates juris-

diction to determine differences between master and "servants in husbandry, artificers, handicraftsmen, miners, potters, etc.," and "other laborers" employed for any certain time, or in any other manner, extended to laborers of all descriptions, and not merely in the particular trades or business there enumerated and that the act consequently embraced a laborer who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work.

In *Kitchen v. Shaw* (1837) 1 Nev. & P. 791, 6 Ad. & El. 729, W. W. & D. 278, 7 L. J. Mag. Cas. N. S. 14, it was held that a domestic servant was not within the purview of 6 Geo. III., chap. 25, which related to the contracts of "artificers, calico printers, handicraftsmen, miners, colliers, keelman, pitmen, glassmen, potters, laborers, and others," and imposed a punishment for the desertion of the

by the month or for a longer space of time, and not by the piece or job.¹

b. New South Wales.—By the interpretation clauses of the master and servants acts 1846, 1857, and 1902, the word “servant” is thus defined: Agricultural and other laborers, shepherds, watchmen, stockmen, grooms, all domestic and other servants, artificers, journeymen, handicraftsmen, gardeners, vine dressers, splitters, fencers, shearers, sheepwashers, reapers, mowers, haymakers.

It has been held that a collier is included within the general words “other laborers,”² and that the expression “domestic servant” covers a “lady help” engaged to assist in household work.³ On the other hand, a person engaged by a veterinary surgeon and working farrier, as an assistant in the veterinary department, also to help in the working of the farriery department, for which he was to receive weekly wages, and for working over hours, half the profits of the work, was in one case denied to be within the purview of the act, for the reason that he was not a “laborer” or a “journeyman.”⁴

In another case the inapplicability of the act in respect of an employee described in his contract as superintendent of the drapery department of a shop was approved on the ground that he was neither an “artificer” nor a “laborer.”⁵

c. Victoria.—By the interpretation clauses of the master and servant act 1864, and the employers and employees act 1890, the word “servant” is thus defined: All agricultural and other laborers and workmen, shepherds, stockmen, and artisans, domestic and other servants.

In one case, a man engaged to perform the duties of a night miller at weekly wages, under the directions of a day miller in the same employment, was held to be an “artisan.”⁶

service by “any artificer, etc., or any other person” who had contracted with “any person whomsoever.”

¹ For a case in which the *ratio decidendi* was that the engagement was for less than a month, see *Dakley v. Normand* (1886) 9 Legal News (L. C.) 213.

² *Reg. v. Merewether* (1862) New South Wales S. C. R. 260.

³ *Ex parte Barnett* (1907) 7 New South Wales St. Rep. 788, 24 W. N. 109, 176.

⁴ *Ex parte Everett* (1854) Legge’s Rep. (New South Wales) 813. But, on the authority of the English de-

cisions relative to the scope of the words “artificer” and “handicraftsman,” it would seem that his work as a farrier might properly have been regarded as bringing him within the purview of the statute.

⁵ *Ex parte Pyne* (1878) 1 New South Wales S. C. R. N. S. 14.

⁶ *Reg. v. Bayne* (1878) 4 Vict. L. R. (L.) 89.

In one case the court doubted whether a locomotive engine-driver was a “servant” within the meaning of this act. *Saire v. Board of Land & Works* (1863) 2 W. & W. (L.) 8 (Vict.)

1970. —of statutes relating to the liability of employers for injuries received by servants.—*a. English enactments.*—For a discussion of the scope of the general term “workmen,” as used in the English employers’ liability act 1880 and the acts modeled thereafter, see § 1968, *ante*. The meaning of the expression “railway servant” is considered in § 1726, *ante*. Seamen, so far as their maritime duties are concerned, are not within the purview of the statute. See § 1728, *ante*.

Under the definition clause of the workmen’s compensation act 1897, the term “workman” included every person who is engaged in an employment to which the act applied, “whether by way of manual labor or otherwise.” See § 1840, *ante*.

It is clear that within the limits fixed by the specification of the employments which were covered by the statute, this definition attached to the term a broader signification than that which it bears in the act of 1880; in which, as has been shown in § 1968, *ante*, it covers only those descriptions of employment which are entirely or mainly of a physical character. The description adopted “made it possible for a man to be a workman within the meaning of the act, although he might not be engaged in manual labor.”¹ But it was deemed to be applicable only to those classes of employees whose remuneration could properly be designated as “wages.” In this point of view it was held in one case that the certificated manager of a coal mine, who was paid a yearly salary, and who, although his duties required his presence in the mine, was not required to engage in manual labor, was not a “workman.”² In another case a graduate in science, who had entered the employment of a dye and chemical manufacturing company, under a written agreement for five years’ service, and upon terms with regard to salary, commission on profits of inventions or

¹ *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* [1905] 1 K. B. (C. A.) 453, 74 L. J. K. B. N. S. 347, 53 Week. Rep. 390, 92 L. T. N. S. 282, 21 Times L. R. 209.

² *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* note 1, *supra*, Collins, M. R., said: “The popular meaning must be given to a definition where we are confronted with such an expression as ‘wages,’ and we must interpret the act as applying to persons whom *ex hypothesi* the legislature regards as not being in a position to protect themselves. None of these considerations apply to the case of a person holding the position

of a certificated manager of a colliery, who comes within a very different category from that of an ordinary workman. I do not say that a person in the position of the deceased is absolutely excluded from the possibility of coming within the act, for it is possible that such a man might in fact work as a workman, though I do not know that such a contingency is at all probable; there might, however, be facts in a particular case from which the conclusion might be drawn that, although the man was a certificated manager, he was also a workman.”

improvements in manufacture discovered by him, restrictions as to employment after the termination of his engagement, and disclosure of matters relating to the business of the company and his own researches, was declared not to be a "workman," although his employment involved manual labor on his part.³

Under the definition clause of the existing act of 1906 (§ 7), certain classes of employees are expressly excluded from the scope of the term "workmen," and with these exceptions the term means "any person who has entered or works under a contract of service or ap-

³ *Bagnall v. Levinstein* [1907] 1 K. B. (C. A.) 531. The position of Collins, M. R., and Cozens-Hardy, L. J., as stated in the headnote, was that the governing factor in determining whether the man was a workman within the meaning of the act was the question what he was employed to do; and that the judge misdirected himself by not taking into consideration the terms of the employment as disclosed in the agreement, and in treating the performance of manual labor in the discharge of his duties as conclusive that the man was a workman within the meaning of the act. The master of the rolls remarked: "The root of the matter is that each case must be decided in view of that which the person whom it is sought to treat as a workman was employed to do. The learned judge has not dealt quite fairly with the argument as to this man being a master of science. It is true that a person of that description may be employed as a workman, but the governing factor is whether he was employed as a master of science, to get the benefit of his attainments, and if the true inference from the facts is that this was the main purpose of the employment, the case is not *prima facie* one of employment as a workman, even though the man has to do some manual labor in putting himself in a position to give his skilled service. The case of *Simpson v. Ebbw Vale Steel, Iron & Coal Co.* reaffirms the position that the popular meaning must be given to the term 'workman,' and to call a skilled expert a workman is to travel out of the ordinary meaning of that term." The learned judge referred with approval to the decisions in *Jackson v. Hill* (1884) L. R. 13 Q. B. Div. 618, 49 J. P. 118 (see § 1968, note 39,

ante). Farwell, L. J., dissented on grounds which were thus forcibly stated: "In the present case there is an agreement in writing for service by a man who is a skilled workman. I should be loath to say that education is a bar to success in a claim for compensation under the act. In my view the consideration whether the applicant is a gentleman, or whether his education is good or bad, is not relevant. The case does not, in my opinion, turn so much on the construction of the agreement, though that is an important matter to consider, as on the work that was done by the deceased under it. In the agreement the undertaking of the deceased to obey all orders of those in authority in such work as might be allotted to him is put in the forefront of the matter. . . . Under this agreement the man might be employed in such a way as to be a mere workman, or he might be something more, and which he was must depend on the event. If he had been found sufficiently skilful to be employed in the laboratory, he might have been withdrawn from manual labor; but this, as appears from the evidence of the manager, was not the case. That evidence is that when the man was disabled a foreman did his work, and that he had done no research work during the whole time that he was there; for certainly five sixths of his time he was working as an ordinary though skilled workman. The hours that he worked and the salary that he received appear to me to make no difference, and there is in my opinion nothing in the terms of the agreement which overrides the fact that the man was doing, for the greater part of the time, work which would be done by an ordinary workman."

prenticeship with an employer, whether by way of manual labor, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

In a few cases the question has arisen whether a person employed under peculiar circumstances is a workman within the meaning of the act.⁴

⁴ A son twenty-six years of age who is employed by his father, lives with him and pays him for his board and lodging, is a member of the father's family, dwelling in his house, and is not a workman. *M'Dougall v. M'Dougall* [1911] S. C. 426, 48 Scot. L. R. 315, 4 B. W. Comp. Cas. 373.

A man employed on temporary work by a distress committee under the unemployed workmen act 1905, is a workman. *Gilroy v. Mackie* [1909] S. C. 466. Lord Duneden said: "A pauper may be compelled to work in a poor-house, or a prisoner in prison by force of statute. There is, therefore, entirely wanting that freedom of contract on both sides which is of the essence of employment as we are using the term "employment" in the sense of the act before us. But I am afraid that the difference here is that there is just the question of freedom. The unemployed need not go and ask for work unless he likes, and he need not take the work offered unless the terms suit him. If he does take the work, I think he becomes employed."

A blind man who, upon entering an institution for the blind, stipulated that he would give his services for what they were worth, and in return receive board, lodging, and clothing and 5 shillings a month in money, is a workman. *Macgillivray v. Northern Counties Inst.* [1911] S. C. 897, 48 Scot. L. R. 811, 4 B. W. Comp. Cas. 429.

A workman whose trade was the fixing of enamel letters to windows, and who had been for a year in the habit of calling on a firm who made and dealt in enamel letters, and of obtaining work from them, being paid by the piece, defraying his own traveling expenses, and under no obligation to undertake any particular job, and who was at liberty to accept, and occasionally accepted, work from other employers, is a "workman." *Taylor v. Burnham* [1909-10] S. C. 705, 47 Scot. L. R. 643, 3 B. W. Comp. Cas. 569.

A member of the police force does not share the benefits of the act. *Sudell v. Blackburn Corp.* (1910) 3 B. W. Comp. Cas. 227.

A person who, at an exhibition of an airship, is engaged to explain the various parts of the machine and the exploits of the operator, is not a "workman" so as to be entitled to the benefits of the act, when injured by an explosion of the airship. *Waites v. Franco-British Exhibition* (1909) 25 Times L. R. 441.

A skilled music teacher is not a workman. *Simmons v. Heath Laundry Co.* [1910] 1 K. B. 543, 79 L. J. K. B. N. S. 395, 102 L. T. N. S. 210, 26 Times L. R. 326, 54 Sol. Jo. 392, 3 B. W. Comp. Cas. 200. Cozens-Hardy, M. R., said that there might be a contract for services, but not a contract of service.

A professional football player who had entered into a written agreement to serve the defendants for one year at a weekly wage, by playing football, when required, with the team of the club, to attend regularly the training and general instructions, and not to engage himself to play football for any other person or club during the stipulated term, has been held to be a "workman." *Walker v. Crystal Palace Football Club* [1910] 1 K. B. (C. A.) 87. Cozens-Hardy, M. R., and Fletcher Moulton, L. J., were of opinion that the contract was one "by way of manual labor," and that it certainly came under the more general words "or otherwise." Farwell, L. J., thus discussed the two points made by the defendants: "The appellants have made two points. They first of all say there is no contract of service with an employer because the football player is at liberty to exercise his own initiative in playing the game. That appears to me to be no answer. There are many employments in which the workman exercises initiative, but he may or may not be bound to obey the directions of his employer when given to him. If he

One member of a partnership is not entitled to compensation for injuries received while working for the partnership.⁵

But a person who owns ten sixty-fourths shares of a trading vessel, and who is employed as master by the managing owner, is entitled to compensation when injured in the course of his employment.⁶

The act is applicable to a member of a crew of a small cargo boat, whose remuneration consisted of a specified share of the gross earnings.⁷

As to whether independent contractors are within the purview of the compensation act, see § 1972, note 5 (j), *post*.

As maritime work was not one of the descriptions of employment covered by the act of 1897, it did not affect the relation between ship-owners and sailors when engaged in their ordinary occupation of sailing upon the seas. See § 1825, *ante*.

But the act of 1906 is expressly declared (§ 7) to be applicable to "master, seamen, and apprentices in the sea service, and apprentices in the sea-fishing service."

b. American enactments.—On the ground that the New York act does not purport to make any distinction between different classes of "employees," it has been held that the superintendent of a knitting mill is within its purview.⁸ The same broad scope would presumably be ascribed the term "employees" in other enactments in which its meaning is not limited by an express provision. In the

has no duty to obey them, it may very well be that there is no service, but here not only is the agreement by the player that he will serve, but he also agrees to obey the training and general instructions of the club. I cannot doubt that he is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game,—that is to say, any direction that is within the terms of his employment as a football player. The other point taken is that he is not a 'workman' within the act. It appears to me that it is impossible for the court to consider the practical utility of the service or work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby, it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is there-

fore necessarily excluded from the definition of workman within the meaning of the act. I put during the argument the case of the huntsman and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it."

⁵ *Ellis v. Joseph Ellis & Co.* [1905] 1 K. B. 324, 74 L. J. K. B. N. S. 229, 53 Week. Rep. 311, 92 L. T. N. S. 718, 21 Times L. R. 182.

⁶ *Sharpe v. Carswell* [1910] S. C. 391, 47 Scot. L. R. 335, 3 B. W. Comp. Cas. 552.

⁷ *Clark v. Jamieson* [1909] S. C. 132, 46 Scot. L. R. 74 (payment by percentage of gross earnings does not itself indicate partnership).

⁸ *Aken v. Barnett & A. Knitting Co.* (1907) 118 App. Div. 463, 103 N. Y. Supp. 1078.

Massachusetts act there is such a provision, excluding "domestic servants" and "farm laborers."

c. Canadian enactments.—The purport of the clauses by which the term "workman," as used in the employers' liability acts of Manitoba, British Columbia, and New Brunswick is defined, is stated in § 1662, *ante*.

In all these acts there is an exception of "domestic servants" and "servants in husbandry."⁹

A salesman is not a workman under the Manitoba compensation act (see § 1803), since to obtain compensation the work must be manual.¹⁰

A longshoreman is a "workman" as being a "ship laborer" under the definition clause of the New Brunswick act.^{10a}

d. Australian enactments.—In the Victoria employers' liability act, 54 Vict. No. 1087, § 37, the expression "workman" is defined in the same terms as in the English act of 1880.

The same phraseology is used in the New South Wales act, 61 Vict. No. 28, § 3; but it also includes "seaman employed upon ships owned in that state, or whose articles were signed there."

Under the factories and shops act 1896 of New South Wales, persons employed in a wholesale warehouse in unpacking and marking goods received in bulk are engaged in "preparing articles for sale."¹¹ But a clerk is not a "servant."¹²

In Queensland the rule has been laid down that to constitute an employee a worker it is not necessary that the relation of master and servant should exist. This decision, however, seems contrary to the rule established in England, although the court expressly said that the construction placed upon the imperial statute should be adopted in the courts of a state which has passed a similar statute.¹³

The Victoria act is expressly declared not to be applicable to any

⁹ In one case it was held to be a question for the jury whether the plaintiff was a servant in husbandry and was engaged in the usual course of his work, the evidence being that a farmer had not engaged him to do any particular kind of work, but that he was first put at mason work, and then at digging the drain which caved in and thus caused the injury complained of. *Reid v. Barnes* (1894) 25 Ont. Rep. 223.

¹⁰ *Hewitt v. Hudson's Bay Co.* (1910) 20 Manitoba L. Rep. 126, 15 West. L. Rep. (Can.) 372.

^{10a} *Logan v. Lee* (1908) 39 Can. S. C. 311 (owing to negligence of winchman heavy weight fell on plaintiff while standing under an open hatchway).

¹¹ *Holden v. Bull* (1911) 11 New South Wales St. Rep. 564.

¹² *Ex parte Danahey* (1911; New South Wales St. Rep.) 28 W. N. 155.

¹³ *Herbert v. Edelston* (1909) Queensland St. Rep. 316 (worker engaged to ring-bark 200 acres of land at a fixed sum per acre, payable on the completion of the work, for which no time was fixed, and at liberty to begin work when he wished).

person coming within the purview of Part III. of the mines act 1890.

1971. —of statutes prohibiting Sunday work.—It has been held that a barber who shaves customers on Sunday is not a “tradesman, artificer, workman, or laborer, or any other person whatsoever,” within the meaning of the English statute, 29 Car. II, chap. 7, § 1, which prohibits persons so designated from exercising any worldly labor, business, or work of their ordinary callings upon the Lord’s Day.¹

B. SCOPE OF THE STATUTES AS DEPENDENT UPON THE EXISTENCE OF THE RELATIONSHIP OF MASTER AND SERVANT BETWEEN THE CLAIMANT AND THE PERSON FOR WHOM THE GIVEN WORK WAS PERFORMED.

1972. Statutes usually deemed to be applicable only to persons hired as servants.—There is authority for the doctrine that an enactment by which a lien is given in general terms to persons performing “labor and services” may, under the rule of liberal construction, be regarded as wide enough to embrace contractors and subcontractors.¹ This doctrine presumably extends to all statutes which are framed upon broad lines similar to those of the mechanics’ lien laws of the ordinary type. It has also been held that one who contracts to transport mail is a “laboring person” within the scope of a constitutional provision which declares that the homestead exemption shall not extend to any execution, order, or other process issued on any demand for services rendered by a “laboring person or a mechanic.”²

A person engaged to fell pine and to do everything necessary to prepare the logs for market, at a certain rate per foot and a bonus for good work, no time being fixed within which the work is to be completed, and he being at liberty to begin or cease work at any hour he chooses, who is allowed to employ other labor only in the event of extra labor being required to keep up the requisite supply, and who is bound to prepare sufficient timber to keep a mill supplied, but who is not at liberty to cut more timber than is necessary for that requirement,—is a worker. *Bagnall v. Laheys* (1910) Queensland St. Rep. 85.

¹*Palmer v. Snow* [1900] 1 Q. B. 725, 69 L. J. Q. B. N. S. 356, 64 J. P. 342,

48 Week. Rep. 351, 82 L. T. N. S. 199, 16 Times L. R. 168.

¹*Carver v. Bagley* (1900) 79 Minn. 114, 81 N. W. 757, a decision with respect to the lumbermen’s lien law of Minnesota, Laws 1876, chap. 89, as amended by Laws 1897, chap. 347.

²*Farinholt v. Luckbard* (1886) 90 Va. 936, 44 Am. St. Rep. 953, 21 S. E. 817. The court reasoned thus: “It would be difficult, if not impracticable, to give any general definition of the words ‘laboring man’ which would at once include all the cases falling within the words and exclude those falling without. . . . But we think it safe to say that the word ‘laborer,’ when used in its ordinary and usual acceptation, carries with it the idea of actual

And that the duty imposed by § 18 of the New York labor law, which provides that every person who employs another to perform labor in erecting, etc., a house, building, or other structure, shall furnish a suitable scaffolding, enures to the benefit of the servants of an independent contractor.³ But, speaking generally, the statutes with which we are concerned in the present chapter are, in the absence of some express provision to a different effect,⁴ deemed to be applicable only to persons whose contract of employment is of such a character as to create the relationship of master and servant. The authorities which exemplify this rule of construction are collected in the note below. In order to show more clearly the full effect of each decision the words or phrases used in the given provision for the purpose of designating the employees within its purview are specified.⁵

physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. It is in this sense that the words 'laboring man' were used in the Constitution. The framers of that instrument, in giving to a large class of people a homestead exemption, clearly designed that it should not affect that class of persons who were dependent upon their own manual labor for the support of themselves and their families, and whose necessity for the prompt and certain payment of their wages they regarded as paramount even to the claims of the debtor to a homestead."

³ *Huston v. Dobson* (1910) 138 App. Div. 810, 123 N. Y. Supp. 892.

⁴ By Rev. Stat. (Ont.) 1897, chap. 256, § 2, it is provided that the workmen of a contractor, etc., to do work for the owner, shall, for all purposes of the principal act and the amendment, be taken as being in the service of the owner.

By the Ontario shop regulation act, Rev. Stat. (Ont.) 1897, chap. 257, § 4 (2), employees hired by persons contracting with owners, occupiers, or tenants of premises, are declared to be within the purview of the statute.

⁵ (a) *Statutes concerning liens and preferences* were held not to be applicable to independent contractors in the following cases: *Winder v. Cald-*

well (1852) 14 How. 434, 14 L. ed. 487 (statute enumerating certain classes of mechanics and tradesmen, including, *inter alios*, "carpenters," and concludes with words, "any other person"); *Vane v. Newcombe* (1889) 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60 ("employees"); *Campfield v. Lang* (1885) 25 Fed. 128 ("laborers, servants, and employees"); *Bankers' & M. Teleg. Co. v. Bankers' & M. Teleg. Co.* (1886) 27 Fed. 536 ("employees"); *Tod v. Kentucky Union R. Co.* (1892) 18 L.R.A. 305, 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241 ("employees" and "laborers"); *Malcomson v. Wappoo Mills* (1898) 85 Fed. 907 ("laborers" and "employees"); *Frick Co. v. Norfolk & O. V. R. Co.* (1898) 32 C. C. A. 31, 57 U. S. App. 286, 86 Fed. 725 (provision in Va. Code, § 2485, enumerating several classes of employees); *Little Rock, H. S. & T. R. Co. v. Spencer* (1898) 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196 ("every mechanic, builder, artisan, workman, laborer, or other who shall do or perform any work or labor"); *Cochran v. Swann* (1874) 53 Ga. 39 ("laborer"); *Savannah & C. R. Co. v. Callahan* (1873) 49 Ga. 506 ("laborer"); *Rogers v. Dexter & P. R. Co.* (1893) 85 Me. 373, 21 L.R.A. 528, 27 Atl. 257 ("laborer"); *Littlefield v. Morrill* (1903) 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109 ("laborer"); *Re Clark* (1892) 92 Mich. 351, 52 N. W. 637 ("labor debts"); *Blakey v. Blakey* (1858) 27 Mo. 39 ("mechanic, builder, artisan, workman, laborer, or

other person"); *Nelson v. Withrow* (1883) 14 Mo. App. 270 (same terms); *Murphy v. Murphy* (1886) 22 Mo. App. 18 (same terms); *Erath v. Allen* (1893) 55 Mo. App. 107 ("mechanics and laborers"); *Hale v. Brown* (1880) 59 N. H. 551, 47 Am. Rep. 224 (lien given "for personal services"); *Re Barr-Dinwiddie Printing & Bookbinding Co.* (1899) — N. J. Eq. —, 42 Atl. 575 ("laborers"); *Lehigh Coal & Nav. Co. v. Central R. Co.* (1878) 29 N. J. Eq. 252 ("laborers"); *Charron v. Hale* (1898; Sup. Ct.) 25 Misc. 34, 54 N. Y. Supp. 411 ("employees, operatives, and laborers"); *Re Ripsom & N. Fur Co.* (1900) 32 Misc. 56, 66 N. Y. Supp. 113 ("employees, operatives, and laborers"); *Johnston v. Barrills* (1895) 27 Or. 251, 50 Am. St. Rep. 717, 41 Pac. 656 ("laborers or employees"); *Jones v. Shawhan* (1842) 4 Watts & S. 262; *Seiders's Appeal* (1863) 46 Pa. 57 ("laborers"); *Wentroth's Appeal* (1876) 82 Pa. 469 ("laborers"); *Llewellyn's Appeal* (1883) 103 Pa. 458 ("laborers"); *Com. v. Marsh* (1894; Pa. Q. S.) 3 Pa. Dist. R. 489, 14 Pa. Co. Ct. 369 ("laborers"); *Parks v. Locke* (1894) — Tex. Civ. App. —, 25 S. W. 702 ("mechanic, laborer, or operative"); *Eastern Texas R. Co. v. Foley* (1902) 30 Tex. Civ. App. 129, 69 S. W. 1030 ("mechanics, laborers, or operatives"); *Campbell v. Sterling Mfg. Co.* (1895) 11 Wash. 204, 39 Pac. 451 ("every person performing work or assisting in manufacturing, etc."); *Gross v. Eiden* (1881) 53 Wis. 543, 11 N. W. 9 ("laborer"); *Lang v. Simmons* (1885) 64 Wis. 525, 25 N. W. 650 ("laborers, servants, or employees").

The prior lien upon the assets of an insolvent corporation extended by New Jersey corporation act, § 63, to "laborers" (defined as stated in § 1948, *b*, *ante*), does not include the claim of another corporation for an amount due for work done under an independent contract. *Re Barr-Dinwiddie Printing & Bookbinding Co.* (1906) — N. J. Eq. —, 42 Atl. 575.

In *Ex parte Walter* (1873) L. R. 15 Eq. 412, 42 L. J. Bankr. N. S. 49, 21 Week. Rep. 523, it was held that a music master and a drill sergeant, engaged by the term to attend a school twice a week at a fixed rate per hour or per lesson, were not "clerks or servants." Their attendance was deemed

rather to be of the same nature as that of a surgeon or an apothecary.

That an accountant employed at a fixed salary to keep the books of a trader was not a "servant" or "clerk" within the meaning of the act of 1849 was held in *Ex parte Butler* (1857) 28 L. T. 375.

The Indiana statute (Acts 1883, p. 140, chap. 115, as amended by Acts 1889, p. 257, chap. 123; Burns's Anno. Stat. §§ 8295, 8305) giving liens to mechanics, laborers, and materialmen does not give liens to contractors or subcontractors. *Indianapolis Northern Traction Co. v. Brennan* (1909) 174 Ind. 1, 30 L.R.A. (N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; *Cleveland, C. C. & St. L. R. Co. v. De Fries* (1909) 173 Ind. 717, 87 N. E. 722; *Fleming v. Greener* (1909) 173 Ind. 260, 140 Am. St. Rep. 254, 87 N. E. 719, 90 N. E. 72, 21 Ann. Cas. 959.

In *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.* (1886) 66 Wis. 481, 29 N. W. 285, a carriage maker and blacksmith who kept a shop of his own, and from time to time manufactured articles for the insolvent, was held not to be within the description "laborers, servants, and employees."

In *Re Kimberly* (1899) 37 App. Div. 108, 55 N. Y. Supp. 1024, a person engaged in a general trucking business was held not to be an "employee." With this decision may be compared *Ney v. Dubuque & S. C. R. Co.* (1866) 20 Iowa, 347, in which a decree of a court providing for the payment of the "employees" of a railway company was held not to be applicable to an independent contractor.

In *Fortier v. Delgado* (1903) 59 C. C. A. 180, 122 Fed. 604, it was held that persons who had contracted with a sugar refinery to weigh and load cane on cars for shipment to the refinery at an agreed price per ton, and who had hired and paid the laborers to do the work, were within the scope of the descriptive expressions, "clerks, secretaries, or agents."

In *Farmer v. St. Croix Power Co.* (1903) 117 Wis. 76, 98 Am. St. Rep. 914, 93 N. W. 830, the court made the following remarks concerning the effect of §§ 3314 and 3315 of Wis. Rev. Stat. 1898, which give a lien to a principal contractor, subcontractor, or employee of either, "who performs any work or labor," etc., "for, in, or about the erec-

tion or construction" of certain structures and improvements. "At the outset we must not overlook the significance of the terms 'principal contractor,' 'subcontractor,' or 'employee of either,' used in such a way as to unmistakably indicate a legislative purpose to favor three distinct classes of persons by the statutory privilege. That precludes us from speculating as to whether a 'subcontractor,' in the broadest sense of the term, can be classed as an employee under any circumstances. So we reach the question at once of whether appellant was an employee or a subcontractor. Within the meaning of the statute he could not have been both. If he was the latter, he was a subcontractor of a subcontractor, and not within the statute."

In *Footman v. Pusey* (1871) 45 Ga. 561, it was held that the Georgia act of 1869, giving to mechanics a lien upon the property of their employers for labor performed and materials furnished, was for the benefit of such mechanics only as perform the labor and furnish the materials to the employer, and that it was not applicable to a manufacturer of materials sold to the employer in the usual course of trade, although the manufacturer might be a mechanic.

In *Hoyt v. Glenn* (1874) 54 Ga. 571, it was held that the affidavit for the enforcement of a laborer's lien under that act must allege that the work was done by the plaintiff claiming such lien.

By the last clause of § 14 of Minnesota Laws 1876, chap. 89, which provides for a lien for labor upon logs and timber, it is declared that the provision "is intended only for the protection of laborers for hire, and shall not enure to the benefit of any person interested in contracting, cutting, hauling, banking, or driving logs by the thousands." It has been held that the object of this provision is to differentiate between independent contractors and laborers, and that in order to effectuate this object, the comma after the word "contracting" is to be omitted, so as to give it the same meaning as if it read "contracting for hauling." *King v. Kelly* (1879) 25 Minn. 522.

In one case it has been denied that an insurance adjuster is not a "clerk, servant, or employee" of the insurance company. *American Casualty Ins. Co's Case* (*Boston & A. R. Co. v. Mercantile*

Trust & D. Co.) (1896) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778. But this doctrine would clearly not be applicable to all employees of that description. For the facts of the case, see § 1949, *c. ante*.

The doctrine applied in one case was that an attorney not employed for any particular period, nor at a fixed price, is not within a statute according a preference to the "wages" of "employees, operatives, and laborers." *People v. E. Remington & Sons* (1887) 45 Hun, 329, affirmed in (1888) 109 N. Y. 631 (mem.) 16 N. E. 680. The actual *ratio decidendi* was that sums due for professional services are not "wages." But the refusal to allow the claim might have been put on the ground that the statute was obviously intended to be applicable to persons whose relation to the corporations in question was that of servants.

That legal or other services rendered in acquiring rights of way for a railroad do not constitute "services," within the meaning of a lien law, was held in *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.* (1896) 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105.

In another case it was held that an attorney not in regular, continuous service was not an "employee" under a statute preferring "clerks, servants, and employees." *Lewis v. Fisher* (1894) 80 Md. 139, 26 L.R.A. 278, 45 Am. St. Rep. 327, 30 Atl. 608.

The following decisions regarding attorneys, although they are not strictly speaking, in point, may also be referred to in connection with the above cases:

The term "wages of employees," in an order requiring a railroad receiver to pay such wages, does not include services of counsel employed for special purpose. *Louisville, E. & St. L. R. Co. v. Wilson* (1891) 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Rep. 405.

An attorney is not a "servant" or "employee," nor are the fees due to him for special services "wages" or "salary," within a statute according a preference to "wages or salaries to clerks, servants, or employees." *Lewis v. Fisher* (1894) 80 Md. 139, 26 L.R.A. 278, 45 Am. St. Rep. 327, 30 Atl. 608.

A lawyer employed by a railroad company at a fixed salary per month is within an order directing the payment of wages due to "employees" for labor

and services. *Finance Co. v. Charleston, C. & C. R. Co.* (1892) 52 Fed. 526.

A claim of counsel for professional services rendered to a railroad company is within an order appointing a receiver directing him to pay debts "owing to laborers and employees" of the company "for labor and services." *Gurney v. Atlantic & G. W. R. Co.* (1874) 58 N. Y. 358, reversing (1873) 2 Thomp. & C. 446 (cases involving liability to stockholders referred to, *arguendo*).

That a person who lets out the services of another is not a "clerk" within the meaning of the provision regarding privileges in the Louisiana Code was held in *Guion v. Brown* (1851) 6 La. Ann. 112.

The same rule has been made with regard to a man employed to sell goods, under a contract which provided that he was to receive half the profits and bear half the losses of the business. *Brierre v. Their Creditors* (1891) 43 La. Ann. 423, 9 So. 640.

(b) *Statutes making individual stockholders individually liable for labor debts.*—For cases in which it was declared that contractors are not within the scope of these statutes, see *Peck v. Miller* (1878) 39 Mich. 594; *Taylor v. Manwaring* (1882) 48 Mich. 171, 12 N. W. 28; *Boutwell v. Townsend* (1860) 37 Barb. 205; *Coffin v. Reynolds* (1868) 37 N. Y. 640; *Moyer v. Pennsylvania Slate Co.* (1872) 71 Pa. 293 (decided on the ground of a strict construction of the words, "mechanics, workmen, and laborers.")

In *Aikin v. Wasson* (1862) 24 N. Y. 482, the court, in discussing the import of the words "laborers and servants," as used in the New York railroad act, 1850 § 10, said: "It is obvious from the nature and terms of this and other provisions of the act, as well as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labor of the company. To accomplish this design, it is not necessary that the words 'laborers and servants' should receive their broadest interpretation. Indeed, such a construction would scarcely harmonize with the general scope and object of this and similar acts. In some very extended sense, the directors and other principal officers of the corpora-

tion may be considered as its agents and servants, and yet no one, I apprehend, would contend that the provision was intended for their benefit. The word 'servants' is qualified and to some extent limited in its meaning, by its association with the word 'laborers,' according to the familiar maxim, *noscitur a sociis*. It clearly would not include everyone who should perform any service in any form for the company. Such a construction is repelled, not only by the apparent reason for the enactment, but by the language used, which would naturally have been far more general if such had been its object."

(c) *Statutes making principal employers liable for the wages of the employees of contractors.*—In *Chicago & N. E. R. Co. v. Sturgis* (1880) 44 Mich. 538, 7 N. W. 213, and *Martin v. Michigan & O. R. Co.* (1886) 62 Mich. 458, 29 N. W. 40, contractors and subcontractors were held not to be "laborers" within the meaning of a statute of this description.

In Maine it has been held that such a statute does not apply to the personal labor of a subcontractor who has worked with the crew employed by him upon a section of a railroad which he has contracted to build. *Rogers v. Dexter & P. R. Co.* (1893) 85 Me. 372, 21 L.R.A. 528, 27 Atl. 257 (Rev. Stat. chap. 51, § 141).

That the term "laborer" could not be construed as designating one who contracted for and furnished the labor and services of others, or one who contracted for and furnished one or more teams for work, whether with or without his own services, was held in *Baleh v. New York & O. M. R. Co.* (1871) 46 N. Y. 521 (railroad act, Laws 1850, chap. 140, § 12). That decision was followed in *Mann v. Burt* (1886) 35 Kan. 11, 10 Pac. 95 (Laws 1872, chap. 136); *Groves v. Kansas City, St. J. & C. B. R. Co.* (1874) 57 Mo. 304.

In *Atcherson v. Troy & B. R. Co.* (1856) 1 Abb. App. Dec. 13, 6 Abb. Pr. N. S. 329, the court observed: "The whole object manifestly was to protect a class of day laborers upon works of this description who depended mainly upon their own labor and payments at short intervals, against the failures and frauds of contractors by whom they were employed; and not those who

might, for convenience or profit, employ the labor of others."

A subcontractor was held to be within the purview of Mass. Stat. of 1873, chap. 353, by which a right of action against the owner of a railroad is given to "any person to whom a debt is due for labor performed . . . by virtue of an agreement with the owner . . . or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labor." *Hart v. Boston, R. B. & L. R. Co.* (1877) 121 Mass. 510. But by Rev. Laws 1902, § 164 (Pub. Stat. 112, § 143), it is provided that no person who has contracted to construct the whole or a specific part of the railroad shall have a right of action.

A subcontractor is also deemed to be within the scope of the term "workman," as used in the New South Wales act. *Ex parte Walker* (1885) 2 W. N. 112.

(d) *Statutes exempting wages from attachment.*—It has been laid down that the "wages of laborers" which are protected by the Pennsylvania statute are the earnings which a laborer acquires by his personal toil, and not the profits which a contractor deserves from the labor of others. *Smith v. Brooke* (1865) 49 Pa. 147. This statement does not cover cases in which a single person works in the capacity of an independent contractor. But the earlier decisions on the subject seem to indicate that remuneration earned under such circumstances is deemed to be exempt. In *Heebner v. Chave* (1847) 5 Pa. 115, it was laid down generally that the price of work done by a person who took an "occasional contract" was not within the statute. But the actual scope of the decision is shown by *Pennsylvania Coal Co. v. Costello* (1859) 33 Pa. 241, 15 Mor. Min. Rep. 47, where the statute was held to protect the remuneration accruing for the personal labor of the miner who mined coal at a certain price per ton, and employed another laborer to assist him at so much *per diem*. Apparently the employee in this instance was viewed as an independent contractor. At all events, the report does not show that he was under the control of the employer in the same sense as a servant.

In *Schwacke v. Langton* (1878) 12 Phila. 402, it was held that the money the debtor earned by carrying on a

school with the assistance of other teachers was not exempt.

In *Heard v. Crum* (1895) 73 Miss. 157, 55 Am. St. Rep. 520, 18 So. 934, the stipulated compensation of a person who had contracted to build a house by the labor of himself and his employees was denied to be "wages of a laborer."

That a person who manufactures a pair of boots upon another's order is not within a statute which covers claims "for clerks, laborers, or mechanics' wages," was held in *Fox v. McClay* (1896) 48 Neb. 820, 67 N. W. 888.

That claim for services as a physician is not a "claim for labor," within § 5 of a homestead act, which provides that the exemption shall not extend to "any claim for labor less than \$100," was held in *Weymouth v. Sanborn* (1861) 43 N. H. 171, 80 Am. Dec. 144.

That an attending physician is not a "laborer or servant," nor his compensation "wages," within the meaning of a statute which covers the "wages of any laborer or servant," was held in *Magers v. Dunlap* (1890) 39 Ill. App. 618.

In *Tatum v. Zachry* (1891) 86 Ga. 573, 12 S. E. 940, it was held that a blacksmith in business on his own account was not within the description, "journeymen, mechanics, and day laborers."

Compare also *Whitcomb v. Reid* (1856) 31 Miss. 567, 66 Am. Dec. 579, where it was held that a dentist was not within the purview of a statute exempting the tools of a mechanic which are necessary for carrying on his trade.

(e) *Statutes permitting claims for wages to be enforced against exempt property.*—In one case it was laid down that the words "claims for labor" do not cover the professional services of a physician. *Weymouth v. Sanborn* (1861) 43 N. H. 171, 80 Am. Dec. 144. The court said: "The term 'laborer' is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor [in the act exempting homesteads] would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad and other contractors, but would be confined to claims arising out of services where physical

toil was the main ingredient, although directed and made more valuable by mechanical skill."

In another case it was held that a person who had contracted to make and burn bricks for a certain price per thousand, engaging all the employees required, keeping in repair and oiling the machinery, and feeding a team furnished by the contractee, was not a "laborer." *Henderson v. Nott* (1893) 36 Neb. 154, 38 Am. St. Rep. 720, 54 N. W. 87.

On the other hand, the phrase "debts for labor" has been held to cover the remuneration of an attorney for services in having a homestead set apart, and in maintaining the application against the attacks of creditors. *Strohecker v. Irvine* (1886) 76 Ga. 639, 2 Am. St. Rep. 62. The latter decision is obviously opposed to the general current of authority, as indicated by the cases cited *passim* in this note. It also runs counter to the theory accepted by nearly all the authorities, that the word "labor," when used in a statutory provision, is always to be taken as importing "manual labor," unless it is qualified by some word in the context from which the intention of the legislature to enlarge its ordinary scope can reasonably be inferred. But from the cases cited in § 1962, *ante*, it is manifest that this word, as used in statutes which have a relation to exemption rights, has been construed far more liberally, not to say loosely, in Georgia than in any other state.

(f) *Truck acts and other statutes of a similar type*.—See § 1973, notes 8, 9, *post*.

(g) *Statutes regulating the hours of work*.—In *Billingsley v. Marshall County* (1897) 5 Kan. App. 435, 49 Pac. 329, a contractor was held not to be within the descriptive terms, "laborers, workmen, mechanics, or other person."

(h) *Statutes requiring the payment of wages at certain intervals*.—One employed by a corporation to cut merchantable timber, under a contract which provides for settlement each month, but for the retention of 25 per cent of the amount due, not exceeding a specified sum, as a security for the satisfactory completion of the job, was held not to be an "employee," within a local statute providing for the appointment of a receiver of any corporation in a certain county which neglects or refuses to pay its employees for the

space of thirty days. *Clark v. Renninger* (1899) 89 Md. 66, 44 L.R.A. 413, 42 Atl. 928 (Md. Acts of 1878, chap. 108).

(i) *Statutes providing summary remedies, as between certain classes of employers and employees*.—In the following cases the inapplicability of the earlier English master and servant acts to the employees in question was affirmed: *Reg v. Johnson* (1839) 9 L. J. Mag. Cas. N. S. 27, 7 Dowl. P. C. 702, 3 Jur. 481 (contract to print certain pieces of woolen cotton goods); *Hardy v. Ryle* (1829) 9 Barn. & C. 603, 4 Moody & R. 295, 7 L. J. Mag. Cas. N. S. 118 (weaver contracting to weave certain goods); *Lancaster v. Greaves* (1829) 9 Barn. & C. 628, 7 L. J. Mag. Cas. N. S. 116 (person contracting to build a structure for a certain price and within a certain time);

Bramwell v. Penneck (1827) 1 Mann. & R. 409, 7 Barn. & C. 536, 6 L. J. Mag. Cas. N. S. 47 (man employed to keep possession of goods seized under a *fi. fa.*, not entitled to proceed under 20 Geo. II., chap. 19).

In *Rex v. Haywood* (1813) 1 Maule & S. 624, where a special act relating to the settlement of disputes between certain classes of manufacturers was held not to be applicable to demands against one of those manufacturers by the owner of another establishment, for work done in relation to the articles manufactured.

That persons who manufactured cigars by the lots, and whose obligation to continue work was restricted to the period required for the completion of a given lot, were not within the by-law of the city of Montreal (see § 1969, *ante*). *Youngheart v. Chow* (1901) 7 R. de J. 274.

In *Dalison v. Hamfel* (1910) 12 West. Australian L. R. 152, in an action for wages under the masters and servants acts 1892, it was held that the claim was barred on the merits, as plaintiff was an independent contractor, not a servant.

(j) *Statutes relative to employers' liability for injuries received by servants*.—A contractor for a lump sum, whose tender is for labor and tools, but who is not to supply any materials, is not within the English workmen's compensation act of 1897. *Simmons v. Faulds* (1901) 17 Times L. R. (C. A.) 352, 65 J. P. 371.

The general rule in the text is also

1973. Circumstances bearing upon the nature of the relation between the parties in question.—a. Generally.—If the evidence shows that the claimant was under the control of his employer in respect of the details of the stipulated work, he is not excluded from the operation of these statutes, although he may have furnished at his own expense the instrumentalities necessary for the performance of that work;¹ or may have been paid according to the quantity of work

illustrated by *Vamplew v. Parkgate Iron & Steel Co.* [1903] 1 K. B. 851, 72 L. J. K. B. N. S. 575, 67 J. P. 417, 51 Week. Rep. 691, 88 L. T. N. S. 756, 19 Times L. R. 421. See also *McGregor v. Dansken* (1899) 1 Sc. Sess. Cas. 5th series, 536, 36 Scot. L. R. 393, 6 Scot. L. T. 308, a case of a small contractor.

A laborer who, with several others, enters into a contract with a quarryman to remove the surface earth from a new part of the quarry, at so much per cubic yard, and who exercises full control over the work, and is not tied down to hours, is an independent contractor; and his wife is not entitled to compensation for injuries which he received resulting in his death. *Hayden v. Dick* (1902) 5 Sc. Sess. Cas. 5th series, 150, 40 Scot. L. R. 95, 10 Scot. L. T. 380.

The owner of a horse, who contracts, when required, to drag logs from one place to another, for which he is paid at a certain rate per day, and whose share of the work is confined to leading the horse, which he might do by means of a substitute, there being no contract that he should perform the work personally, is not a "workman." *Chisholm v. Walker* [1909] S. C. 31, 46 Scot. L. R. 24. *Paterson v. Lockhart* (1905) 7 F. 954, 42 Scot. L. R. 24, distinguished.

The licensed driver of a taxicab who pays a certain per cent of the earnings to the owner is a bailee, and not a workman. *Smith v. General Motor Cab Co.* [1911] A. C. 188, 80 L. J. K. B. N. S. 839, 105 L. T. N. S. 113, 27 Times L. R. 370, 55 Sol. Jo. 439, 4 B. W. Comp. Cas. 249.

See also *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706, § 1973, note 10 (a case decided with reference to the employers' liability act 1880).

But the mere fact that a man works by the piece is not sufficient to exclude him from the benefits of the compensation act.

A finding that the injured person was a "workman" is justifiable, where he was employed in a quarry under an agreement that he should be paid so much for every ton he got out, and the tools were found for him, and he used to hire and discharge the men who worked under him. *Evans v. Penweyllt Dinas Silica Brick Co.* (1901) 18 Times L. R. (C. A.) 58.

And where he was one of a squad of mechanics who were paid by the piece, for work on a vessel under construction, but were bound to work continuously all the working hours recognized in the yard, were supervised generally by the foreman of the employer, and were subject to printed rules and regulations "to be observed by the workmen in the employment" of shipbuilders. *McCreedy v. Dunlop* (1900) 2 Sc. Sess. Cas. 5th series, 1027, 37 Scot. L. R. 779, 8 Scot. L. T. 91.

A man engaged to quarry, from a quarry on an estate, stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct, who was paid by the day, and who might employ assistants, to be paid through him at the same rate, and whose tools were supplied partly by himself and partly by the estate, and who was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made,—was a servant or workman in the sense of the act. *Paterson v. Lockhart* (1906) 7 Sc. Sess. Cas. 5th series, 954.

A stonebreaker engaged by a contractor to break stones for road metal at a certain rate per cubic yard of metal broken, and subject to the orders of the contractor, and to dismissal by him, is a "workman." *Doharty v. Boyd* [1909] S. C. 87, 46 Scot. L. R. 71.

¹ A drayman who furnished his own team, but worked for a corporation regularly, and almost constantly and

performed by him;² or may have received his remuneration, wholly or partially, in the form of a share of the gross or net profits of the

exclusively, and was entirely under its control as to all matters within the scope of the employment, was held to be a laborer within § 63 of the New Jersey corporation act. *Watson v. Watson Mfg. Co.* (1879) 30 N. J. Eq. 588 (see § 1647, b, *ante*).

See also *Mohr v. Clark* (1888) 3 Wash. Terr. 440, 19 Pac. 28, note 14, *infra*.

² In *Re Allsop* (1875) 32 L. T. N. S. 433, a miner employed to get ironstone out of a mine, for which he was paid by the yard or ton, had under him, to assist in the work, other men for whose wages he alone was responsible, but he was bound to conform to the regulations in force at the time, by which he was obliged to work a stated number of hours per day, and was subject to be dismissed at a moment's notice for misconduct, and could not leave or absent himself without the consent of the manager. Held, that he was entitled to a preference as a servant under § 32 of the English bankruptcy act of 1869. This decision overrules an earlier one, rendered with reference to the bankruptcy act of 1825, in which the claim of a person employed on a piecework footing was rejected. *Ex parte Grellier* (1831) Mont. Bankr. Cas. 264, reversing Mont. & M'Arth. 45. This case was followed in two of the Australian provinces, with relation to statutes which did not expressly include persons working by the piece. *Re Murray* (1874; Victoria) 5 Austr. J. R. 3 (insolvency act 1871, § 113); *Re Whittell* (1848) Legge Rep. (New South Wales) 441 (insolvency act 1842). Both of these cases, it will be observed, antedated the decision in *Re Allsop*, *supra*.

In *Re Bailey* (1854) 3 El. & Bl. 607, 23 L. J. Mag. Cas. N. S. 161, the term "artificer," as used in the master and servant act, 4 Geo. IV. was held to be applicable to a man who had agreed to serve as a collier, subject to termination of the employment at a month's notice; wages to be so much per ton of coals; obligation to serve personally. A working tailor engaged to make clothes, each garment to be paid for according to a price list, was also held to be an "artificer" within the same enactment, chap. 34, § 3. *Ex parte Gordon* (1855) 25

L. J. Mag. Cas. N. S. 12, 1 Jur. N. S. 683, 3 Week. Rep. 568 (convicted for failure to finish a piece of work which he had begun).

A finding that the injured person was a "workman" within the English employers' liability act 1880 was held to be justifiable, where he was employed in a quarry under an agreement that he should be paid so much for every ton he got out, and the tools were found for him, and he used to hire and discharge the men who worked under him. *Evans v. Penwyllt Dinas Silicia Brick Co.* (1901) 18 Times L. R. (C. A.) 58;

A similar decision was rendered in a Scotch case where the injured person was one of a squad of mechanics who were paid by the piece, for work on a vessel under construction, but were bound to work continuously all the working hours recognized in the yard, were supervised generally by the foreman of the employer, and were subject to printed rules and regulations "to be observed by the workmen in the employment" of shipbuilders. *McCready v. Dunlop* (1900) 2 Sc. Sess. Cas. 5th series, 1027, 37 Scot. L. R. 779, 8 Scot. L. T. 91.

In *McElmurray v. Turner* (1890) 86 Ga. 215, 12 S. E. 359, where, under the contract between landlord and a "cropper," the landlord furnished the land, stock, etc., and the "cropper" the labor, for making the crop of a year, which crop was to be controlled by the landlord until after the rent and advances were paid, and then to be equally divided between them, it was held that the "cropper" was entitled, after the payment of the rent and advances, to foreclose her special laborer's lien for the balance due her. The *ratio decidendi* was that the "cropper's" share of the crop was in the nature of wages, and that the claimant was a servant, not an independent contractor. For other cases bearing upon the relationship between "croppers" and their landlords, see § 77 a, *ante*.

For another case in which it was held that a man who raises a crop on shares is entitled to a lien as a laborer, see *Burgie v. Davis* (1879) 34 Ark. 179.

In the following cases the rule stated in the text was either expressly affirmed,

business or enterprise to which the contract of employment has reference;³ or in the form of a commission on the value of the transactions consummated by him in the capacity of an agent dealing with third persons;⁴ or may have lent money to the alleged employer

or, having regard to the facts, must have been taken for granted; *Lowther v. Radnor* (1806) 8 East, 113; *Prather v. Pantone* (1906) 125 Ga. 808, 54 S. E. 663; *Littlefield v. Morrill* (1903) 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109; *Adcock v. Smith* (1896) 97 Tenn. 373, 56 Am. St. Rep. 810, 37 S. W. 91; *Thayer v. Mann* (1848) 2 Cush. 371; *Hopkins v. Cromwell* (1903) 89 App. Div. 481, 85 N. Y. Supp. 839; *O'Brien v. Hamilton* (1878) 12 Phila. 387; *Carlisle v. Brogden* (1874) 1 New Zealand Amer. Jur. Ct. Rep. 169; *Guian v. Pell* (1874) 1 New Zealand and Jur. Rep. S. C. 91; and several of the decisions which are cited in notes 8-13, *infra*.

In *Re Hollyoak* (1887) 35 Week. Rep. 396, a man who formerly acted for the bankrupt as general foreman of a brickyard entered into an agreement with him by which he undertook to manufacture bricks by piecework, receiving so much per thousand for the bricks produced, out of which the wages of the men who worked under him were to be paid. It was shown further that the bankrupt had paid the workmen who did certain parts of the work, and that the claimant continued to act as general manager of the brickworks, and that he was liable to be discharged at a week's notice by the bankrupt, who had also the right to discharge and engage all the men working under the contract, and to make alterations in the rate paid per thousand for the bricks. Held, that he was within the description, "laborers or workmen," in § 40 of the English bankruptcy act of 1883, which, by its express terms, is applicable to the remuneration of employees paid by the piece.

That a person employed under a written contract, to work at his trade, whether it be for the entire undertaking, or by the piece, or according to the quantity,—for example, at so much a thousand,—falls within the purview of the by-law of the city of Montreal which provides summary remedies as between master and servants, was held in *Dinelle v. Gauthier* (1887) Montreal

L. Rep. 3 S. C. 134 (employee not merely an independent contractor).

That a journeyman shoemaker, engaged to make shoes at so much a dozen, was within that by-law, was held in *Gagnier v. De Montigny* (1890) Montreal L. Rep. 7 S. C. 19, 14 Legal News (L. C.) 35.

³ The immateriality of this circumstance seems to be a necessary deduction from the general rule laid down in § 68, *ante*.

In *Ex parte Hickin* (1850) 3 De G. & S. 662, 14 Jur. 405, 19 L. J. Bankr. N. S. 8, it was held that the claimant, a bookkeeper and cashier, was entitled to a preference under the English bankruptcy act, the *ratio decidendi* being that he was not a partner, although he had been performing services for several years before any definite agreement as to a salary of a specific amount was made, and the evidence showed that the reason why such an agreement had not previously been made was that the employer was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which the claimant was to be paid for his services. But it was also proved that he had done his work in consideration of an anticipated salary, and was not looking for his remuneration solely to the profits of the business.

⁴ A stuff presser or stuff finisher of Italian goods, working at weekly wages and a commission, besides superintending other servants, was held liable, as an "artificer" for a breach of contract under Stat. Geo. IV., chap. 34, § 3. *Whiteley v. Armitage* (1864) 13 Week. Rep. 144.

In *Hamberger v. Marcus* (1893) 157 Pa. 133, 37 Am. St. Rep. 719, 27 Atl. 681, the meaning of the act of Apr. 15, 1895, which provides "that the wages of any laborer or the salary of any person in public or private employment shall not be liable to attachment in the hands of the employer," was thus discussed: "It was the obvious purpose of this act to enable laborers and persons in public or private

under an arrangement the virtual effect of which was to render the debt a first charge upon the returns from the given business;⁵ or may have received his wages from a third person;⁶ or may have had the supervision of the other employees engaged in similar work.⁷

b. Performance of stipulated work wholly or partially with the assistance of others.—The effect of several cases decided under the English truck acts is that an employee whose contract obligates him to perform labor in person is an “artificer,” although he may have been at liberty to hire, and actually did hire, workmen to assist him;⁸ but that an employee who is not under such an obligation is

employment to receive from their employers compensation for their personal services without hindrance from their creditors. The miner who is paid by the ton, the mechanic who is paid by the piece, and the clerk or salesman who is paid by commissions on his sales, are as much within its protection as if they were paid by the day, week, month, or year. A wholesale merchant employs two persons to travel over the country and obtain from the retail dealers orders for his goods; to one of them he pays a certain sum per month, and to the other he pays commissions on the amount of orders taken. These commissions are as clearly compensation of the employees for personal services in the interest and for the benefit of the employer as the monthly stipend is. It is a narrow construction of the statute which allows the creditors of one employee to attach in the hands of the employer the commissions which constitute his compensation for personal services, and exempts from attachment in the hands of the same employer the compensation of another employee for like services. A construction which admits of such results is not warranted by a mere difference in the method of compensation.”

⁵ In *Ex parte Harris* (1845) De G. Bankr. Cas. 165, 9 Tr. 497, 14 L. J. Bankr. N. S. 26, a trader borrowed £550 under an agreement by which the lender was to become his clerk at a salary of £220 a year. The trader agreed to produce his accounts and balance sheets to the lender, who was to get in the debts, and alone to draw checks on the banking account. If the balance was in the trader's favor at any time, he might draw the amount of it. On payment of the loan, or on proceedings being

taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. Held, that the lender was a “clerk.” The contention on the other side was that he was merely a person advancing capital, and that the agreement was only a mode of paying a larger rate of interest.

⁶ *Willett v. Boote* (1860) 30 L. J. Mag. Cas. N. S. 6, 6 Hurlst. & N. 26, 3 L. T. N. S. 276 (applicability of master and servant act of 4 Geo. IV. chap. 34, affirmed.)

⁷ *Stothart v. Melton* (1903) 117 Ga. 460, 43 S. E. 801.

⁸ *Floyd v. Weaver* (1852) 21 L. J. Q. B. N. S. 151. It was held that the county court judge was justified in holding the plaintiff to be an “artificer,” where the evidence was that he was a collier employed to get coal from a mine at a certain rate per ton on the coal taken out by him, that he was at liberty to employ other men to assist him, and that he was subject to be dismissed or leave his work at a month's notice. Patteson, J., said: “The case is not as satisfactorily stated as we could wish. If the agreement was that the plaintiff should work personally, though he might employ others under him, he was, I think, an “artificer” within the meaning of the act of Parliament; but if the contract was that the plaintiff undertook a portion of the mine to gain coal by the hands of others, without being bound to go to it or work at it himself, then I should say that the case fell within the principle of *Riley v. Warden* (1848) 2 Exch. 59, 18 L. J. Exch. N. S. 120.”

This case was followed in *Bowers v. Lovekin* (1856) 6 El. & Bl. 584, 25 L. J. Q. B. N. S. 371, 2 Jur. N. S. 1187,

outside the purview of the statute, even though, as a matter of fact, he may have taken part in the work.⁹ The criteria thus indicated.

4 Week. Rep. 600, where "butty men" in a coal mine, who were paid by the cubic yard, and employed laborers to assist them, but who had to work personally, and were treated as workmen, were held to be within the act. In *Ingram v. Barnes* (see following note), the controlling element in this case was said by Channell, B., to be the fact that the employee in question was under an engagement to work personally.

In *Pillar v. Llynvi Coal & I. Co.* (1869) L. R. 4 C. P. 752, 38 L. J. C. P. N. S. 294, 20 L. T. N. S. 923, 17 Week. Rep. 1123, the plaintiff, a tinman, who was employed by defendants to work, either by the day or at fixed prices, upon materials furnished by the defendant, and required to give his personal services, was held to be within the act.

⁹ In *Riley v. Warden* (1848) 2 Exch. 59, it was held that a man who had agreed to make a railway cutting at so much a cubic yard, and had hired several laborers to help him, was not an "artificer." Parke, B., laid it down that the act was "applicable to those persons only who strictly contract as laborers; that is, to such as enter into a contract to employ their personal services, and to receive payment for that service in wages."

In *Sharman v. Sanders* (1853) 13 C. B. 166, 3 Car. & K. 298, 22 L. J. C. P. (N. S.) 86, 17 Jur. N. S. 765, 1 Week. Rep. 152, the plaintiff had agreed to load, unload, and burn ironstone for the defendants, who were to furnish the carts and horses necessary for the work, and pay him every month at the rate of so much per ton. He had hired men to do the work, and occasionally assisted in it personally. Held, that he was not within the act.

In *Ingram v. Barnes* (1857) 7 El. & Bl. 115, 3 Jur. N. S. 156, 26 L. J. Q. B. N. S. 82, affirmed by the Exch. Ch. in (1857) 7 El. & Bl. 132, 26 L. J. Q. B. N. S. 319, 3 Jur. N. S. 861, 5 Week. Rep. 726, the plaintiff contracted to make as many bricks in the defendant's brickfield as should be required by the latter. The plaintiff was to find the labor, and the defendant the materials. The plaintiff did some personal work. Held by the exchequer chamber, affirm-

ing the judgment of the Queen's bench (from which Erle, J., dissented), that the plaintiff was not within the act. In his judgment, Cockburn, Ch. J., who expressed his approval of the doctrine laid down by Maule, J., in *Sharman v. Sanders*, *supra*, remarked that "the act was not designed for the protection of persons taking contracts for labor to be done by others,—persons who speculate upon the state of the labor market; that the whole context of the act shows that the term artificer was intended only to apply to those who are actually and personally engaged or employed to do the work; and that, 'when the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, the circumstance of his doing some portion of the work himself does not bring him within the statute. There must be a contract by which he binds himself to do it.'"

The doctrine thus enunciated was again applied in *Squire v. Midland Lace Co.* [1905] 2 K. B. 448, 93 L. T. N. S. 29, 21 Times L. R. 466, 74 L. J. K. B. N. S. 611, 69 J. P. 29, 53 Week. Rep. 653, where the act was held not to be applicable to workwomen called "clippers," to whom a firm of lacemakers was in the habit of handing finished lace, for the purpose of having superfluous threads and material removed. The clippers, who were not employed exclusively by any one firm, undertook to get lace clipped, and applied to the manufacturers for lace, which they took home with them for that purpose. The lacemakers had no control over the clippers, who might and often did employ others to assist them in the work; the clippers might execute the work themselves, or give it to others to execute, or might return it unexecuted. The clippers were responsible in case of the nonreturn of the lace, and were paid at the end of each week according to the work done; they were required to pay for damage done to the lace in clipping.

Sleeman v. Barrett (1864) 2 Hurlst. & C. 934, 33 L. J. Exch. N. S. 153, 10 Jur. N. S. 476, 9 L. T. N. S. 834, 12 Week. Rep. 411. There "butty colliers" (i. e., men working as partners), who contracted to dig coal by the day, the

have also been applied in determining the scope of statutes regarding the liability of employers for injuries received by employees;¹⁰ of statutes providing summary remedies for the enforcement of the duties of employers and employees;¹¹ of statutes exempting wages from attachment;¹² and of statutes affixing a preferential quality to

ton, or the piece, according to the nature of the work, and employed others to assist them, were held not to be within the act, although they worked like ordinary laborers, and were not at liberty to leave their work or to underlet it. See, however, *Bowers v. Lovekin*, note 8. *supra*.

In *Kellick v. Adams* (1893) New Zealand L. R. (S. C.) 715, a person had made a contract to fell a quantity of brush at a fixed price per acre, but had not bound himself to do the work in person. Held, that the stipulated remuneration was not "wages," nor was he himself a "workman," with the meaning of those terms, as defined in the act.

¹⁰ *Stuart v. Evans* (1883) 49 L. T. N. S. 138, 31 Week. Rep. 706. The decision that a laboring man who had entered into a contract to make as many bricks as should be required by a contractee, who was to supply the materials and pay so much a thousand for the finished bricks, was not a "workman," was put upon the ground that he was not under any obligations to perform the work personally.

See also *Evans v. Penycyllt Dinas Siliica Brick Co.* (1901) 18 Times L. R. (C. A.) 58, note 2. *supra*.

In *Paterson v. Lockhart* (1905) 7 Sc. Sess. Cas. 5th series 954, a man hired for daily wages to get out stone blocks from a quarry, and subject to dismissal, was held to be a "workman," within the purview of the workmen's compensation act 1897, although he was at liberty to have assistants, to be paid by his employer.

In the employers' liability act of New South Wales, the intention of the legislature is indicated with more precision than in the English statute, as its provisions are expressly declared to be applicable to those who enter into a "contract of service or a contract personally to execute any work or labor." It has been held that a contract, to fall within this description, must be a contract to serve personally, or to serve for some

period, or to do some particular work; and that no action can be maintained by a man who, being the owner of two carts, went when it suited him, to the brick kiln of the defendant, and conveyed bricks to different places on the defendant's premises, not being bound to do the work, but being entitled to receive a specified sum of money if he thought fit to do it. *Lobb v. Amos* (1886) 7 New South Wales L. R. (L) 92.

See also *McElroy v. Australian Forge & Engineering Co.* (1899) 24 Vict. L. Rep. 953, where it was laid down that the employers and employees act of Victoria is not applicable to persons entering into a contract which can be performed by deputy.

¹¹ In *Lowther v. Radnor* (1806) 8 East, 113, the fact that a man employed to dig a well at so much a foot had hired assistants was held not to be sufficient in itself to remove him out of the purview of the master and servant act, 2 Geo. II. chap. 19.

Iron riveters paid at a fixed price per ton, with liberty to employ other workmen of inferior skill to themselves, were held to be "handicraftsmen" within the Stat. 4 Geo. IV., chap. 34, § 3. *Lawrence v. Todd* (1863) 32 L. J. Mag. Cas. N. S. 238, 14 C. B. N. S. 554, 10 Jur. N. S. 179, 8 L. T. N. S. 505, 11 Week. Rep. 835 (convicted for absence from work).

In *Grainger v. Aynsley* (1880) L. R. 6 Q. B. Div. 182, 50 L. J. Mag. Cas. N. S. 48, 43 L. T. N. S. 608, 29 Week. Rep. 242, 45 J. P. 142, it was held that the mere fact that the employee, for the sake of speed and convenience, hired a certain number of assistants, whom he paid himself, will not take him out of the class of persons "engaged in manual labor."

¹² *M'March v. Emslie* (1888) 15 Sc. Sess. Cas. 4th series, 375 (lampighter of a town held to be a "laborer," though his contract required him to employ two assistants). *Pennsylvania Coal Co. v. Costello* (1859) 33 Pa. 241, 15 Mor.

wages.¹³ But the applicability of such enactments has sometimes been considered with reference to other standards. In one case it was held that a person who had hired laborers to assist him in the performance of a contract was entitled to a lien in respect of such money as might be due to him for his own labor, but not in respect of that part of his claim which represents the price of the labor of his assistants, or the price of his own services in the capacity of a superintendent.¹⁴

In another case the conclusion of the court that persons who used the services of others for the purpose of performing a stipulated piece of work were not entitled to a lien as "mechanics" or "laborers" was put upon the narrow ground that the statute was obviously intended for the benefit of classes of persons other than those within the purview of a general mechanics' lien law which had previously been enacted.¹⁵

Min. Rep. 47 (skilled miner, mining coal at so much a ton, and employing laborer at daily wages to assist him, held to be a laborer).

¹³ The English cases in which the truck act 1831 was construed (see § 1962a, note 1, *ante*) were followed in *People v. E. Remington & Sons* (1887) 45 Hun, 329, 10 N. Y. S. R. 310, affirmed in (1888) 109 N. Y. 631 mem. 16 N. E. 680; and in *People v. Remington* (1889; Sup. Ct. Gen. Term) 3 Silv. Sup. Ct. 478, 25 N. Y. S. R. 301, 6 N. Y. Supp. 796.

The effect of these decisions was that persons who were employed on the terms that they were to receive a fixed price per piece in respect of work done for a corporation which furnished them with room, power, and stock, and were to employ and discharge their own workmen, were not "employees, operators, or laborers."

In *Hopkins v. Cromwell* (1903) 89 App. Div. 481, 85 N. Y. Supp. 839, the claimant had, in the name of a corporation, engaged in the wholesale pickle business, purchased pickles in the vicinity of his residence, received the pickles, prepared them for shipment, and shipped them as ordered by the corporation, under an agreement by which he was to receive a certain sum for every hundred pounds of pickles purchased, when delivered on the cars. The work was done by him personally, with the occasional assistance of his own man of all work, and the help of

coopers, furnished a few weeks during the spring by the corporation. Held, that he was entitled to a preference under New York Laws of 1897, chap. 6, § 9.

The rule laid down in *Littlefield v. Morrill* (1903) 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109, is that a person who contracts for the performance of a specific piece of work, and is entitled, under the terms of his agreement, to perform it either by his own labor or the labor of others, is not a "laborer" in the statutory sense, although, in point of fact, he may perform the whole of it himself.

See also *Seides's Appeal* (1863) 46 Pa. 57, § 1974, note 1, *post*.

¹⁴ *Mohr v. Clark* (1888) 3 Wash. Terr. 440, 19 Pac. 28 (decided with reference to § 1973 of the Washington Code, by which a lien is declared in favor of "any person who shall do labor upon any farm or land.") The court said "A laborer may own a team of horses, or a machine, and not be debarred from claiming or having a lien for his labor combined with these; they are merely a part of his labor,—his implements,—the means by which he labors and earns; but when he adds to these other laborers, he then becomes an employer or a contractor, as in this case."

¹⁵ *Savannah & C. R. Co. v. Callahan* (1873) 49 Ga. 506 (decided with reference to the repealed Georgia act of 1869).

Taking the decisions as a whole, it would seem that the only general rule which can be laid down in the present connection is that, having regard to the usual footing upon which contracts for work and labor are entered into, the circumstance that the given contractor was at liberty to hire, and did hire, assistants, points strongly to the conclusion that the relationship between the contractee and himself was not that of master and servant. There is certainly no inherent or essential incompatibility between the supposed situation and the existence of that relationship.

1974. Statutes usually deemed to be applicable only to the immediate employers of the persons for whose benefit they are enacted.—As a general rule, the special rights conferred upon servants by the enactments discussed in the present chapter cannot be enforced by the servant of an independent contractor against the principal employer.¹

¹ For cases which proceeded upon this doctrine, see *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847 (Federal eight hours law held not to give an employee of a contractor performing public work any rights against the government); *St. Louis & N. A. R. Co. v. Rogers* (1904) 72 Ark. 270, 79 S. W. 794 (person rendering services to a railroad contractor held not to be within the scope of a statute giving a lien to every person who performs valuable services by which the railroad receives a benefit); *Howard v. Moore* (1883) 20 Fla. 163 (servant of subcontractor not entitled to a lien upon a railroad under a statute applicable to every person who performs labor upon, or for the benefit of, any railroad); *Guion v. Brown* (1851) 6 La. Ann. 112 (servant of accountant employed by a commercial firm to post its books, not entitled to a privilege as against the firm); *Lynch v. Trainor*, Newfoundl. Rep. (1884-96) 744 (lien given by statute, applicable to any "mechanic, laborer, or other person contributing labor," not enforceable by the servants of a contractor in proceedings *in personam* against the principal employer); *Galagher v. Ashby* (1857) 26 Barb. 143 (statute making stockholders individually liable to "laborers and servants," not applicable to laborers hired by contractors); *Marks v. Indianapolis, B. & W. R. Co.* (1871) 38 Ind. 440 (similar ruling).

In *Ex parte Ball* (1853) 3 De G. M. & G. 155, 17 Jur. 198, 22 L. J. Bankr.

N. S. 27, it was held that the phrase "laborer or workman of such bankrupt," in § 169 of the act of 1849, did not include "drawers" employed in mining to assist colliers, to whom the work was let out at a certain price per score baskets. The evidence showed that each collier had a "drawer" attached to him, whom he had brought when he was himself hired, and whom he paid out of his own earnings, according to an agreement made without the privity of the bankrupt, and that the colliers discharged the drawers as they saw fit, without interference by the bankrupt.

In *Gross v. Eiden* (1881) 53 Wis. 543, 11 N. W. 9, it was held that a laborer in the employ of a person under a special contract to manufacture shingles at a certain price for a given quantity was not within the purview of Sanborn & S. Rev. Stat. (Wis.) § 3341, by which a lien is granted to anyone who performs work upon lumber "for or on account of the owner, agent, or assignee thereof." The principle upon which the decision proceeded was that, in order to entitle a laborer to the benefits of the act, it must appear that there was a privity of contract between him and the owner of the lumber. The court distinguished *Paine v. Gill* (1861) 13 Wis. 563; *Paine v. Woodworth* (1862) 15 Wis. 299; *Battis v. Hamlin* (1868) 22 Wis. 669; and withdrew an intimation in *Babka v. Eldred* (1879) 47 Wis. 189, 2 N. W. 102, 559, to the effect that the lien may be asserted where the labor was performed for a subcontractor.

The express object of one group of statutes, however, is to render principal employers liable for the wages earned by the servants of

The lien given by § 1981 of the Georgia Code to mechanics, upon property manufactured or repaired by them, does not attach in favor of a workman who is hired by a mechanic to do the work, the reason assigned being that, in such a case, the possession and the lien are in the workman's master, with whom the contract is made. The lien of the workman under such circumstances is on the property of his master, not on that of his master's employer. "It would," observed the court, "breed endless confusion, and almost a stoppage of business, to declare that each workman in a shop, who repairs a boot or a buggy under the orders of the owner of the shop, has a lien on the boot or buggy he repairs.

In *Seiders's Appeal* (1863) 46 Pa. 57; it was held that a helper employed and paid by the chief workman was entitled, under Pennsylvania act of April 2, 1849, to a preference out of the assets of the latter's employer; but the decision proceeded upon the ground that the chief workman acted as an agent of his own employer in employing the helper, and that the helper was in fact the servant of the principal employer, and not of the chief workman.

In *St. Louis & N. A. R. Co. v. Rogers* (1904) 72 Ark. 270, 79 S. W. 794, it was held that a person employed by a contractor to keep his accounts and the time of the laborers, to look after the live stock of the contractor, to set up camp and build huts for the laborers, was not entitled to a lien under an enactment applicable to "persons performing work and labor upon a railroad."

In *Morrison v. Whaley* (1890) 16 R. I. 715, 19 Atl. 330, it was held that the servant of a subcontractor was not entitled to the lien given by a provision (R. I. Pub. Laws, chap. 177) which specified the procedure by which it may be secured by persons who do work in the construction, etc., of a building, at the request of any person who has entered into a contract for such construction, etc. It was considered that the word "contract" connoted only the original contract with the principal employer.

In *Richardson v. Norfolk & W. R. Co.*

(1893) 37 W. Va. 641, 17 S. E. 195 it was held that the right to a lien on the property of a corporation, given by W. Va. Acts 1882, chap. 64, § 7, "to every workman, laborer, or other person who shall do or perform any work or labor by virtue of any contract, for any incorporated company," does not extend to subcontractors or to other persons who have no privity of contract with the corporation, but is confined to those having such contract, and who, by virtue thereof, do the work and perform the labor for which the lien is claimed. The court refused to accept the contention of counsel, that the expression "any contract" meant "anybody's" contract. In this case the claimant was a subcontractor, but the rule laid down is obviously broad enough to cover the servant of a contractor.

One E. entered into a contract with the owners of a colliery to sink a shaft in their coal mine. By the contract, E. (who was therein called the "contractor") was to provide such sinkers, etc., as might be necessary for the execution of the work, and was to be paid a certain sum per fathom sunk. E. employed and paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him. Held, that E. was an independent contractor, and that the deceased was not within the English employers' liability act 1880, as a "workman" who had "entered into or worked under a contract" with the colliery owners as his employers. Held, also, that the control given by the coal mines regulation act of 1887, and by the special rules of the mine, to the manager over all persons in the mine, did not make E. and the sinkers employed by him "workmen" in the employment of the colliery owners. *Narrow v. Flimby & B. M. Coal & Fire Brick Co.* [1898] 2 Q. B. (C. A.) 588, 67 L. J. Q. B. N. S. 976, 79 L. T. N. S. 397, 14 Times L. R. 583.

The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink and wall a shaft in the colliery. One of the men employed upon the work by the contractor and paid by him was fatally

contractors. See §§ 781 *et seq.*, *ante*. Statutes of this description have been declared to be applicable to laborers employed by subcontractors, in cases where the action is brought against the principal employer.² It is otherwise where the party sued is a surety on a bond which, under the terms of the enactment, the contractor is required to give for the payment of his laborers. Under these circumstances the rule that the obligations of a surety are *strictissimi juris* is deemed to involve the corollary that the laborers of a subcontractor cannot hold the principal contractor liable for their wages.³ Some of the statutes are, by their explicit terms, applicable to the servants of subcontractors.⁴

injured by an explosion of gas in the mine. The deceased had, in common with all the men employed by the contractor signed the "record book" kept by the colliery owners, by which, in consideration of being employed at the mine, he became bound to observe the regulations and conditions laid down for the safety of the mine and for the guidance of the persons employed there. Held, that the signature of the conditions by the deceased did not create a contract of service between himself and the colliery owners; that the deceased was therefore not within the same act, as a "workman" who had "entered into or worked under a contract" with the colliery owners as his employers. *Fitzpatrick v. Evans* [1901] 1 K. B. 756, 70 L. J. K. B. N. S. 353, 49 Week. Rep. 491, 84 L. T. N. S. 233, 17 Times L. R. 253, affirmed in [1902] 1 K. B. (C. A.) 505, 71 L. J. K. B. N. S. 302, 50 Week. Rep. 290, 86 L. T. N. S. 141, 18 Times L. R. 290.

² *George v. Washington County R. Co.* (1899) 93 Me. 134, 44 Atl. 377; *Peters v. St. Louis & I. M. R. Co.* (1857) 24 Mo. 586; *Kent v. New York C. R. Co.* (1855) 12 N. Y. 628, overruling *Miller v. Lake Ontario A. & N. Y. R. Co.* (1854) 9 How. Pr. 238; *Mundt v. Sheboygan & P. du L. R. Co.* (1872) 31 Wis. 451.

In *Hart v. Boston, R. B. & L. R. Co.* (1877) 121 Mass. 510, this doctrine was affirmed both on general grounds, and also for the reason that the clauses of the act which related to the giving of notice to the company pointed unmistakably to the conclusion that the claimant was entitled to sue under them.

In *Gannahan v. Hannibal & St. J. R. Co.* (1860) 30 Mo. 546, it was held that the liability of the principal employer might be enforced by a man hired by a subcontractor to whom a higher subcontractor had sublet the work, although the subletting was in violation of an express agreement.

³ *McCluskey v. Cromwell* (1854) 11 N. Y. 593.

⁴ By Kirby's Dig. § 6661, it is provided that every mechanic, laborer, or other person who shall perform any work on the construction, equipment, or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof, shall have a lien therefor. Held, that this enactment is applicable to the services of a foreman who, under contract with a subcontractor, superintends and directs the laborers in the construction or repair. *St. Louis, I. M. & S. R. Co. v. Love* (1905) 74 Ark. 528, 86 S. W. 395.

By Burns's Anno. Stat. 1901, § 7265, it is declared that all persons who shall perform labor in building bridges or other structures in the construction or repair of any railroad, whether under a contract with the railroad corporation, or a contract with any person, corporation, or company engaged, as lessee, contractor, subcontractor, or agent of such railroad company, in constructing or repairing any such railroad, shall have a lien.

In *Pere Marquette R. Co. v. Baertz* (1905) 36 Ind. App. 408, 74 N. E. 51, it was held that, under this enactment, the servants of subcontractors in the second degree are entitled to a lien in respect of any work performed in pur-

1975. Servants not within statutes creating possessory liens.—

Statutes drawn in terms which show that they were intended to be merely declaratory of the doctrine of the common law, under which a workman to whom materials have been delivered for the purpose of expending labor upon them is entitled to a possessory lien, are construed as being inapplicable to servants, for the reason which has always been deemed to preclude a servant from claiming a common-law lien; *viz.*, that he cannot acquire an independent legal possession of any article of property which belongs to his master.¹ See §§ 313, 749, *ante*.

suance of a recognized authority originally emanating from the railroad company.

¹The provision in California Civil Code (§§ 3051, 3052) that a person who makes, etc., any article of personal property, may have a special lien thereon, and may retain possession until his charges are paid, has been held to be applicable only to a bailee for hire, to whom property is delivered in the way

of his trade or occupation. It does not create a lien in favor of a person who performs work with reference to personal property which is in his possession as a servant. *Michaelson v. Fish* (1905) 1 Cal. App. 116, 81 Pac. 661, where a man employed as distiller to manufacture brandy and wines at stipulated wages was held not to be entitled to a lien thereon.

CHAPTER LXXXV.

EMPLOYERS' LIABILITY UNDER THE CIVIL LAW AND SYSTEMS FOUNDED THEREON.

1976. Scope of chapter.

A. DUTIES OF EMPLOYERS TO THEIR SERVANTS.

1977. Generally.

1978. Duty of employer as to appliances and place of work.

1979. —as to methods of work.

1980. —as to rules and regulations.

1981. —as to the employment of competent servants.

1982. —as to instruction and warning.

1983. Duty to save life of imperiled servant.

1984. Assurance of safety.

1985. Liability to servants working outside the scope of their employment.

1986. Obligations of an employer not owed to volunteers.

1987. Causation.

B. DEFENSES AVAILABLE TO EMPLOYERS.

1988. Assumption of risks.

1989. *Volenti non fit injuria*.

1990. Contributory negligence.

1991. Common employment.

a. Scotland.

b. France.

c. Italy and Switzerland.

d. Germany and Austria.

e. Quebec.

f. Mexico.

1976. [875] Scope of chapter.— In this chapter it is proposed to give a brief summary of the principles by which the extent of an employer's liability is determined in countries in which the civil law is the basis of the jurisprudence administered by the courts. The systems with regard to which American lawyers will naturally be most desirous of obtaining some information are those which prevail in the countries bordering upon the United States. The

greater part of the chapter, therefore, is devoted to a review of the doctrines adopted in the Canadian Province of Quebec and in the Republic of Mexico. But it has been deemed advisable to devote some little space to the law of Continental Europe also.¹

A. DUTIES OF EMPLOYERS TO THEIR SERVANTS.

1977. [876] Generally.—In all the jurisdictions with which we are concerned in this chapter, the extent of an employer's obligations depends, either wholly or partially, upon the construction of general or specific statutory provisions. The effect of the most important of those provisions is stated in the subjoined note.¹

¹For many of the facts which are mentioned regarding European law the writer is indebted to Mr. McKinney's treatise on Fellow Servants, § 8, where the learned author expresses his own obligations to three works,—*viz.*, a note by Mr. G. W. Easley in 25 Am. & Eng. R. Cas. p. 513; a pamphlet on Employers' Liability by Mr. Fall; and a monograph on the same subject by Mr. Irving Taylor.

See also the English Parliamentary Blue Book, No. 21, of 1886, which contains reports on the liability of employers in foreign countries, the information having been collected in compliance with directions issued by Lord Rosebery to the English consular representatives on the Continent of Europe and elsewhere.

France.—Code Napoleon, art. 1383. Everyone is responsible for the damage of which he is the cause, not only by his own act, but also by his negligence and imprudence.

Art. 1384. A person is responsible not only for the injury which is caused by his own act, but also for that which is caused by the act of persons for whom he is bound to answer, or of things which he has under his care.

Italy.—Arts. 1153, 1154, of the Italian Code are couched in the same terms as the above-cited provisions in the French Code.

Quebec.—Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill.

Art. 1054. He is responsible, not M. & S. Vol. V.—385.

only for the damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care. Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Germany.—Until comparatively recent times the liability of employers was determined with reference entirely to the rules of the Roman law, under which employers are liable only for negligence in selection and supervision (*culpa in eligendo, inspiciendo, et custodiendo*). But some classes of employees have now been placed in a more favorable position by the provisions of the Codes and other enactments.

Mexico.—Several articles of the Codes are set out in the report of *Evey v. Mexican C. R. Co.* (1897) 38 L.R.A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.

The effect of art. 11 of the Penal Code, and arts. 301, 304, 307, and 326 of book 2 of the same Code, is to confer on any person injured by and through the negligence of another a right to recover in a civil proceeding all the actual damages sustained.

Art. 330 of the same Code provides that masters may be held civilly liable, through their clerks and servants, according to the provisions of arts. 326 and 327, for the negligence of said clerks and servants within the scope of their employment.

The railroad law declares (art. 184) that railway companies "are liable for all faults or accidents which occur through tardiness, negligence, impru-

In the ensuing sections a summary is given of the decisions under the Civil Code of Quebec. As the courts of that Province avowedly defer to the authority of the judges and juridical writers of France, the decisions cited may be regarded as a fairly accurate presentment of the law of that country, also. The Code of Italy, being copied from that of France, receives, it may be presumed, a similar construction. For an account of the former and the existing law of employers' liability in Germany and Austria, the reader is referred to two articles contributed by Mr. Pearce Higgins to the *Juridical Review*, vol. ix., pp. 249, 395.

1978. [877] Duty of employer as to appliances and place of work.—

The owners of industrial establishments are bound to provide fully for the safety of the workmen employed by them, and they are responsible, as regards those workmen, for all accidents and injuries which may result either from defects of construction, or from the failure to keep machinery and apparatus in proper condition, or from the negligence or unskilfulness of the employees who superintend the different departments of the business. They cannot escape their responsibility except in cases of *force majeure*.¹ The fact that a certain suggested precaution would have required a considerable expenditure of money is not of itself an adequate excuse for the master's failure to take that precaution.² Still less will the master

dence, or want of capacity of their employees." By this provision a company is rendered liable for an injury to an employee resulting either solely from its own negligence, or from its own negligence concurring with that of fellow servants. See *Mexican C. R. Co. v. Glover* (1901) 46 C. C. A. 334, 107 Fed. 356.

Art. 194 of the act of the Mexican Congress of December 15, 1881, declares that railway companies are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees.

¹*Sarault v. Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217, adopting the statement of Laurent, vol. 26, No. 474.

An electric-power company is liable for the death of an employee from an electric shock from a wire not properly insulated, where it failed to provide him with protecting gloves, which it was accustomed to furnish its employees when engaged in similar work, and which would have prevented the acci-

dent. *Desjardins v. Citizens' Light & P. Co.* (1898) Rap. Jud. Quebec, 15 C. S. 28.

Tackle used in loading or unloading a ship ought to be sufficient to withstand any strain that is likely to be put upon it by ordinary, unskilled laborers. *Ross v. Langlois* (1885) Montreal L. Rep. 1 Q. B. (Quebec) 280.

Whether, in the absence of an express statutory provision requiring that precaution, the failure of an employer to fence dangerous machinery is to be deemed, as respects adults, a culpable breach of duty, was left unsettled in two cases. *Archambault v. Dominion Barb Wire Co.* (1889) 18 Rev. Leg. (Quebec S. C.) 57 (recovery here was denied on the ground of contributory negligence); *Légaré v. Esplin* (1897) Rap. Jud. Quebec, 12 C. S. 113 (negligence said to be possibly not predicable of omission to provide a guard).

²An employer who has omitted to provide a building especially for the thawing out of dynamite is not relieved from liability for injuries result-

be permitted to escape liability by the plea that the adoption of a different arrangement would have entailed a slight increase of expenditure, and some retardation of the work.³

If a machine used by a master was in good order, negligence will not be imputed to him merely on the ground that it was somewhat inferior to more modern machines of the same description.⁴

A master who is dealing with essentially dangerous things is bound to take the utmost care to see that they do not inflict any injury upon his servants, and must endeavor to secure their safety by adopting all known devices which are conducive to that end.⁵

A master is bound to protect his servants, so far as that result can be attained by the adoption of every reasonable precaution which, under the given circumstances, would be deemed necessary and proper by a person possessing that degree of skill and special knowledge which the law imputes to those who engage in any particular trade or business. *Spondet peritiam artis*.⁶

A master is not an insurer or guarantor of the safety of his servants.⁷

The principle which forbids the inference of culpability where

ing from such omission on the ground that it would have been difficult and costly to provide a building especially for the purpose. *Durand v. Asbestos & Asbestic Co.* (1898) Rap. Jud. Quebec, 19 C. S. 39, affirmed in (1900) 30 Can. S. C. 285.

³ *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264.

⁴ *Sarault v. Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217.

⁵ An electric-light and power company owes to a lineman the duty of adopting every precaution which can be taken to prevent live wires causing accidents. *Citizens' Light & P. Co. v. Lepitre* (1898) 29 Can. S. C. 1.

In *Asbestos & Asbestic Co. v. Durand* (1900) 30 Can. S. C. 285, the court, in holding that negligence might properly be inferred from the fact that an unnecessary and unreasonable quantity of dynamite had been accumulated in dangerous proximity to the place of work, said: "The peril to life from high explosives is so great, and, as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one

who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstance or neglect of others or other cause, he takes the chance of the happening of such other event, and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence."

⁶ An employer engaged in constructing sewers is liable to an employee for injuries sustained because of his failure to use means known to experts for removing carbonic gas, which would necessarily accumulate at the bottom of the trench, although the employee and his companions undertook the excavation in a certain time at a fixed daily sum. *Dagenais v. Houle* (1897) Rap. Jud. Quebec, 11 C. S. 225.

A stevedore is chargeable with knowledge of the danger created by a jet of steam issuing from an unprotected waste pipe. *St. Arnaud v. Gibson* (1898) Rap. Jud. Quebec, 13 C. S. 22.

⁷ *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264; *Cornier v. Barā* (1886) Montreal L. Rep. Q. B. 262.

the appliances and the methods used by the master are of such a character that his servants can avoid injury by the exercise of ordinary care is recognized, and in some cases is decisive in his favor.⁸ But this principle is subject to some important qualifications. Starting from the theory that an employer owes to his workmen the same measure of care as is owed by a "*bon père de famille*" to his own child,⁹ the courts deduce the consequence that he must protect his servants against even the consequences of their own mistakes, imprudence, and thoughtlessness, and that he is to this end bound not only to give such orders as, if they are obeyed, will secure their safety, but also to see that those orders are properly executed.¹⁰ The obligation thus predicated is declared to be especially incumbent in

⁸ It is not negligence to use a machine which is not dangerous in itself, but merely dangerous to a workman who is negligent and inattentive to his duty. *Sarault v. Viau* (1881) 11 Rev. Leg. (Quebec S. C.) 217 (injury caused by a machine into which the workman had to insert the paste to be rolled for making biscuits). See also cases cited in § 1990, *post*.

⁹ *McCarthy v. Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272.

¹⁰ *George Matthews Co. v. Bouchard* (1887) Rap. Jud. Quebec, 8 B. R. 550 (injury caused by projecting set screw).

In *St. Arnaud v. Gibson* (1898) Rap. Jud. Quebec, 13 S. C. 22, the court approved a ruling in the earlier case of *Ibbotson v. Trevelthick*, Rap. Jud. Quebec, 4 S. C. 318, that "an employer is bound to protect his employees by the best possible means, and even, to some extent, against their own imprudence." The court remarked: "The position of employee is a difficult one. The least exhibition of unwillingness on their part may lead to the loss of their situation; their attention, too, is taken up with the manual labor they are in the act of performing; they are, by education and training, far less capable of foreseeing and avoiding danger than their employers."

In one case the law was summed up in the following propositions: That the master is responsible for his faults of omission as well as his faults of commission; that he is bound to take the precautions necessary to avoid the accidents which may occur to the workmen whom he employs, even by reason

of their own imprudence; that it is his duty to see that the measures thus adopted are observed; that it is not even enough for him to have taken serious precautions, if he failed to take all those which were compatible with the necessities of his industry; that he is bound to provide not only for accidents of a usual kind, but for those which are barely possible; that he is responsible for an injury received by his workman while engaged in a dangerous work which he has ordered such workman to perform; that it is his duty to take all necessary precautions to guarantee the workman against the consequences of his own imprudence; that this obligation is still more strict when the servant is a child who is ignorant of the danger which he may incur, or has neither the prudence nor the experience necessary to protect himself; that the master is bound, when he employs children, not to assign to them a work which brings them into contact with the dangerous parts of machines; and that it is his duty to protect them against the grave consequences which may be entailed by acts of levity, thoughtlessness, and the caprices natural to that time of life. *Arobbald v. Yelle* (1897) Rap. Jud. Quebec, 6 B. R. 340.

In *Sarault v. Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217, the court refers to a passage in which Laurent (vol. 20, p. 518, No. 438), commenting upon a French decision to the effect that an employer is in fault, where he fails to take the most minute precautions for the protection of his employees, and that he is bound to safeguard them against the effects of their

the case of young children.¹¹ As applied for the benefit of this class of employees, such a doctrine may be nearly, if not exactly, paralleled in the common law (see § 913, *an'e*); but, so far as adults are concerned, it certainly fixes a higher standard of care than that system enacts.

1979. [878] —as to methods of work.—In carrying out his work an employer is under the duty of using methods as safe as are practicable.¹ He is negligent if the methods which he employs in carrying on his work are such as expose his servants to unnecessary and avoidable perils.²

The test of negligence is not whether greater precautions might have been taken, and the accident avoided, but whether ordinary precautions,—those usual under the circumstances,—were taken.³

1980. [879] —as to rules and regulations.—Where the conditions under which the master's business is carried on are such that the safety of the servants cannot be adequately secured without the promulgation of rules, an obligation arises to make rules which will be effective for the protection of the servants, and to see not only that those rules are understood, but also that they are obeyed. This duty is more especially obligatory where girls and young persons are employed.¹

own imprudence, remarks that this doctrine may seem excessively severe, as regards the employer, but that it is, nevertheless, as completely conformable to juridical principles as it is to humanity, inasmuch as workmen who are without education, and wanting in foresight, because they are thus wanting, became so familiar with the dangers of their work that they neglect the precaution which the most simple prudence indicates. The learned author puts the case of a contractor for the excavation of a bank, who has directed his workmen to retire when there is danger of the material slipping down, and lays it down that such contractor is responsible in the event of an accident happening, if he does not watch over the execution of this order, and so protect the workmen against their own imprudence.

The doctrine that a master is bound to see that an order is executed was lately applied in *Martel v. Ross* (1899) Rap. Jud. Quebec, 16 C. S. 118.

¹¹ *Robitaille v. White* (1901) Rap. Jud. Quebec, 19 C. S. 431; *McCarthy v. Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272.

¹ *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264.

² *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264, where the method adopted for hoisting heavy pieces of iron with a derrick was such that the employees had to stand in a position which exposed them to great peril if the chains or pulleys gave way.

³ *Richelieu & O. Nav. Co. v. St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252, holding that it was not negligence to use only one hawser to fasten together two ships, from one of which goods were to be transhipped to the other.

¹ *Parent v. Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283 (principle laid down as being applicable to factories in which steam power is used).

1981. [880] —as to the employment of competent servants.—That the master is culpable if he hires or retains an unskilled or otherwise incompetent servant, and must answer for such injuries as other employees may receive in consequence of the unfitness of that servant, has been declared, *arguendo*, in one case.¹ But this principle is of no practical importance, as the common-law doctrine of co-service is not applied in this Province. See § 1991, *post*. In the case cited the actual rationale of the judgment was that recovery could not be had, as there was no evidence to show how the accident occurred.

1982. [881] —as to instruction and warning.—The existence of an obligation to impart information as to the proper manner of doing the work in hand, or as to the dangers incident thereto, is inferred in all cases where it should have been apparent to a reasonably intelligent person that the perils to which the work subjected the servant in question were probably not appreciated by him.¹ This duty is more especially obligatory in the case of inexperienced children who are assigned to work of an essentially dangerous character.² It would seem, however, that the master discharges his obligations fully under such circumstances if the child is given the assistance of an experienced workman.³

Some kinds of work are apparently regarded as being so dangerous that, where an immature youth has been assigned to them, negligence is inferable, irrespective of whether he was or was not duly instructed.⁴

¹ *St. Lawrence Sugar Ref. Co. v. Campbell* (1885) Montreal L. Rep. 1 Q. B. 290.

² *Cossett v. Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475 (proper way of handling a new tool); *George Matthews Co. v. Bouchard* (1897) Rap. Jud. Quebec, 8 B. R. 550; *Parent v. Schloman* (1897) Rap. Jud. Quebec, 12 C. S. 283.

Where the lumber on a platform car on which the plaintiff was riding gave way and precipitated him to the ground, the railway company was held liable, on the ground that its officials had omitted to warn him not to ride on this car, and had failed to hold the train until he and his fellow workman had been removed to another car. *Canadian P. R. Co. v. Gorgette* (1886) Montreal L. Rep. 2 Q. B. 310.

³ *McCarthy v. Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272 (operation of machine with rapidly revolving knives); *Archbald v. Yelle* (1897) Rap. Jud. Quebec, 6 B. R. 340 (boy injured while holding a belt which was under repair, so as to prevent it from touching a transmitting wheel which was in motion).

⁴ See *McCarthy v. Thomas Davidson Mfg. Co.* (1899) Rap. Jud. Quebec, 18 C. S. 272.

⁵ In one case it was held to be negligence for an employer to put a boy of fifteen to work at a machine for cutting boards, not provided with a guard to protect the operator's hand. *Légaré v. Esplin* (1897) Rap. Jud. Quebec, 12 C. S. 113. The employer's failure to instruct the boy was referred to in the allegations of the plaintiff, but the conclusion of the court is apparently not based on this omission.

1983. [882] Duty to save life of imperiled servant.—To charge a master with the responsibility for the failure of his agent to save the life of a servant in jeopardy, it must be shown that such agent was culpably negligent. He cannot be held liable where the evidence merely shows that something might have been done which was not done, and that, if that something had been done, death would not have ensued.¹

1984. [883] Assurance of safety.—Although the master or his agent may have acted in good faith and in the belief that what he said was true, he is liable, as for negligence, if he assures his servants that they are in no danger, and thus induces them to remain on the premises, when it ought to have been apparent to him that, under the circumstances, their position might at any moment become one of extreme peril.¹

1985. [884] Liability to servants working outside the scope of their employment.—The owner of a manufacturing establishment who causes a workman to perform very dangerous work, especially when such workman is not accustomed to that description of work, and does not receive a salary in proportion to the risk he runs, is liable in damages for the death of the workman.¹

1986. [885] Obligations of an employer not owed to volunteers.—A master is not bound to protect volunteers or intermeddlers from the dangers of work undertaken by them without his authority.¹

1987. [886] Causation.—No action can be maintained unless the injury is shown by direct testimony, or by presumptions consistent, weighty, and precise, to have been caused by the negligence of the master or one of his agents. No recovery can be had where, under the evidence, the manner in which the accident occurred is a mere matter of conjecture.¹

¹ *Richelieu & O. Nav. Co. v. St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252. There recovery was denied in a case where a member of a steamer's crew who fell into the water while goods were being transhipped from another steamer was drowned. The captain did not lower any boats to rescue him, but the evidence was that a number of other boats which were close by hurried towards the drowning man the moment after the accident occurred.

¹ *Macdonald v. Thibaudeau* (1899) Rap. Jud. Quebec, 8 B. R. 449 (servants were directed to return to work after a fire had broken out on the uppermost floor of a factory).

¹ *Price v. Roy* (1898) Rap. Jud. Quebec, 8 B. R. 170.

¹ *Chartier v. Quebec S. S. Co.* (1897) Rap. Jud. Quebec, 12 C. S. 261 (plaintiff joined in the work of the crew of a ship before the arrival of the only agent of the defendant who had the power to employ men).

¹ *Montreal Rolling Mills Co. v. Corcoran* (1896) 26 Can. S. C. 595; *St. Lawrence Sugar Ref. Co. v. Campbell* (1885) Montreal L. Rep. 1 Q. B. 290.

In one case an injury caused by the rebound of a hawser which broke while the defendant's steamer was putting off from a wharf was held to be presumptively due to the insufficiency of the

B. DEFENSES AVAILABLE TO EMPLOYERS.

1988. [887] Assumption of risks.—As under the common law, every risk which is not shown to have been the result of some distinct negligence on the master's part is regarded as being one which belongs to the ordinary class.¹

Where a servant has undertaken work which he knows to be dangerous, the master's whole duty is performed when he has furnished everything that is necessary to protect him from peril, so far as the nature of the work allows.²

1989. [888] Volenti non fit injuria.—The principle embodied in the maxim *volenti non fit injuria* is recognized, and will preclude recovery under circumstances appropriate for its application.¹

1990. [889] Contributory negligence.—If the servant's own negligence was the sole cause of his injury, he cannot recover any damages whatever.¹ The theory upon which recovery is denied in this instance is the same as that which is the basis of the similar rule which prevails under the common law, *viz.*, that the fault of the servant himself breaks the connection between the delinquency complained of

hawser, or to the carelessness of the crew in paying it out, or to the negligence of the captain in not employing a tug to assist in the operation. The defendant was accordingly held to be responsible in any view of the evidence. *Corner v. Byrd* (1886) Montreal L. Rep. 2 Q. B. 262.

¹ *Bourgeault v. Grand Trunk R. Co.* (1887) Montreal L. Rep. 5 S. C. 249 (allegation that a frog was out of order, not proved).

² *Richelieu & O. Nav. Co. v. St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252, reversing (1882) 11 Rev. Leg. 381.

¹ *Richelieu & O. Nav. Co. v. St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252. The effect of the ruling was that, even if the method adopted for doing the work in hand is a negligent one, a servant who is injured by its adoption cannot recover in a case where he is himself the person who is in control of the work.

¹ *Cossett v. Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475; *Richelieu & O. Nav. Co. v. St. Jean* (1883) Montreal L. Rep. 1 Q. B. 252, reversing 11 Rev. Leg. 381, and approving *Sarault v. Viau* (1882) 11 Rev. Leg. 216; *Fortier v. Lauzier* (1898) Rap. Jud. Quebec, 14

C. S. 359; *Archambault v. Dominion Barb Wire Co.* (1889) 18 Rev. Leg. (Quebec C. S.) 57; *Globe Woolen Mills Co. v. Poitras* (1895) Rap. Jud. Quebec, 4 B. R. 116, reversing Montreal L. Rep. 5 S. C. 391; *Robitaille v. White* (1901) Rap. Jud. Quebec, 19 C. S. 431; *Roberts v. Dorion* (1895) Rap. Jud. Quebec, 4 B. R. 117, reversing Rap. Jud. Quebec, 5 C. S. 411; *Currie v. Conture* (1887) 19 Rev. Leg. (Quebec Q. B.) 443; *Dominion Oil Cloth Co. v. Coalier* (1890) Montreal L. Rep. 6 Q. B. 268, reversing (1888) Montreal L. Rep. 5 S. C. 97; *Desroches v. Ganthier* (1882) 5 L. N. 404, 3 Dorion (Quebec) 33; *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264; *Tooke v. Bergeron* (1897) 27 Can. S. C. 567.

A workman injured in the execution of a piece of work which becomes dangerous only when the person executing it fails to pay proper attention to what he is doing cannot recover damages, if he, being fully aware of all the proper precautions to take, can only have been the victim of an accident in consequence of his own fault and his own imprudence. Dalloz et Vergé, Codes Annotées, Code Civ. 2, 1st pt., p. 234, art. 1383, No. 101.

and the injury received.² But the doctrine of Anglo-American jurisprudence, that no action is maintainable in any case where the servant's negligence contributed even in the smallest degree to the accident, has not been adopted. If it appears that the injury was caused partly by the negligence of the master and partly by the negligence of the servant, the damages awarded will be reduced by such an amount as may be deemed equitable in view of all the circumstances involved.³

The standards by which the culpable or nonculpable quality of a servant's acts is gauged are, it would seem, not materially different from those which are applied under the common law. On the one hand we find the general principle formulated that, if a man has done what the majority of men would have done under the circumstances, it cannot be said that he is culpable.⁴ On the other hand, the right of recovery has been denied where a skilled workman continued to use an appliance, the insufficiency of which for the purpose

² According to a standard treatise on French law a servant who receives an injury through his own fault is put upon the footing of a person who has not been injured at all. *Quod quis ex sua culpa damnum sentit, non intelligitur damnum sentire.* Larombière, *Théorie des Obligations*, vol. 5, p. 708, No. 29. The same author also observes that it frequently happens that the fault imputable to the person who alleges himself to be injured is of such a degree that the act complained of, however hurtful it may be, does not present any longer the characteristics of a delict, or quasi-delict.

³ *Fortier v. Lauzier* (1898) Rap. Jud. Quebec, 14 C. S. 359; *Price v. Roy* (1899) 29 Can. S. C. 494, reversing in part (1898) Rap. Jud. Quebec, 8 B. R. 170 (employee of mill owner undertook the manifestly dangerous work of saving a bridge from destruction by a flood); *Paquet v. Dufour* (1908) 39 Can. S. C. 332; *Wire & Cable Co. v. McAllindon* (1907) Rap. Jud. Quebec, 16 B. R. 273; *Locomotive & Mach. Co. v. Lemay dit Delorme* (1908) Rap. Jud. Quebec 17 B. R. 328; *Dorin v. Canadian P. R. Co.* (1910) Rap. Jud. Quebec 37 C. S. 493; *Jodoin v. Dominion Bridge Co.* (1910) Rap. Jud. Quebec 39 C. S. 103; *Demanche v. Asbestos & Asbestic Co.* (1911) Rap. Jud. Quebec 40 C. S. (Ct. Rev.) 270; *Cullen v. Archibald* (1911) Rap. Jud. Quebec 40 C. S. 330;

Price v. Talon (1902) 32 Can. S. C. 123 (servant was guilty of contributory negligence in falling into an unguarded opening, and was assessed half the damages); *Nault v. O'Shaughnessy* (1901) Rap. Jud. Quebec 19 S. C. 448 (boy employed to work on edger fell into hole of which he knew); *Bloval v. Clinton Fireproofing Co.* (1907) Rap. Jud. Quebec 29 C. S. 481 (servant remained in place of danger after he had been warned off); *Giguere v. Frechette* (1911) Rap. Jud. Quebec, 40 C. S. 37 (employee placing materials in a machine permitted his hand to be drawn in); *Wire & Cable Co. v. McAllindon* (1908) Rap. Jud. Quebec 16 B. R. 273 (plaintiff inadvertently placed his hands on cog wheels).

The principle of the French law is that where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault which contributed to the accident he must share the responsibility, and in that case the damages are not divided equally, as is the rule in the English admiralty courts and under the Revised Statutes of Canada (1906) chap. 113, § 918. *Lefebvre v. Nichols Chemical Co.* (1910) Rap. Jud. Quebec 36 C. S. 535, affirmed in (1909) 42 Can. S. C. 402.

⁴ *Cossett v. Leduc* (1883; Quebec Cour de Revision) 6 L. N. 181, citing Laurent, vol. xx., No. 475.

for which it was supplied he should have comprehended;⁵ where a servant unnecessarily exposed himself to peril by using an appliance while it was temporarily in an abnormally dangerous condition;⁶ where a servant, as a result of using for a particular piece of work an implement which, as he knew, was not designed to be used for such a purpose, suffered an injury which would not have been received if he had used the appropriate implement;⁷ and where the injury was the result of the servant's disobedience to the master's orders,⁸ or was due to the servant's disregard of the instructions which he had received as to the manner in which the work assigned to him was to be done.⁹

An act of indisputably negligent quality will not preclude recovery, if the adoption of the course of conduct which the servant ought to have followed would not have enabled him to avoid the danger to which he was exposed when the accident occurred.¹⁰

As is the rule under the common law, the fact that, at the time of the accident, the injured servant was absorbed in duties which engrossed his attention is an adequate excuse for his temporary forgetfulness of a known danger.¹¹ So, also, negligence is sometimes negatived by the fact that, at the time when the servant did the act which

⁵ Laurent, vol. 20, p. 517, No. 486, quoted in *Sarault v. Viau* (1881) 11 Rev. Leg. (Montreal C. S.) 217.

⁶ *Roberts v. Dorion* (1895) Rap. Jud. Quebec, 4 B. R. 117, reversing Montreal L. Rep. 5 S. C. 411 (servant undertook to operate a planer from which the guard ordinarily provided had been removed).

⁷ *Fortier v. Lauzier* (1898) Rap. Jud. Quebec, 14 C. S. 359. The court held that the diversion of the implement to an improper purpose was not excused by the fact that other workmen had been guilty of similar misconduct.

⁸ *Desroches v. Gauthier* (1882) 5 L. N. 404 (Quebec) 33; *Globe Woolen Mills Co. v. Poitras* (1895) Rap. Jud. Quebec, 4 Q. B. 116, reversing Rap. Jud. Quebec, 5 C. S. 391 (servant cleaned machinery while in motion); *Archambault v. Dominion Barb Wire Co.* (1889) 18 Rev. Leg. (Quebec S. C.) 57 (servant attempted to replace a belt while the machinery was in motion, when it was not his duty to do so, and another employee was specially charged with this function); *Dominion Oil Cloth Co. v. Coallier* (1890) Montreal L. Rep. 6 Q. B. 268, reversing

(1888) Montreal L. Rep. 5 S. C. 97 (servant undertook to shift a belt while the machinery was in motion).

⁹ *Currie v. Couture* (1887) 19 Rev. Leg. (Quebec Q. B.) 443 (furnace in which "black ash" was made exploded); *Robitaille v. White* (1901) Rap. Jud. Quebec, 19 C. S. 431 (boy who had been duly instructed as to the proper way of doing the work and the dangers to be guarded against allowed his hand to be drawn between the cylinders of a leather slicing machine); *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264.

¹⁰ In *Scanlan v. Detroit Bridge & Iron Works* (1899) Rap. Jud. Quebec, 16 C. S. 264, a servant was injured as a result of the breaking of some chains and pulleys by which a bridge girder was being raised, while he was standing in a position which he had been forbidden to take while this operation was in progress. The court awarded him damages on the ground that he would in all probability have been injured, even if he had complied with the employer's directions.

¹¹ A servant engaged in performing a piece of work which requires the exer-

was the immediate cause of the injury, extreme terror created by great peril confused his reasoning faculties.¹²

1991. [890] Common employment.—*a. Scotland.*—It has been stated by Sir Frederick Pollock that the doctrine of common employment “was not so much adopted from England, as thrust upon the Scottish courts by decisions of the House of Lords.”¹ This remark is fully justified by the language used in the earlier cases.² Upon the facts it is possible to reconcile the decisions cited with the doctrines applied in the English courts; and it is upon this footing that they are explained in the judgment of the Lord Chancellor in the decision which finally assimilated the law of Scotland to that of England.³ But this very unsatisfactory, not to say disingenuous, method of making out a doctrinal identity is entirely forbidden by the circumstances involved in another case in which the judges, with a full knowledge of the rule which has been formulated a few years previously by the English court of exchequer, deliberately held, upon the broadest grounds, that a master was liable to a servant who was injured by the negligence of a coservant.⁴ This piece of legal history, however, is no longer of any practical interest since the consummation of the coercive process referred to by Sir Frederick Pollock, and the subject is referred to in the present connection chiefly for the purpose of explaining the manner in which it has happened that in Scotland, a country in which the civil law furnishes to a large extent the basis of the jurisprudence administered, a doctrine is now applied which has been repudiated in all other countries in which that system prevails.

cise of his whole physical strength should not be held responsible for having momentarily forgotten a source of danger behind him to which he was exposed by the master's nonobservance of proper precautions. *George Matthews Co. v. Bouchard* (1897) Rap. Jud. Quebec, 8 B. R. 550.

¹² Contributory negligence is not predicable of the act of a female employee in leaping out of a window in the upper story of a burning building, under the belief that she could not save herself in any other way, although she could readily have escaped by the staircase. *Macdonald v. Thibaudeau* (1899) Rap. Jud. Quebec, 8 B. R. 449.

¹ Essays on Jurisprudence, p. 115.

² See *Sword v. Cameron* (1839) 1 Sc. Sess. Cas. 2d series, 493; *Grey v. Brassey* (1852) 15 Sc. Sess. Cas. 2d series,

135 (see, especially, remarks of Lord Cunningham); *Dixon v. Ranken* (1852) 14 Sc. Sess. Cas. 2d series, 420 (see opinions of Lords Moncrieff and Cockburn).

³ *Bartonskill Coal Co. v. Maguire* (1858) 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107.

⁴ *McNaughton v. Caledonia R. Co.* (1857) 19 Sc. Sess. Cas. 2d series, 271 (car repairer injured by negligence of engineer). This decision is the more significant in the present point of view, as it was delivered after the hearing of the English case just cited, but before the rendition of the judgment, and the court explicitly declined to adopt the doctrine of coservice, unless the House of Lords should pronounce in its favor.

b. France.—In 1834, three years before the leading English decision of *Priestley v. Fowler*, it was held by the Cour de Cassation, affirming the decision of the lower court, that the risk of being injured by the negligence of a fellow workman was presumed to be sufficiently compensated for by the wages paid, and that such a risk was, for this reason, one of those which are presumed to have been accepted by every employee.⁵ This decision was soon afterwards followed by another to the same effect.⁶ But the doctrine thus laid down was finally repudiated, and the rule which now prevails is that an employer is not absolved from liability by the fact that the injury was due to the negligence of a coservant.⁷

c. Italy and Switzerland.—It has been stated by Mr. Bateson in the Law Quarterly Review (vol. 5, p. 184) that the doctrine applied in these countries is the same as that which prevails in France.

d. Germany and Austria.—It is stated by Mr. Pearce Higgins (9 Jurid. Rev. p. 271) that, so far as regards the liability of an employer, the public and workmen are on the same footing in these countries, and their systems of law know nothing of any doctrine of common employment.

e. Quebec.—In some of the earlier cases the courts, influenced, possibly, by the contiguity of jurisdictions in which the common-law rule was applied, rendered decisions based upon the theory that the risk of being injured by the negligence of a fellow servant was assumed, as being one of those ordinarily incident to every employment.⁸ But the doctrine now established is the same as that which prevails in France.⁹

⁵ Dalloz, Jurisp. Générale de Roy-aume, 1837, 2d partie, p. 161.

⁶ Dalloz, 2d partie, p. 168.

⁷ Dalloz, 1841, 1st partie, p. 271. See also Demolombe, vol. 31, No. 368; Sourdat, vol. 2, No. 911.

In *Weaver v. W. L. Goulden Logging Co.* (1906) 116 La. 468, 40 So. 798, it was held that the asserted civil law doctrine that a master without fault is liable for the negligence of a fellow servant is recognized neither by the Civil Code nor by the jurisdiction of Louisiana.

⁸ *Fuller v. Grand Trunk R. Co.* (1868; Quebec) 1 L. C. L. J. 68; *Hall v. Canadian Copper & Sulphur Co.* (1879; Mont. Ct. of Rev.) 2 L. N. 245; *Bourdeau v. Grand Trunk R. Co.* (1866; Quebec) 2 L. C. L. J. 186.

In one case a foreman was held to

be a vice principal. *Hall v. Canadian Copper & Sulphur Co.* (1879; Quebec) 2 L. N. 245.

⁹ *Canadian P. R. Co. v. Robinson* (1887) 14 Can. S. C. 105, per Strong, J.; *Asbestos & Asbestic Co. v. Durand* (1900) 30 Can. S. C. 285; *Filion v. Queen* (1894) 4 Can. Exch. 134, affirmed in (1895) 24 Can. S. C. 482; *Belanger v. Riopel* (1887; Quebec) Montreal L. Rep. 3 S. C. 198 (master held liable for negligent construction of a scaffold by a fellow servant); *Filion v. Reg.* (1894) 4 Can. Exch. 134, affirmed in (1895) 24 Can. S. C. 482; *Armstrong v. Rex* (1907) 11 Can. Exch. 119, affirmed in (1908) 40 Can. S. C. 229; *Rex v. Desrosiers* (1908) 41 Can. S. C. 71.

In a recent case one of the Federal courts of appeal applied this doctrine

[*f. Mexico*.—In decisions rendered by a circuit court of appeals, it has been held that the common-law doctrine as to the nonliability of employers to an employee for the negligence of a coemployee does not exist in Mexico.¹⁰]

in a case where the servant of an American railway company was injured in Canada. *Boston & M. R. Co. v. McDuffey* (1897) 25 C. C. A. 247, 51 U. S. App. 111, 73 Fed. 934.

¹⁰ *Mexican C. R. Co. v. Sprague* (1902) 52 C. C. A. 318, 114 Fed. 544.

Under the laws in force in the Republic of Mexico at the time the plaintiff received his injuries, railway corporations were liable for all faults or accidents occurring through tardiness,

negligence, imprudence, or want of capacity of their employees, and this, although the injury resulting was to another employee of the company, himself without fault; or, in other words, in the Republic of Mexico the employee of a railway corporation does not assume, as one of the risks of his employment, the negligence of a coemployee. *Mexican C. R. Co. v. Know* (1902) 52 C. C. A. 21, 114 Fed. 73.

CHAPTER LXXXVI.

CONFLICT OF LAWS IN CASES INVOLVING EMPLOYERS' LIABILITY.

A. WHERE THE EFFECT OF A STATUTE IS NOT INVOLVED.

1992. Conflict of laws, as between the courts of two states.

1993. —as between Federal and state courts.

B. WHERE THE EFFECT OF A STATUTE IS INVOLVED.

1994. Conflict of laws as between the courts of two of the United States.

a. Injury received in another state.

b. Injury received in state where action is brought.

1995. —as between Federal and state courts.

1996. —as between Federal and foreign courts.

1996a. —as between state and foreign courts.

1997. *Lex fori* controlling, where statute affects merely the remedial procedure.

1998. Presumptions as to the law prevailing in other states.

A. WHERE THE EFFECT OF A STATUTE IS NOT INVOLVED.

1992. [868] Conflict of laws, as between the courts of two states.—
For a full discussion of the various principles governing this question generally, see Parmele's Wharton's Conflict of Laws.

It has been laid down that, in determining the right of a servant to recover for an injury received in a sister state, a court is not bound to adopt the construction which has been placed upon the common law in that state. The position taken by one court was that the common law was presumably the same in both jurisdictions, and that the court which tried the action was, for this reason, not only competent, but under an obligation, to decide the rights of the parties according to its own theory of the actual effect of that law, as applied to the facts in evidence. The conclusion deduced from the principle thus laid down was, that the rulings of the court of last resort in the state where the accident occurred were not controlling

as regards the question whether the defense of coservice was available.¹

According to the general rule, the right of recovery, under such circumstances, should be determined with reference to the decisions of the courts of the state or country within the limits of which the injury was received.²

¹ *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 4 Am. St. Rep. 79.

While the courts of this state will follow the decisions of a sister state in construing the statutes of the sister state, they are not bound by the interpretation placed upon the common law by the courts of other states. *Lay v. Nashville, C. & St. L. R. Co.* (1908) 131 Ga. 345, 62 S. E. 189 (headnote by the court).

Where, on propositions of general or common law as distinguished from statutory law, the courts of two states are not in accord, a person having a cause of action in one state cannot have that cause of action enforced in the other state according to the theory approved in the state in which the cause of action arose. *Strong v. Chicago, B. & Q. R. Co.* (1911) 150 Iowa, 1, 129 N. W. 321.

² *Leazotte v. Boston & M. R. Co.* (1899) 70 N. H. 5, 45 Atl. 1084 (applying the Massachusetts doctrine that the duty of a railway company with respect to the inspection of its cars is adequately discharged when competent inspectors have been employed); *Nashville, C. & St. L. R. Co. v. Foster* (1882) 10 Lea, 351 (applying Alabama doctrine that the existence of coservice is not negatived by the fact that the negligent and injured servants were in different departments of the master's business); *McMaster v. Illinois C. R. Co.* (1887) 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. 59 (applying Louisiana rule that conductor is a vice principal as to a brakeman); *Illinois C. R. Co. v. Harris* (1901) — Miss. —, 29 So. 760 (same rule applied).

The rule of the text was also followed in the following cases: *Louisville & N. R. Co. v. Cook* (1910) 168 Ala. 592, 53 So. 190; *St. Louis, I. M. & S. R. Co. v. Hesterly* (1911) 98 Ark. 240, 135 S. W. 874; *Carter v. McDermott* (1907) 29 App. D. C. 145, 10 L.R.A. (N.S.) 1103, 10 Ann. Cas. 601; *Whitfield v. Louisville & N. R. Co.* (1910)

7 Ga. App. 268, 66 S. E. 973; *Christiansen v. William Graver Tank Works* (1906) 223 Ill. 142, 79 N. E. 97, 7 Ann. Cas. 69, affirming (1906) 126 Ill. App. 86; *Louisville & N. R. Co. v. Keiffer* (1908) 132 Ky. 419, 113 S. W. 433; *Fogarty v. St. Louis Transfer Co.* (1904) 180 Mo. 490, 79 S. W. 664, 1 Ann. Cas. 136; *Rahm v. Chicago, R. I. & P. R. Co.* (1908) 129 Mo. App. 679, 108 S. W. 570; *Ham v. St. Louis & S. F. R. Co.* (1909) 136 Mo. App. 17, 117 S. W. 108; *Cannaday v. Atlantic Coast Line R. Co.* (1906) 143 N. C. 439, 8 L.R.A. (N.S.) 939, 118 Am. St. Rep. 821, 55 S. E. 836; *Dryden v. Pelton-Armstrong Co.* (1909) 53 Or. 418, 101 Pac. 190; *Missouri, K. & T. R. Co. v. Keefe* (1905) 37 Tex. Civ. App. 588, 84 S. W. 679; *Johnson v. Union Pacific Coal Co.* (1904) 28 Utah, 46, 67 L.R.A. 506, 76 Pac. 1089; *Sartin v. Oregon Short Line R. Co.* (1904) 27 Utah, 447, 76 Pac. 219; *Marleau v. Grand Trunk R. Co.* (1910) Rap. Jud. Quebec 38 C. S. 394.

In *Walsh v. New York & N. E. R. Co.* (1894) 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584, the Connecticut doctrine, that the inspection of railway cars is a non-delegable duty, was applied in favor of a plaintiff who could not have recovered under the decisions in Massachusetts. The court said: "We are of opinion that, as between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the form resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties. . . . The policy of the supposed Connecticut rule cannot be said to be opposed to that prevailing here, even apart from statute. See Stat. 1893, chap. 359." It was deemed to be unnecessary to consider whether the

The doctrine of the Federal courts, which is discussed in the following section, may, perhaps, be thought to lend some support to the former of these antagonistic doctrines. The elements to be considered, however, are not the same in each instance. The jurisdiction exercised by Federal and by state courts is concurrent and coequal, so far as regards actions of the type with which we are here concerned. There is accordingly no positive reason why the former courts should defer to the opinion of the latter with respect to the applicability of any given principle of the system of law which is administered in both courts. But it is difficult to perceive any satis-

court was prepared to adopt the doctrine propounded by the edition of Story's Conflict of Laws, 8th ed. § 625, note *u*, viz., that "whether the domestic law provides for redress in like cases should, on principle, be immaterial, so long as the right is a reasonable one and not opposed to the interests of the state." (See § 1994, note 3, *post*.)

The doctrine laid down in this case was followed in *Eingartner v. Illinois Steel Co.* (1896) 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664, where the court applied the doctrine of common employment in the form in which it has been adopted in Illinois, the state in which the cause of action arose, although that doctrine was somewhat more favorable to the servant than that which prevailed in Wisconsin.

Where a corporation was engaged in constructing a tunnel under the St. Clair River, which separates Michigan from Ontario, and employed an overseer on each side of the river, it was held that its liability for injuries to a servant, caused by the unsafety of the place of work on the Ontario side, must be determined with reference to the law of Ontario, although the servant had been sent to the Ontario side by the foreman on the American side. *Turner v. St. Clair Tunnel Co.* (1899) 121 Mich. 616, 47 L.R.A. 112, 80 N. W. 720; first appeal (1897) 111 Mich. 578, 36 L.R.A. 134, 66 Am. St. Rep. 397, 70 N. W. 146.

In *Louisville & N. R. Co. v. Cook* (1910) 168 Ala. 592, 53 So. 190, the court said that while it would follow the law of Tennessee as declared in that state, still it did not feel bound to declare the law of that state to be what it was declared to be by some one de-

cision of the supreme court of that state.

In *Louisville & N. R. Co. v. McMillen* (1909) — Ky. —, 119 S. W. 221, following *Louisville & N. R. Co. v. Stanfill* (1908) 32 Ky. L. Rep. 1043, 107 S. W. 721, the court impliedly recognized its obligation to follow the decisions of the court in the state (Tennessee) in which the accident occurred, but held that both states took the same view of the common-law doctrine of assumption of risk.

A plea of acceptance of benefits from the relief department, which under the contract of employment operates as a release, as a defense to an action by an employee against a railroad company for negligent injuries, which contract is valid in the state where made, does not constitute a use of the contract as a weapon, rather than as a shield, so as to be inadmissible in a suit in another state, on the theory that the contract is against its public policy. *Cannaday v. Atlantic Coast Line R. Co.* (1906) 143 N. C. 439, 8 L.R.A. (N.S.) 939, 118 Am. St. Rep. 821, 55 S. E. 836.

If the injury occurred in Texas, the law of that state applies, although the negligence (in loading lumber on a car) occurred in New Mexico. *El Paso & N. W. R. Co. v. McComus* (1904) 36 Tex. Civ. App. 170, 81 S. W. 760.

The common law of England at the time of its adoption by Wyoming had no relation to the master's liability for injuries to his servants, and decisions by the English courts, subsequently rendered, are not binding in determining the question of the liability of the master for injuries occurring within that state. *Johnson v. Union Pacific Coal Co.* (1904) 28 Utah, 46, 67 L.R.A. 506, 76 Pac. 1089.

factory grounds upon which it is possible to sustain a doctrine which amounts essentially to a declaration that the general principle by virtue of which the rights and liabilities of the parties to an action sounding in tort are governed by the law of the place where the tort was committed is subject to an exception in cases where the law to be considered is the common law. The true theory would rather seem to be that, for the purposes of private interstate and international jurisprudence, the presumption may properly be entertained that such rights and liabilities, in so far as they are dependent upon the common law, have been exactly defined by the decisions of the courts in each state or county in which that system prevails. That theory may fairly be said to involve the corollary that such decisions, if any have been rendered which indicate with reasonable clearness what the position of the parties would be in the state or country in which the cause of action arose, are as binding upon a foreign court as the specific provisions of a statute are universally conceded to be under similar circumstances. See §§ 1994-1996, *post*.

[It has been held that the courts of sister states are bound only by the direct decision of a state, and, in the absence of such, will apply their own rules.³]

1993. [869] —as between Federal and state courts.—"The courts of Great Britain and America have established the general doctrine of the nonliability of the employer for an injury to one servant, caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no Federal question, is no more open to judicial denial in the Federal courts than in the state courts or the ordinary common-law tribunals."¹ But a Federal court does not consider itself bound to administer the particular form of that doctrine which may happen to have been adopted by the courts of the state in which the accident occurred.²

³ In *Root v. Kansas City Southern R. Co.* (1906) 195 Mo. 348, 6 L.R.A. (N.S.) 212, 92 S. W. 621, it was held that the courts of a state in which a section foreman on a railroad is held not to be a fellow servant of a brakeman will not, in determining the liability of a railroad company for injury to a brakeman through the negligence of the foreman, in another state, assume that the courts of the latter would hold that they were fellow servants, merely be-

cause its decisions have tended in that direction, but, in the absence of direct decision, will apply their own rule.

¹ *Dillon v. Union P. R. Co.* (1874) 3 Dill. 319, Fed. Cas. No. 3,916, per Dillon, J.

² In *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612, Mr. Justice Harlan thus stated the views of the court: "Our attention has been called to two cases determined in the supreme court of Texas, and which,

it is urged, sustained the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

In *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 378, 37 L. ed. 778, 13 Sup. Ct. Rep. 914, the views of the majority were thus announced: "The question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce, not merely by the Interstate Commerce Act and its amendments, 24 Stat. at L. 379, chap. 104 (U. S. Comp. Stat. 1901, p. 3154), but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. Public Acts, 52d Cong. 2d Sess. chap. 113. The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employees

change at every state line? If, to a train running from Baltimore to Chicago, it should, within the limits of the state of Ohio, attach a car for a distance only within that state, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company? Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employee are not, in any sense of the term, local in character, but are of a general nature, and to be determined by the general rules of the common law."

In this case an elaborate and very able dissenting opinion was delivered by Field, J., in which he combated the doctrine that there was "an atmosphere of general law floating about all the states, not belonging to any of them, and of which the Federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law."

"In the absence of legislative enactments, the liability of a master to one of his employees for the negligence of another is determinable by the general law, and not by the local law, and the decisions of the courts of the state in which the injury is inflicted are not controlling in the national courts." *Northern P. R. Co. v. Mase* (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114; *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 185.

For other cases applying this rule stated in the text, see *Newport News & M. Valley Co. v. Howe* (1892) 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; *Northern P. R. Co. v. Peterson* (1892) 2 C. C. A. 157, 4 U. S. App. 574, 51 Fed. 182 (decision reversed in [1896] 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843, but merely on the ground that the lower court had misapprehended the effect of the earlier decisions of the Supreme Court as to superior servants); *The Louisiana* (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748; *Chapman v. Reynolds* (1896) 23 C. C. A. 166, 33 U. S. App. 686, 77 Fed. 274; *McPeck v. Central Vermont R. Co.* (1897) 25 C. C. A. 110,

B. WHERE THE EFFECT OF A STATUTE IS INVOLVED.

1994. [870] Conflict of laws as between the courts of two of the United States.—*a. Injury received in another state.*—(Compare cases cited in § 1996, *post*.) The broad principle has been laid down that the *lex fori*, and not the *lex loci*, is controlling in cases where suit is brought in one jurisdiction for an injury received in another in which the common-law rights and liabilities of masters and servants have been modified by statute.¹ But the weight of authority is in favor of the doctrine that, under such circumstances, the question whether the injured employee can maintain an action should, as a general rule, be determined with reference to the provisions of the foreign statute.²

This doctrine is, of course, subject to the qualification which re-

50 U. S. App. 27, 79 Fed. 590; *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737; *Briegal v. Southern P. Co.* (1900) 39 C. C. A. 359, 98 Fed. 958; *Louisville & N. R. Co. v. Stuber* (1901) 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934.

In view of these decisions the case of *Kerlin v. Chicago, P. & St. L. R. Co.* (1892) 50 Fed. 185, in which the circuit court for the district of Indiana took the position that, as the control of the relation of master and servant is reserved to the states, a Federal court should follow the ruling of the state courts with regard to the doctrine of coservice, is of no authority. This decision it will be observed antedates *Baltimore & O. R. Co. v. Baugh* (1893) 149 U. S. 378, 37 L. ed. 778, 13 Sup. Ct. Rep. 914, and is therefore impliedly overruled by that case and the others already cited. The court seems to have overlooked *Hough v. Texas & P. R. Co.* (1879) 100 U. S. 213, 25 L. ed. 612, which had previously enunciated the doctrine which is now always applied in the Federal courts.

¹ *Anderson v. Milwaukee & St. P. R. Co.* (1875) 37 Wis. 321.

² Prior to the enactment of the Minnesota act reviewed in chapter LXXVI., *ante*, a railway servant, injured in Iowa by the negligence of a coservant, was allowed to recover in the former state. *Herriock v. Minneapolis & St. J. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413. The court said: "The general rule is that actions for per-

sonal torts are transitory in their nature, and may be brought wherever the wrongdoer may be found, and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common-law. In actions *ex contractu* there is no such distinction, and there is no good reason why any different rule should be applied in actions *ex delicto*. Whenever, by either common law or statute, a right of action has become fixed, and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury. . . . The only case which goes to the length of holding that this action cannot be maintained is that of *Anderson v. Milwaukee & St. P. R. Co.* (1875) 37 Wis. 321, which, on the facts, is on all fours with the present case, and in which the court

sults from the well-recognized principle that a foreign statute which conflicts essentially with the statutes or public policy of the state

holds that such an action will only lie in the state of Iowa, which enacted the statute. But with due deference to that court, and especially to the eminent jurist who delivered the opinion in that case, we think they entirely failed to distinguish between the right of action, which was created by the statute of Iowa and must be governed by it, and the forum of the remedy, which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion."

This Minnesota ruling has been followed quite recently in *Chicago & E. I. R. Co. v. Rouse* (1899) 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, affirming (1898) 78 Ill. App. 286 (accident occurred in Indiana). The court said: "Actions not penal, but for pecuniary damages for torts or civil injuries to the person, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought."

The same principle was also applied in *Illinois C. R. Co. v. Jordan* (1904) 117 Ky. 512, 78 S. W. 426; *Southern R. Co. v. Grace* (1909) 95 Miss. 611, 49 So. 835; *Williams v. Chicago, R. I. & P. R. Co.* (1904) 106 Mo. App. 61, 79 S. W. 1167; *Smith v. Southern R. Co.* (1910) 87 S. C. 136, 69 S. E. 18.

The Georgia rule that a railway employee suing the company for the negligence of a fellow servant must show that he himself was free from fault is a rule of substantive law, and is without applicability where a railway employee sues the company for an injury received in another state where no such

doctrine prevails. *Southern R. Co. v. Robertson* (1909) 7 Ga. App. 154, 66 S. E. 535.

In *Rick v. Saginaw Bay Towing Co.* (1903) 132 Mich. 237, 102 Am. St. Rep. 422, 93 N. W. 632, 13 Am. Neg. Rep. 342, it was held that the law of Canada, where the injury was received, would be enforced in Michigan, although such law abrogated in part the fellow servant rule.

A servant injured in Iowa may recover under the statutes of that state, which abrogate the fellow servant doctrine, although the common law is enforced in Missouri, in which state the action is brought. *Benedict v. Chicago G. W. R. Co.* (1904) 104 Mo. App. 218, 78 S. W. 60.

The statute of a state where an action is brought to recover damages for injuries to an employee, making void unreasonable contracts for notice of the injury to the employer as a condition of maintaining an action in such cases, is not applicable to affect a contract valid in the sister state where made and in that where the injury occurred, in the absence of anything to disclose a legislative intent to make it applicable to such contracts. *Chicago, R. I. & P. R. Co. v. Thompson* (1906) 100 Tex. 185, 7 L.R.A.(N.S.) 191, 123 Am. St. Rep. 798, 97 S. W. 459.

In *Voshefskey v. Hillside Coal & I. Co.* (1897) 21 App. Div. 168, 47 N. Y. Supp. 386, the action was held to be barred because the plaintiff had violated a Pennsylvania statute prohibiting the riding upon loaded cars in mines.

In a case where a railway employee was suing in Kentucky, under the provisions of the employers' liability act of Alabama, for an injury received in the latter state through the negligence of an engineer, it was held that he could recover damages without showing that such engineer was guilty either of gross or of wilful negligence, although proof of such negligence would be a condition precedent to the maintenance of such an action under the law prevailing in Kentucky. *Louisville & N. R. Co. v. Graham* (1896) 98 Kv. 688, 34 S. W. 229.

in which the suit is being prosecuted will not be enforced by the courts of that state.³ That this qualification does not affect the right of recovery is a conclusive inference in those cases where a statute which coincides in its provisions with that of the state in which the accident occurred has been enacted in a state in which the suit is instituted.⁴ But the mere fact that the common-law doctrine estab-

See also the cases cited in the next subsection.

Only the parties specified as having the right to sue under the provisions of a damage act can maintain an action upon that act in another state. *Western & A. R. Co. v. Strong* (1874) 52 Ga. 461; *Hendricks v. Western & A. R. Co.* (1874) 52 Ga. 467 (wife held not entitled to sue alone, as the children are also made beneficiaries under the Tennessee act).

If contributory negligence, as that term is ordinarily understood, is a bar to a right of action created by the statute of the state where the injury was received, while the doctrine as to comparative negligence prevails in the state where the action is brought, the servant cannot recover if his negligence was a proximate cause of the accident, whether that negligence was greater or less than that of the employer. *East Tennessee, V. & G. R. Co. v. Lewis* (1890) 89 Tenn. 235, 14 S. W. 603 (injury was received in Georgia).

³*Texas & P. R. Co. v. Cox* (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Hamilton v. Chicago, B. & Q. R. Co.* (1910) 145 Iowa, 431, 124 N. W. 363.

In *Illinois C. R. Co. v. Ihlenberg* (1896) 75 Fed. 873, it was held that the Federal courts would enforce in Tennessee the provisions of the Mississippi Constitution, that mere knowledge of the unsafe condition of machinery or appliances would not defeat a recovery, since such a provision was to be considered only a variation of the Tennessee common law, and not repugnant to the spirit of the law of the latter state, the legislature of which had passed statutes modifying the old common law as to contributory negligence.

In *Morrisette v. Canadian P. R. Co.* (1904) 76 Vt. 267, 56 Atl. 1102, it was held that the law of Canada, under which neither assumption of risk nor contributory negligence constituted a bar to the right of recovery, but operat-

ed only to reduce the damages, would be enforced in Vermont, in an action arising in Canada.

⁴In *Chicago, St. L. & N. O. R. Co. v. Doyle* (1883) 60 Miss. 977 (decision as to damage act) the court said: "The view that no recovery could be had here except for a result traceable to an omission of duty in Mississippi is unfounded. Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and *vice versa*; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employee was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used. . . . The fact that he was in service off of that part of the road on which his constant service was rendered makes no difference. He was in the habit of rendering the service in which he was killed. He was still an engineer of the company, in charge of one of the locomotives, and engaged in a duty incident to his employment, and the place made no change in his position, duties, or rights, and none as to the liability of his employer to him."

Where two states, in which a corporation has an existence, have a statute of similar import, giving an action for the death of an employee, caused by its negligence, suit may be brought

lished in the state where the action is brought differs from that which is embodied in the statute of the other state does not necessarily show that there is an antagonism between the policy of the two states.⁵

It is well settled that "a court of one state accepts the interpretation of a statute affixed to it by the court of last resort thereof."⁶ But the decisions of the courts of sister states as to statutes of a similar tenor are, at most, of merely persuasive authority, and will be followed only when the reasoning on which they are based is deemed to be satisfactory.⁷

in either. *Louisville & N. R. Co. v. Shively* (1892) 13 Ky. L. Rep. 902, 18 S. W. 944.

⁵ *Herrick v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413. There it was contended by counsel that the general rule which declares that the law of the state in which the injury was received determines the rights and liabilities of the parties in an action brought in another state is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. The court said: "We admit that some text writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it. . . . A few cases appear to lay some stress upon the fact that the statutes of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. Such is the case of *Chicago, St. L. & N. O. R. Co. v. Doyle* (1883) 60 Miss. 977. . . . But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the law of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under

the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

The Indiana employers' liability act is not "so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people," that the Illinois courts should refuse to enforce it. *Chicago & E. I. R. Co. v. Rouse* (1899) 178 Ill. 132, 44 L.R.A. 410, 52 N. E. 951, affirming (1898) 78 Ill. App. 286, where the court expressed its views on this point in the virtually equivalent form that the common-law rule is not such a part of the public policy of Illinois as will prevent its courts from enforcing a statute of another state, abolishing the rule, in an action for personal injuries received in the latter state.

⁶ *Tullis v. Lake Erie & W. R. Co.* (1899) 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 4 Am. St. Rep. 79.

⁷ This principle is illustrated by *Mikelson v. Truesdale* (1895) 63 Minn. 137, 65 N. W. 260, and other cases in which the courts have declined to follow the Georgia and Ohio decisions denying the right to recover from railway receivers under statutes giving a right of action against railway com-

In an action against a railway company which operated a line extending through North Carolina and Tennessee, three out of five of the judges of the supreme court of the former state held that an action brought for injuries received in Tennessee through the negligence of a fellow servant was one sounding in contract, and not in tort;⁸ that, in the absence of any evidence to show where the contract was made, or what state should take jurisdiction of its enforcement, the law applicable to the case was that which prevailed in North Carolina, where the plaintiff and the defendant company were domiciled; and that the action was therefore maintainable under the statute by which the doctrine of coservice has been abrogated as to railway companies operating in that state.⁹ (See chapter LXXVI., *ante*.)

The converse of the situation presented in the cases so far discussed in this section arises where the accident occurred in a state in which common-law doctrines are applied, and the action is brought in a state in which those doctrines have been modified by statute. Under such circumstances the right of recovery is determined with reference to common-law doctrines.¹⁰

b. Injury received in state where action is brought.—In Arkansas it has been held that, under a constitutional provision to the effect

panies in cases where the delinquent is a coemployee. See § 1617, *ante*.

⁸ See, however, the Arkansas case cited in note 9, *infra*.

⁹ *Williams v. Southern R. Co.* (1901) 128 N. C. 286, 38 S. E. 893. The other judges concurred in the decision on the ground that, even under the law of Tennessee, the defense of coservice would not have been available.

The *Williams Case* is followed in *Miller v. Southern R. Co.* (1906) 141 N. C. 45, 53 S. E. 726, where the accident happened in Alabama. The court said: "By the contract of service made in North Carolina, the provisions of the fellow servant act must be read into the contract, and, there being no evidence that the service was to be performed altogether in another state, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract."

¹⁰ *Atchison, T. & S. F. R. Co. v. Lannigan* (1895) 56 Kan. 109, 42 Pac. 343; *Brewster v. Chicago & N. W. R. Co.* (1901) 114 Iowa, 144, 89 Am. St. Rep. 348, 86 N. W. 221; *Sanner v. Atchison, T. & S. F. R. Co.* (1897) 17 Tex. Civ.

App. 337, 43 S. W. 533; *Louisville & N. R. Co. v. Keiffer* (1908) 132 Ky. 419, 115 S. W. 433; *Farrar v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 188, 130 S. W. 373; *Morrison v. San Pedro, L. A. & S. L. R. Co.* (1907) 32 Utah, 85, 88 Pac. 998.

In *Ham v. St. Louis & S. F. R. Co.* (1910) 149 Mo. App. 200, 130 S. W. 407, the cause of action arose in Arkansas, and it was held that the case was governed by the common law of that state, although the common-law rules applicable to the facts of the case had been changed by statute in Missouri.

In *Atchison, T. & S. F. R. Co. v. Moore* (1883) 29 Kan. 632, instructions were held to be erroneous which allowed the jury to find in the plaintiff's favor if the accident was due to the negligence of any coservant of the plaintiff, whether vice principal or not (such being the effect of the Kansas statute), when it was shown by the evidence that the distinction between a vice principal and a mere servant was recognized in Texas, where the accident occurred.

that all railroads which are now or may hereafter be built and operated, either in whole or in part, in Arkansas, shall be responsible for all damages to persons and property, under such regulations as may be prescribed by the legislature, a railroad company whose road is operated in part in Arkansas is governed by the statutes of Arkansas, and is liable to an employee in tort for injuries received there, caused by failure to discharge any duties growing out of said statutes, though the contract of service may have been made in another state.¹¹

[A decision based on the same principle has been rendered in New York.¹²]

1995. [871] —as between Federal and state courts.—A state statute expressly regulating the extent of an employer's liability is applied by the Federal courts, pursuant to U. S. Rev. Stat. § 721 (U. S. Comp. Stat. 1901, p. 581), as a "law" of the state.¹ So far as those courts are concerned, the construction placed upon such a stat-

¹¹ *Kansas City, Ft. S. & M. R. Co. v. Becker* (1899) 67 Ark. 1, 46 L.R.A. 814, 77 Am. St. Rep. 78, 53 S. W. 406. The court took the ground that, although the relation between the plaintiff and defendant was created by contract, the duty upon which the former relied as a ground of recovery was imposed by law, and arose from the relation, rather than the contract. The conclusion, therefore, was that a servant injured by the non-performance of this duty could elect to sue upon the contract, or to treat the wrong suffered as a tort, and bring an action *ex delicto*.

The doctrine of the North Carolina court as to the nature of the action seems to be different from that which is thus propounded.

¹² In *Gruner v. Texas Co.* (1909) 133 App. Div. 413, 117 N. Y. Supp. 741, it was held that the provisions of the labor law in respect to scaffolding applied to a vessel being painted in a dry dock in New York, although the vessel was in commission and engaged in interstate commerce, and was owned by a Texas corporation.

¹ *Northern P. R. Co. v. Hambly* (1894) 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983.

This rule was applied for the benefit of servants in *Northern P. R. Co. v. Behling* (1893) 6 C. C. A. 681, 12 U. S. App. 662, 57 Fed. 1037 (section hand allowed to recover in the Minnesota district for negligence of trainmen, the Minnesota statute being controlling);

Northern P. R. Co. v. Mase (1894) 11 C. C. A. 63, 27 U. S. App. 238, 63 Fed. 114 (decision in Minnesota district that, under Mont. Stat. of 1887, chap. 25, § 697, the conductor of one train was a vice principal as to employees on another train).

On the ground that a receiver might be sued for an injury resulting in death, under the statute of Louisiana, in which the injury was received, it has been held that an action might be maintained in a Federal court sitting in Texas, although, according to the decisions in the latter state, no action lies against a receiver for such an injury. *Texas & P. R. Co. v. Cox* (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905, declining to follow the doctrine laid down in *Turner v. Cross* (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; *Texas & P. R. Co. v. Collins* (1892) 84 Tex. 121, 19 S. W. 365 (see § 1617, *ante*).

If an action by the representative of a deceased employee is brought under the damage act of a state other than that in which the contract of employment was made and in which the accident took place, the right to recover, and the limit of the amount of the judgment, are governed by the *lex loci*, and not by the *lex fori*. *Northern P. R. Co. v. Babcock* (1894) 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978 (action in district of Minnesota for injury received in Montana). See also next note.

ute by the highest court of the state in which it has been enacted is conclusive.²

In one case the theory upon which the court seems to have proceeded was that, if a statute modifying the liability of employers has been enacted in the state which corresponds territorially to the Federal district, in which the injury was received, and in which the action is brought, and the provisions of that statute are sub-

²In *Northern P. R. Co. v. Hogan* (1894) 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, the doctrine of *Chicago, M. & St. P. R. Co. v. Ross* (1884) 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184, that a conductor is a vice principal, was not followed, where the suit was brought in the Minnesota district for an injury received in North Dakota. "It was ruled, in effect," said the court, "that, under the provisions of the Dakota statute, a master is not liable to one employee for the negligent act of another, unless the latter is at the time engaged in the performance of some duty that is personal to the master. There seems to be no valid ground, therefore, for dissenting from the view which is advocated by counsel for the plaintiff in error, that the statute of North Dakota, as construed by the highest court of that state, exempts the railroad company from liability for the injuries complained of, and that in the courts of that state the plaintiff below could not have recovered upon the state of facts proven at the trial. It must also be regarded as a well-established doctrine that the states have the right to regulate the relations existing between employers and employees within their respective borders, and to determine by legislative enactment when and under what circumstances an employer shall be held liable to an employee for an injury sustained by the latter while in his service. So far as we are aware, laws of this description have always been treated as obligatory upon the Federal courts to the same extent and with like limitations as other statutory enactments, even where they modify to some extent the pre-existing rules of the common law; and we can conceive of no sufficient reason why they should not have the same effect in the Federal courts, as rules of decision, which is accorded to other state statutes." The special points raised by counsel, that the statute of Dakota was merely de-

claratory of the common law, that, in construing the statute, the state court merely gave expression to its view of the common law, and that the Federal courts, being courts of co-ordinate jurisdiction, were not bound by the decision of the state court on questions of that character, were thus disposed of: "The argument is ingenious, but, as we think, it is fallacious. The state statute to which reference has been made supersedes the common law in the state where it was enacted, touching the subject to which it relates; and, while it is true that the state court had occasion to refer to the principles of the common law, yet it must be borne in mind that such reference was made solely for the purpose of ascertaining the intent of the law maker as evidenced by the statute in question. It is the statute, however, and not the common law, which is now in force in the state of North Dakota; and it is the statute, as construed by the highest court of that state, which must determine the rights of the parties and control the decision in the case at bar. Any other view would render the statute inoperative and nugatory."

In *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1888) 69 Fed. 353; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (1895) 69 Fed. 357, a Federal court sitting in the district of Tennessee applied, as against the servant of a railway company domiciled in Georgia, the doctrine of the courts of that state (see § 1617, *ante*), that employees of a receiver of a railway company are not within the purview of the statute abrogating the defense of common employment as regards employees of railway companies. See chapter LXXVI, *ante*.

See also *New York, N. H. & H. R. Co. v. O'Leary* (1899) 35 C. C. A. 562, 93 Fed. 737, where the general rule that rights under a state statute are determinable with reference to the decisions of state courts was recognized.

stantially identical with those of a statute previously enacted in another state, the more recent of the two statutes should ordinarily receive the same construction as that which has been placed upon the earlier of the statutes by the courts of the state in which it was enacted, unless the courts of the state in which the court is sitting have previously rendered decisions inconsistent with that construction.³ But in two instances a Federal court of appeals has declined to attach to a statute the same interpretation as similar enactments had received in states other than that in which these courts were sitting.⁴

1996. [872] —as between Federal and foreign courts.—When an action is brought in a Federal court for an injury received outside the territorial limits of the United States, the juridical situation is not affected by the peculiar relations existing between the national government and the individual states. Under such circumstances, therefore, the right of action is determined with reference to the general principles of private international law.

That an American citizen is entitled to maintain an action in a Federal court for injuries received on the Mexican division of a railway which is operated by an American corporation on both sides of the frontier has recently been held in several cases.¹

The doctrines applied are summarized in the propositions set out in the subjoined note. These statements constitute the headnotes of the report of the first of the three cases cited, and were adopted in the second of those cases as a correct presentment of the law.²

³ *Chicago, R. I. & P. R. Co. v. Stahley* L. ed. 829, 12 Sup. Ct. Rep. 905, note (1894) 11 C. C. A. 88, 27 U. S. App. 1, *supra*.
157, 62 Fed. 363.

⁴ The effect of the cases referred to is that statutes abrogating the defense of coservice, so far as regards employees of railway companies, are not applicable where the action is brought against a receiver of a railway. *Hornsby v. Eddy* (1893) 5 C. C. A. 560, 12 U. S. App. 404, 56 Fed. 461 (Georgia cases not followed); *Peirce v. Van Dusen* (1897) 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693 (Georgia and Texas cases not followed).

As to these cases, see further, § 1617, *ante*.

As to the rule applied where the accident occurs in a state where a receiver may be sued, and the action is brought in a state where the courts have determined that a receiver is not subject to an action, see *Texas & P. R. Co. v. Cox* (1892) 145 U. S. 593, 36

L. ed. 829, 12 Sup. Ct. Rep. 905, note 1, *supra*.

¹ *Evey v. Mexican C. R. Co.* (1897) 38 L.R.A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294; *Mexican C. R. Co. v. Marshall* (1899) 34 C. C. A. 133, 91 Fed. 933; *Mexican C. R. Co. v. Jones* (1901) 48 C. C. A. 227, 107 Fed. 64.

² (a) The right of an employee of a railroad company, injured in the Republic of Mexico by the negligence of the company, to recover in a civil action damages for such injury under the law of that republic, may be enforced in a Federal court of the state of Texas, having jurisdiction of the parties and the subject-matter; that law being neither so vague and uncertain nor so dissimilar to the law of the state of Texas as to prevent it from being so enforced, and both parties being citizens of the United States.

(b) A dissimilarity between the law of another country and the law of a

On the ground that, under the Civil Code of Quebec (arts. 1053, 1054), a servant can recover for injuries caused by the negligence of a coservant, it was lately held by a Federal court sitting in the district of Vermont that an American company was liable for injuries so caused, if they were received in that part of its system which was operated on Canadian territory.³

[In a Vermont case it has been held that, in an action for injuries received in Quebec, evidence of the law of that Province is admissible, although by that law contributory negligence is not a defense to the action, while in Vermont it is.⁴

To sustain an action in a Federal court for injuries sustained in a foreign country by a servant because his master failed to supply him with reasonably safe machinery and appliances, the servant is not bound to show that the action was maintainable under the law

state in the Federal court of which it is sought to be enforced will not prevent such enforcement, unless the dissimilarity is so great as to conflict with the settled policy of that state.

(c) The fact that a person injured by the negligence of a railroad company in another country might sue in that country is not sufficient to prevent him from suing in a United States court, particularly where the company owns and operates part of the same line of railroad in the state in which the suit is brought.

(d) The fact that acts of negligence for which the laws of Mexico give a civil remedy constitute also a crime under the laws of that country does not prevent the person injured from maintaining a civil suit therefor in a United States court, the liability not depending on the criminal prosecution or conviction of the defendant.

(e) The fact that the provision of the Penal Code of Mexico (article 323) that the judge may award, as "extraordinary indemnity," any sum that he may determine, considering the "social position" of the person injured, is against the policy of our law, is no obstacle to a suit in a United States court to enforce a right given by the law of Mexico, there being no prayer for such extraordinary indemnity.

(f) The fact that the Mexican courts are not governed by precedent, and have no reports of adjudicated cases, is not an obstacle to an action in a United

States court to enforce a right given by the laws of Mexico.

(g) The decisions of a state court that a law of another country is opposed to the policy of the state, and cannot be enforced there, are not controlling in the Federal courts, the question of international comity being controlled by international law and custom.

³ *Boston & M. R. Co. v. McDuffey* (1897) 25 C. C. A. 247, 51 U. S. App. 111, 79 Fed. 934. One of the authorities relied upon was *Dennick v. Central R. Co.* (1880) 103 U. S. 11, 26 L. ed. 439, where the court used the following language: "It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal, and not a real, action, and is of that character which the law recognizes as transitory, and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance.

Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

⁴ *Morrisette v. Canadian P. R. Co.* (1904) 76 Vt. 267, 56 Atl. 1102.

of the foreign country, but the court will decide it according to the principles of the common law, in the absence of anything to show that they were not in force in the country where the injury occurred.⁵

An action based on an accident happening on the high seas, upon a German vessel carrying the German flag, is governed by the German statute.⁶

1996a. —as between state and foreign courts.—In a Michigan case, it has been held that where the accident occurred in Canada, the plaintiff's rights were to be determined by the law of Canada, although the statutes of that country abrogated in part the fellow servant doctrine, while it remained in full force in Michigan.¹

1997. [873] Lex fori controlling, where statute affects merely the remedial procedure.—The general principle, that everything which pertains merely to the remedy is controlled by the law of the state where the action is brought,¹ involves the corollary that the question whether the servant's action is barred by the lapse of time is determined by the provisions of the statute of limitations which is in force in the jurisdiction where the suit is brought, and not by those of the statute of the state in which the injury was received.²

On the ground that a rule of evidence has no extraterritorial force,

⁵ *Cuba R. Co. v. Crosby* (1909) 95 C. A. 539, 170 Fed. 369.

⁶ *Beyer v. Hamburg-American S. S. Co.* (1909) 171 Fed. 582.

¹ In applying the Canadian statute making the master liable for injuries to a servant caused by the negligence of a servant intrusted with any superintendence, the court in *Rick v. Saginaw Bay Towing Co.* 132 Mich. 237, 102 Am. St. Rep. 422, 93 N. W. 632, said that, before the court of any state is justified in refusing to enforce a right of action accruing under the laws of any other state or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interest of the citizens of the state of the forum, and that it does not follow that, because the statute differs from the law of the forum, it is contrary to the public policy of the state, within the meaning of this rule.

¹ *Herrick v. Minneapolis & St. L. R. Co.* (1883) 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; 2 Kent, Com. * 462.

² *Canadian P. R. Co. v. Johnston* (1894) 25 L.R.A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738 (action held maintainable, although it would have been barred if brought in the jurisdiction where the accident occurred); *Krogg v. Atlanta & W. P. R. Co.* (1886) 77 Ga. 202, 4 Am. St. Rep. 79.

See generally, Story, Conf. L. § 576.

This elementary rule seems to have been somewhat strangely lost sight of in *Fingartner v. Illinois Steel Co.* (1896) 94 Wis. 70, 34 L.R.A. 503, 59 Am. St. Rep. 859, 68 N. W. 664, where, in an action between parties who were both domiciled in Illinois, it was held that the effect of the statute of limitations which was in force in that state could not be considered, because it had not been put in evidence. The reason thus assigned, in so far as it may be taken to imply that the statute would have been regarded as controlling if it had been properly proved, manifestly places the court in antagonism to the authorities above cited.

it has been held that a statute which provides that, where an injury is caused by a defect in the appliances of a railway company, proof of the existence of that defect shall be presumptive evidence of the company's knowledge thereof, is not the law of the case in an action brought in another state, where the ordinary rule still prevails, that a master is not liable for injuries caused by defects, unless they could have been discovered by the exercise of ordinary care.³

1998. [874] Presumptions as to the law prevailing in other states.—

In a case already cited, where the action was brought in a Federal court in the district of Texas for an injury received in Mexico, it was laid down that, in the absence of proof, it was to be presumed that in regard to the liability of an employer for negligence resulting in injuries to an employee, the law of Mexico was the same as the law of Texas, in both of which countries the civil law originally prevailed.¹

Some courts have held that, in an action brought in one state for an injury received in another, it will be presumed, in the absence of evidence to the contrary, that the rights and liabilities of employers and employees are regulated by the common law.² In some

³ *Jones v. Chicago, St. P. M. & O. R. Co.* (1900) 80 Minn. 488, 49 L.R.A. 640, 83 N. W. 446. For a discussion of the principle here applied, see Taylor, Ev. § 49; Story, Conf. L. 7th ed. 634a.

¹ *Mexican C. R. Co. v. Marshall* (1899) 34 C. C. A. 133, 91 Fed. 933. The court cited Phillips on Ev. (Cowen & Hill's and Edwards' notes), pp. 42 *et seq.*, and adjudged cases there cited; 1 Rice, Ev. p. 65; Wharton, Ev. § 1292; and added: "Indeed, there is good authority for holding that, as the state of Texas recently constituted a part of the Republic of Mexico, the courts in the state of Texas, in proper cases, will take judicial notice of the laws common to both prior to the separation. *Malpica v. McKown* (1830) 1 La. 248, 20 Am. Dec. 279; *Berluchaux v. Berluchaux* (1835) 7 La. 539. Further than this, it is to be noticed that, under the laws of Mexico as proved herein, it is clear that a civil action may be brought to recover damages resulting from negligence."

² *Charleston & W. C. R. Co. v. Miller* (1901) 13 Ga. 15, 38 S. E. 338, second appeal (1902) 115 Ga. 92, 41 S. E. 252 (where the correctness of the declaration in an action for injuries caused by

defective machinery was tested with reference to the law prevailing in South Carolina); *St. Louis, I. M. & S. R. Co. v. Brown* (1899) 67 Ark. 295, 54 S. W. 865 (defense of coservice presumed to be available); *Lay v. Nashville, C. & St. L. R. Co.* (1908) 131 Ga. 345, 62 S. E. 189 (see § 1992, note 1, *ante*); *Whitfield v. Louisville & N. R. Co.* (1910) 7 Ga. App. 268, 66 S. E. 973 (fellow servant rule presumed to exist in Tennessee); *Southern R. Co. v. Elliott* (1907) 170 Ind. 273, 82 N. E. 1051 (fellow servant rule presumed to exist in sister state); *Wabash R. Co. v. Hassett* (1908) 170 Ind. 370, 83 N. E. 705 (no cause of action for death presumed unless foreign statute giving it is pleaded).

"Tennessee being of common origin with Alabama, this court, in the absence of proof, will presume that the common law of this state prevails in Tennessee. . . . While this court will presume that the common law prevails in Tennessee, this *prima facie* presumption is to the effect that it is the same in Tennessee as in Alabama." *Louisville & N. R. Co. v. Cook* (1910) 168 Ala. 592, 53 So. 190.

of the cases cited, it will be observed, this rule was applied where the question was whether the doctrine of common employment precluded recovery. But the position has also been taken that this doctrine was not a part of the common law existing at the date of the separation of the United States from England, and that for this reason the courts of one state cannot presume that the doctrine exists in another state, and thus cast upon a plaintiff who is seeking to recover for an injury received in such other state through the negligence of a fellow servant the burden of proving that the doctrine has been abrogated by statute.³ Although the weight of judicial authority is in favor of a different theory, the statement here made with regard to the date at which the doctrine was introduced into English law is possibly accurate. See § 1394, *ante*. But even if its accuracy be conceded, the fact relied upon can scarcely be regarded as adequate to support the conclusion deduced from it. A more reasonable theory of the situation, it is submitted, is that any court in which the common law is administered is chargeable with notice of the universal acceptance which the doctrine in question has obtained in all the countries and states in which that system of law prevails, and that, as a result of the imputation of this notice, such a court is bound to entertain a *prima facie* presumption that the defense of coservice is still open to an employer in each of those countries and states.

These considerations would seem to be decisive against the correctness of another decision also, in which it was laid down that, where an action for an injury received in one state is brought in another state in which an act is in force which abrogates the defense of coservice as regards certain employees, it will be presumed, in the absence of specific testimony to the contrary, that the law of the state in which the injury was received is the same as that of the state in which the action is brought, although the defendants have alleged that the common-law rule prevails in the former state.⁴

[The view taken by the Wisconsin court has been expressly repudiated.⁵

³ *Williams v. Southern R. Co.* (1901) 128 N. C. 286, 38 S. E. 893.

⁴ *MacCarthy v. Whitcomb* (1901) 110 Wis. 113, 85 N. W. 707.

⁵ In Indiana it has been held that in a suit by a railroad employee to recover damages for injuries occurring in another state and caused by the negligence of a co-employee, the common-law rule

exempting the employer from liability for injuries caused by the negligence of a fellow servant will be presumed to be in force, in the absence of any showing to the contrary, notwithstanding the existence, in the state in which the action is brought, of a statute abrogating such rule. *Baltimore & O. S. W. R. Co. v. Read* (1902) 158 Ind. 25, 56 L.R.A..

It has been held in one case that, in the absence of averments and proofs of the laws of the sister state in which the injury was received, the case should be dealt with in accordance with the common law prevailing in the state in which the action was brought, notwithstanding the contention that the common law never prevailed in the sister state (Florida).⁶]

468, 92 Am. St. Rep. 293, 62 N. E. 488. ⁶ *Watford v. Alabama & F. Lumber*
To the same effect, *Baltimore & O. S. Co.* (1907) 152 Ala. 178, 44 So. 567.
W. R. Co. v. Jones (1893) 158 Ind. 87,
62 N. E. 994.

CHAPTER LXXXVII.

MEDICAL ATTENDANCE ON SERVANTS.

- 1999. Master's duty in respect to providing medical assistance for his servant.
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1999. Master's duty in respect to providing medical assistance for his servant. Generally.—*a. Ordinary servants.*—In some English cases decided during the eighteenth century the courts used language which, if taken literally, would seem to indicate the acceptance of an unqualified doctrine to the effect that a master is subject, merely by virtue of the relation created by the contract, to the obligation of providing medical assistance for his servant.¹ But in the cases referred to, the master's liability to a third person who had attended or supplied medicines to a servant was not involved.

All that the older authorities which bear directly on the subject can fairly be said to show is that there was at one time a strong judicial tendency to adopt the rule that a master might be held liable for the medical expenses of a menial servant, but not for those of other servants.² Soon after the commencement of the nineteenth

¹ In *Rex v. Hales-Owen* (1718) 11 Mod. 278, where Pratt, C. J., remarked that "the master is to keep the servant in sickness and in health," the point actually decided was that the fact that an apprentice was suffering from a serious disease (scrofula) did not warrant the justice in dissolving the contract of apprenticeship.

In the three following cases, the question was merely whether the service had been continuous for an entire year, so as to give the servant a right to a settlement.

"If the servant is taken ill, by the visitation of God, it is a condition incident to humanity, and is implied in all contracts. Therefore the master is bound to provide for and take care of the servant so taken ill in his service." *Rex v. Christchurch* (1760) Burr. Sett. Cas. 494.

"The master is bound to take care of his servant during illness, if the latter

inist upon it." *Grose, J., in Rex v. Sutton* (1794) 5 T. R. 657.

If a farm servant is taken ill after the service has begun, the master is bound to support him, and cannot turn him away on that account. *Rex v. Winterset* (1783) Cald. 298.

² In *Newby v. Wiltshire* (1785) 2 Esp. 739 (farm servant injured by a fall from a wagon), Lord Mansfield said: "In general, from humanity and kindness a master should take care of his servants; but the question here is, What is the law?" He decided that no action lay against the master to compel him to repay the parish for the cure of his servant.

The distinction between menial and other servants was not specifically referred to in the above case; but in *Scarman v. Castell* (1795) 1 Esp. 270, in which an action for medicine supplied to, and medical attendance upon, the defendant's servant, was held to be

century, however, it was definitely laid down, as a rule applicable to all descriptions of servants, except apprentices, that a general obligation to provide medical attendance is not an implied incident of a contract of hiring. In one point of view this rule involves the consequences that the master is not bound to defray the expenses of such attendance upon a servant who falls sick, or receives personal injuries in the course of the employment, unless he has expressly or impliedly agreed to do so.³ Under another aspect it operates so

maintainable, Lord Kenyon adopted the view of plaintiff's counsel, that the earlier case merely defined the extent of a master's obligations in respect to a servant in husbandry. He expressed the opinion that a master was obliged to provide for his servant in sickness and in health, and that he was therefore liable for medicine furnished to a servant while in his service. The servant was not at liberty to go abroad and contract debts for medicines; but while he was under the master's roof, the master was under a legal as well as a moral obligation to provide the necessary medicines. In his argument at the bar in *Wennall v. Adney* (see next note, *infra*) Sergeant Bayley sought to cut down the effect of this decision by pointing out that the medical man, though not expressly employed by the defendant, might reasonably infer from the circumstances of his being sent for to the defendant's house that he was to be paid by the defendant. But this theory of a contract implied from the particular circumstances does not harmonize with the very general language of Lord Kenyon.

The doctrine applied on *Scarman v. Castell* was recognized in *Simmons v. Wilmott* (1800) 3 Esp. 91, 93, where Lord Eldon instructed a jury that, if the servant had been one who lived under the roof of his master, his master would have been liable for his medical expenses.

³ *Wennall v. Adney* (1802) 3 Bos. & P. 247. The effect of this case, as stated in the headnote, is that a master is not liable upon an implied assumption to pay for medical attendance on a servant who has met with an accident in his service. Lord Alvanley, C. J., said: "In this kind of question much may depend upon the nature of the contract entered into between the master and the servant. Sometimes a master

engages to supply his servant with necessary victuals, and it may undoubtedly be argued that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as, if a servant be in need of wine or victuals of that description, which are given by way of medicine. It is sufficient, however, to observe, that previous to the case of *Scarman v. Castell* [note 2, *supra*] there is no authority in the law of England to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance which the necessity of the case usually requires, to recover against them the amount of money expended." Heath, J., said: "I believe that the humanity of Lord Kenyon mislead him when he adopted the doctrine upon which he decided the case of *Scarman v. Castell*. Probably at the moment it occurred to him that, if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute; but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters; for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness." Rooke, J., said: "The contract on the part of the servant is merely to serve; but on the part of the master it is varied by numberless stipulations, according to the inclinations of the contracting parties. I cannot think, however, that, without any stipulation to that

as to exempt the master from liability for refusing or neglecting to provide such attendance.⁴

By nearly all the American courts this rule has been adopted without any qualifications.⁵ It has been held that the mere fact of the

effect, the master is liable to furnish his servant with medicine. . . . If the general principal contended for by the plaintiff were to be adopted as a rule of law, many persons who are obliged, for the purposes of their trade, to keep a number of servants, would be unable to fulfil the duty imposed upon them by the law. It must be left to the humanity of every master to decide whether he will assist his servant according to his capacity or not." *Chambre, J.*, said: "The obligation of the master to provide medical assistance for his servant, if any, must arise from contract. It cannot be contended that a master impliedly contracts to furnish his servant with all necessities; for in some cases he neither engages to furnish cloaths nor victuals; and if not, he is not bound to provide either. What has passed at nisi prius upon this subject has been somewhat hasty; and I think the rule there laid down would be very disadvantageous to the servants themselves if it were adopted."

Under the English poor laws which were in force until the introduction of the present system of poor relief in 1835, the medical expenses of a pauper servant were a charge upon the parish. See cases cited in the reporters' notes to *Newby v. Wiltshire* (1785) 4 Dougl. K. B. 284, and 2 Esp. 739, 5 Revised Rep. 772, and *Watling v. Walters* (1823) 1 Car. & P. 132.

⁴ *Makarsky v. Canadian P. R. Co.* (1904) 15 Manitoba L. Rep. 53. On the authority of *Wennall v. Adney* (last note), it was there held that allegations in a statement of claim that the deceased came to his death as a result of the injuries received and of the neglect of the master to provide medical or surgical care were demurrable.

⁵ That a master is not, in the absence of some stipulation, under any legal obligation to furnish medical attendance to a servant who falls sick or is injured, while engaged in his duties, is explicitly recognized in the following cases: *Davis v. Forbes* (1898) 171 Mass.

548, 47 L.R.A. 170, 51 N. E. 20; *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Denver & R. G. R. Co. v. Iles* (1898) 25 Colo. 19, 53 Pac. 222; *Sweet Water Mfg. Co. v. Glover* (1859) 29 Ga. 399; *Toledo, W. & W. R. Co. v. Rodrigues* (1868) 47 Ill. 188, 95 Am. Dec. 484; *Vorass v. Rosenberry* (1899) 85 Ill. App. 623; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (1895) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458; *Union P. R. Co. v. Beatty* (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845; *Clark v. Missouri P. R. Co.* (1892) 48 Kan. 654, 29 Pac. 1138; *Lithgow Mfg. Co. v. Samuel* (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906; *Malone v. Robinson* (1893) — Miss. —, 12 So. 709; *Spelman v. Gold Coin Min. & Mill. Co.* (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597; *Voorhees v. New York C. & H. R. R. Co.* (1909) 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed in (1910) 198 N. Y. 558, 92 N. E. 1105.

In *Holmes v. Hutchinson* (1833) Gilpin, 447, Fed. Cas. No. 6,639, the court, in comparing the condition of seamen with other laborers, remarked that the latter are not only obliged, in case of sickness, accident, or other disability, to maintain themselves and pay all the expense of nursing, medicine, and medical attendance, but that their wages, their only source of revenue, the only means by which they can provide such expenditure, are stopped.

In South Carolina it is the duty of the railroad company under Gen. Stat. § 1525 to notify a physician most accessible to the place of an accident occurring on its road by which employees are injured. *Adkins v. Atlanta & C. Airline R. Co.* (1887) 27 S. C. 71, 2 S. E. 849. In that case a brakeman, seen on the train after leaving a station, was missed at the next stopping point, but supposed to be on the engine. When it was learned that he was not there, the conductor telegraphed inquiries to the station where the absent brakeman was first missed, and to head-

employer's having summoned a doctor to attend upon a servant will not render him liable for the doctor's fees.⁶ But in Indiana, the doctrine has been propounded that, although in ordinary cases a railway company is not subject to the obligation of furnishing medical assistance to his servants, unless he has agreed to do so, such an obligation should rest upon him "in extraordinary cases, where im-

quarters, and inquiries were made along the line on the return trip. Held, that it was not the duty of the railroad company to institute search for the brakeman's body along the line of its track. The court said: "The fact that an employee of a railroad company is known to be on the train at a certain point . . . many miles distant is certainly not sufficient to affect the company with knowledge of the fact that such person was either killed or injured by an accident on the road between those two points, especially when there is no evidence whatever that any accident had occurred to the train in the interval between such points, and, on the contrary, the evidence shows that the train ran as usual between those points, with nothing exceptional or peculiar to attract the attention of those charged with the management of the train. The absence of a person under such circumstances might, and most naturally would, be accounted for in some other way than by supposing that he had been injured."

In *Baltimore & O. R. Co. v. State* (1874) 41 Md. 268, it was held that, where a railway servant who, under the rules of the company, had no right to claim compensation "when disabled by sickness or other cause," had been injured in the course of his duties, the duty of the company to take care of him, in his capacity as a servant, ceased when he had been conveyed to the nearest place where medical attendance was procurable, and there left in charge of a physician. In respect to his subsequent transportation to a more distant point, his relation to the company was declared to be that of a stranger in a like condition.

His rights were therefore determinable with reference to the rule that no obligation rests upon railway companies to furnish physicians, nurses, or other attendants for sick and disabled persons who may choose to travel in

their conveyances, the duty to carry safely being no greater in the case of such persons than in the case of those who are in good health.

⁶ *Meisenbach v. Southern Cooperage Co.* (1891) 45 Mo. App. 232. Thompson, J., in delivering the opinion, said: "The reason and policy of this rule are obvious. . . . When a person is dangerously wounded and perhaps unable to speak for himself, or suffering so much that he does not know how to do it, any person will run to the nearest surgeon in the performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally responsible for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for the want of the necessary immediate attention. Nor is there a common and fair understanding that the person making the request, or ordering it to be made in behalf of the sufferer, under the circumstances, assumes responsibility for the surgeon's bill."

In *Jesserich v. Walruff* (1892) 51 Mo. App. 270, the same court relied upon the general principle that, "when a person requests a physician to perform service for a patient, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request to the patient is such as raises a legal obligation on his part to call in a physician and pay for his services." There was declared to be no such relation existing between employer and employed. (See § 536, *ante*.)

The decisions regarding the nonliability of a parent to pay for medical services rendered to an emancipated child are noticed in the section just mentioned.

mediate medical or surgical assistance is imperatively required to save life or avoid further serious bodily injury.”⁷

The obligation thus predicated is regarded as one of a real juristic quality, being referred to the general duty of a master to provide for the safety and welfare of his servant.⁸ But it is open to serious doubt whether the differentiation, in this point of view, between cases which do and which do not involve an emergency, can be sustained. There does not appear to be any sufficient reason why the general duty should be taken to be, in the sense suggested, one of a wider and more comprehensive scope in the former class of cases than in the latter. Other authorities have predicated the existence of a moral obligation on the part of a master to see that a servant who has been injured in the course of his employment shall receive proper medical attention, and have treated that obligation as a ground for attributing to certain agents of the master the authority to make, within somewhat indefinite limits, such agreements as may be necessary with physicians, surgeons, and nurses.⁹ But this point of view is open to the criticism that, by most of the authorities, English and American, the doctrine that a moral obligation may be a sufficient consideration to support an express promise has been rejected.¹⁰ As will be seen by referring to §§ 2003, 2004, the implied authority of the employer's agents to provide injured servants with medical attendance may be referred to more satisfactory considerations than that of a merely temporary duty or a moral obligation. The mere fact that the physical state of the servant which necessitated the medical expenses in question was produced by conditions or occurrences betokening negligence on the master's part is not regarded as

⁷ *Ohio & M. R. Co. v. Early* (1894) 141 Ind. 73, 28 L.R.A. 546, 40 N. E. 257. Similar language had previously been used in *Terre Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752. See also the other decisions of the courts of this state which are cited in § 2004, *post*.

⁸ See the extracts given in § 2004, note 2, from the opinions of the supreme court.

⁹ *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 289; *Fraser v. San Francisco Bridge Co.* (1894) 103 Cal. 79, 36 Pac. 1037. In the California case last cited the court took the ground that, as the injured person had been a faithful serv-

ant of the company, and had been injured while engaged in the performance of his duties, there was “some moral obligation resting on the defendant to furnish to him such assistance and care as were necessary to relieve his sufferings, and, if possible, to save his life,” and that this obligation “should be held to constitute a sufficient consideration for the legal obligation expressed in the letter” in which the president's promise was made.

¹⁰ See *Pollock, Contr.* ** 169, 170; 1 *Parsons, Contr.* ** 432-434.

In *Holmes v. McAllister* (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 229, the court refused to found a legal upon a moral obligation. See § 2002, note 3, *post*.

a sufficient reason for imposing on him larger obligations than he would have been subject to if the case had not involved that element.¹¹ But the consideration that the injury in a given instance may possibly be attributable to the master's fault may not unreasonably be regarded as an important element in determining the extent of an agent's implied authority to provide medical assistance, with a view to keeping down the damages which may ultimately be awarded. See § 2004, *post*.

b. Slaves.—In a case decided while slavery existed in the United States, we find a general intimation to the effect that a master was bound to defray the medical expenses of his slave.¹² But in another case his obligation in this regard was stated in a qualified form.¹³

c. Apprentices.—See chapter xc. § 2159, *post*.

2000. Specific agreements to provide medical assistance.—*a. Generally.*—The question whether the master had, in a given case, undertaken to provide medical assistance for a particular servant is one of fact, to be determined from a consideration of the whole evidence in the case. From the English decisions it would appear that the intention on the master's part to become responsible for the medical expenses of a menial servant may with propriety always be inferred by a jury, where it is shown that he himself had called in his own

¹¹ *Davis v. Forbes* (1898) 171 Mass. 548, 47 L.R.A. 170, 51 N. E. 20.

In cases where the master is liable to an action, although he "must answer to the servant in damages for all loss proximately resulting, including physicians' and surgeons' charges, yet the law does not require him to engage their services, or to pay them for performing the services. He may, if he chooses, employ physicians, surgeons, and nurses, and promise to pay them, and, of course, he would then be liable directly to those employed." *Spelman v. Gold Coin Min. & Mill. Co.* (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

In *Chicago, B. & Q. R. Co. v. Howard* (1895) 45 Neb. 570, 63 N. W. 872, the court seems to have based his decision that the defendant company was not liable for more than a judicious selection of the physician summoned by it, upon the conception that, as the company had not been guilty of any negligence which contributed to the servant's injury, the employment of the physician was voluntary.

But a different theory was propounded in *Lithgow Mfg. Co. v. Samuel* (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906, the effect of which is stated in § 2003, note 20, *post*.

¹² *Sweet Water Mfg. Co. v. Glover* (1859) 29 Ga. 399.

In this connection it is interesting to note that by § 217 of the old Babylonian Code of Hammurabbi, it was provided that the owner of a slave should give two shekels of silver to the physician who operated on him for a severe wound.

¹³ "If medical aid or other assistance be rendered to a slave in a case of necessity which does not admit of a previous application to the master, the person so rendering the assistance would probably be entitled to compensation from the master; and the law would raise an implied assumpsit on the ground that the master was legally bound to make the requisite provision for his slave." *Dunbar v. Williams* (1813) 10 Johns. 249.

physician to treat the servant,¹ or that the person representing him in the management of his household had, without raising any objections, allowed the doctor, after he had, in the first instance, been called in by a member of the household, to go on treating the patient.²

Those decisions seem to embody a doctrine somewhat more favorable to the medical attendant than that which has been applied in some American cases. In one of these it was held that a master is not necessarily liable, on an implied assumpsit, for medical attendance on a servant, even when he himself has summoned the doctor; and that in order to warrant recovery against him, it must be shown that he made in his own name a request upon the credit of which the services were rendered, or else that he subsequently did something which indicates that he expected to pay for the services.³ In another case it was laid down broadly that a railway company is not affected with such an obligation to care for an injured employee

¹ In a *nisi prius* case it has been held that, if a menial servant falls ill, and a master calls in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there is a special contract between master and servant that he should do so. *Sellen v. Norman* (1829) 4 Car. & P. 80, per Gaselee, J.

² In a *nisi prius* case, it was held that, where the father of a family lives at a distance from the place at which his children are, and puts them under the protection of servants, the establishment being visited at frequent intervals by his wife, who is apparently intrusted with the general superintendence of the household, he may properly be found liable for the fees of a doctor called in by one of the servants to treat a wet nurse for an illness which resulted from suckling one of defendant's children, where the evidence shows that his wife knew of the surgeon's attendance and expressed no disapprobation. The mere fact that he afterwards sends his own surgeon will not, under such circumstances, release him from liability. *Cooper v. Phillips* (1831) 4 Car. & P. 581, per Taunton, J.

On the other hand, it was held, in the same case, that, where a servant, who had hurt her foot in getting over a gate, called in a surgeon, who was not

the regular medical attendant of the family, without the knowledge of her master or mistress, the master was not liable to pay the surgeon's bill.

³ *Clark v. Waterman* (1835) 7 Vt. 76, 29 Am. Dec. 150. The circumstances which were held to import liability on the master's part, and the extent to which the court intended to go in imposing such liability, are shown by the following passage from the opinion: "The employment or request to attend upon the patient was made and often repeated by the defendant, in person. Complaints of the inefficient practice of one of the plaintiffs, and an exchange for the other, like a man acting in his own business, and at last a virtual admission that it was his expectation to pay, by calling for the bill to lay before the town, 'to see if they would not assist him;' this appears like an original employment of the defendant, and the plaintiffs' making the charges directly against him is evidence that they so understood it. If these facts were such as it would have been proper, in action of assumpsit, to have left to the jury, then they were sufficient for the auditors to act upon. The other circumstances in the case, that the patient had been brought up by the defendant, and although she had been three years out of her time, yet continued most of the time in his family, and 'in his employ, without contract or

that any person without authority from the company may render the service and compel payment. To bind the company there must be an express and explicit request from a person who is empowered to act for it.⁴ It has also been denied that the mere fact that a father requested a physician to attend a child of full age who was sick at his house, but for whom he was not bound to provide, raised an implied promise on the father's part to pay the physician for his services.⁵

It is manifest that if the employer neither expressly agreed beforehand to pay for the services in question, nor was under any implied obligation to do so, a promise of payment, made after the performance of the services, will merely constitute a promise to pay the debt of another person, and as such will be invalid under the statute of frauds, unless it is in writing.⁶

That the account offered by the plaintiff hospital was made out to the patient, and that she was sued jointly with the employer, does not, as a matter of law, conclusively prove that the plaintiff did not rely upon the implied promise of the employer to pay the bill.^{6a}

The duration of the responsibility of an employer who has expressly promised to pay for medical or surgical attendance upon a sick or injured servant is a matter which depends upon the terms of his promise and the condition of the servant.⁷

A railroad company which undertakes to care for and treat one

accounting,' renders it not improbable that he was willing to render her all needful aid in time of sickness, and that his intention was really such as his conduct naturally indicated. . . . We do not mean by this determination to intimate that a man who, by himself or another, happens to go for a doctor to attend a hired man, or maid, or sister, or friend in his house, is of course liable to pay the bill. In many, and perhaps most, of these cases, the person going or sending might be regarded as a mere medium of intelligence that a physician was wanted; but where the proof in the case is sufficient, as we think it was in this case, to authorize the triers to find that the defendant intended, and gave the plaintiffs so to understand, that he was himself the employer, then the original credit was given to him; then he is liable upon general principles; and it, not being the debt of another, is not affected by the statute of frauds."

⁴ *Toledo, W. & W. R. Co. v. Rodriguez* (1868) 47 Ill. 188, 95 Am. Dec. 484.

For a case in which the failure of the defendant company either to disavow knowledge of the despatch of the message purporting to be sent from it, or to disclaim the authority of the person sending it, was held, in connection with other evidence, to justify the conclusion that the company had assumed the responsibility for the care of an injured servant, see *General Hospital Soc. v. New Haven Rendering Co.* (1907) 79 Conn. 581, 586, 118 Am. St. Rep. 173, 65 Atl. 1065, 9 Ann. Cas. 168.

⁵ *Rankin v. Beale* (1897) 68 Mo. App. 325.

⁶ *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220.

^{6a} *Gainesville & A. County Hospital Asso. v. Hobbs* (1910) 153 N. C. 188, 69 S. E. 79.

⁷ The effect of one case is thus stated in the headnote written by the court: The defendant took one of its employees, who had been seriously injured, to plaintiff's hospital, and at its request and upon its promise to pay for his care and treatment, the plaintiff accept-

of its employees suffering from smallpox, and negligently permits him to escape, is liable to persons to whom he communicates the disease while he is at liberty.^{7a}

b. Liability of employer where deductions from wages were made to cover medical expenses.—In some countries the legislatures have explicitly recognized and regulated the right of employers to make deductions from the wages of servants for the purpose of furnishing them with such medical attendance as they may require.⁸ But, even in the absence of such provisions, the validity of stipulation between the parties that deductions shall be made for the purpose is indisputable. Such stipulations usually have reference to the establishment and disposition of specific relief funds, in which the contributory servants are entitled to share, when they are disabled by accident or sickness.⁹

Under arrangements of this character the employer may be held liable for any damages which proximately result from his failure to

ed and received him as a patient for an indefinite period, no length of time being mentioned. Subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger of his life or health, the defendant gave notice that thereafter it would not be responsible for his care or treatment. Held, that defendant had no right thus to terminate its liability; that, under the circumstances, it was an implied condition of the contract that defendant could only terminate it by removing the patient, or when he could be dismissed by the plaintiff without serious danger to his life or health. In order to relieve itself from liability for care and treatment, furnished after the notice, on the ground that the patient had means of his own to pay for it, the burden was on defendant to prove that he had means out of which the plaintiff could and should have collected its pay. *St. Barnabas Hospital v. Minneapolis International Electric Co.* (1897) 68 Minn. 254, 40 L.R.A. 388, 70 N. W. 1126.

As to cases in which the existence of a special emergency is a controlling factor, see § 2004, *post*.

^{7a} *Missouri, K. & T. R. Co. v. Wood* (1902) 95 Tex. 223, 56 L.R.A. 592, 93 Am. St. Rep. 834, 66 S. W. 449.

⁸ Deductions in respect to medicines and medical attendance are excepted

from the operation of the English truck act 1831. See § 23, of that act.

By the Nova Scotia companies' doctors act, Rev. State, 1900, it is provided that, in any case in which an employer in any mine or manufacturing establishment makes a monthly deduction from the wages of employees for medical attendance, any employee may, by writing, specify any practitioner in respect to whose services the employer may deduct a fee from the wages of such employee. But the employer is not bound to recognize the specification of any employee, unless at least 150 employees write in, specifying some qualified practitioner whose services they desire.

⁹ In *Keith v. Chicago, B. & Q. R. Co.* (1908) 82 Neb. 12, 23 L.R.A. (N.S.) 352, 130 Am. St. Rep. 655, 116 N. W. 957, railway employees only were permitted to join the relief department of the defendant company, an institution organized to pay disability benefits to members. The contract for benefits provided that "the word 'disability' shall be held to mean physical inability to work." Held, that the words "physical inability to work" meant inability to perform such labor as the injured member was engaged in at the time of his injury, or similar labor which would enable him to earn wages equally as remunerative.

furnish such attendance as is contemplated.¹⁰ But a servant to whom the stipulated benefits have been refused is bound to keep down the

¹⁰ *American Tin-Plate Co. v. Guy* (1900) 25 Ind. App. 588, 58 N. E. 738 (complaint alleging that the company's physician, although notified of the injury, failed to give the injured person the necessary treatment, held to state a cause of action).

Where every employee of a railroad company on a certain division, who should have been employed as much as four days in a month, was required by the company to contribute to the maintenance and support of a hospital, and the employees making the payments had no voice in the management or control of the hospital, except that superior employees gave to their subordinates certificates of admission when they were sick or injured, plaintiff, an employee who was injured after being employed more than four days, was held to be entitled to admission to the hospital. The company, therefore, was pronounced liable for injury resulting from the refusal of his foreman to give him a certificate entitling him to transportation and entrance to the hospital. *Illinois C. R. Co. v. Gheen* (1902) 112 Ky. 695, 66 S. W. 639, rehearing denied in 112 Ky. 704, 68 S. W. 1087. It was laid down that, if plaintiff was entitled to admission to the hospital, he was entitled to the skilled surgical treatment and accommodations he would have received there, and also to board and transportation, and that, if the company refused to furnish these things, it was liable for the cost thereof.

In a suit by an employee for breach of a contract by which, in consideration of fees deducted monthly from his wages, he was to have free medical treatment at a hospital, he was held to be entitled to damages for increased suffering due to the refusal of defendant's foreman to telegraph for a free pass to the hospital, inasmuch as the evidence showed that it was the duty of such foreman to send such a despatch. *Gulf, C. & S. F. R. Co. v. Harney* (1899) — Tex. Civ. App. —, 54 S. W. 791.

In an action for breach of contract to furnish a railroad employee medical and hospital attention, the plaintiff is entitled to recover for both physical and mental suffering. But damages resulting from the fact that, by reason

of his lack of money to pay his railway fare, and the defendant's refusal to transport him, he was compelled to walk from the place where he was taken sick to his home, are too remote to be recovered. *Galveston, H. & S. A. R. Co. v. Rubio* (1901) — Tex. Civ. App. —, 65 S. W. 1126.

A servant who is entitled, under the implied terms of his contract, to be transported free of charge when he sustained an injury, to the employer's hospital, and is not promptly furnished with transportation, is bound, if he has enough money in his possession, to expend it in reaching the hospital without delay, and thus avoid aggravating the effects of his injury. If he fails to do so, he cannot recover damages in respect of the pain and suffering caused by the delay of the employer in performing his obligation. *St. Louis Southwestern R. Co. v. Reagan* (1906) 79 Ark. 484, 7 L.R.A. (N.S.) 997, 96 S. W. 168. The court said: "When a party has the money with which to purchase a ticket, the natural and ordinary damages which would result from a breach of a contract to give him free transportation would be the price of the transportation agreed to be furnished. If plaintiff in this case had the money with which to have purchased a ticket, we see no reason why he should be allowed to recover damages for failing to furnish a ticket, beyond the price of the ticket. For if, having the money to buy a ticket, he voluntarily exposed himself to this additional pain and suffering rather than pay the price of a ticket, his suffering caused by the delay is as much due to his own inaction as to that of the defendant, and he ought not to be allowed to hold the defendant liable for pain and suffering that he could have avoided by such a slight expenditure on his part."

In *Harding v. Ostrander R. & Timber Co.* (1911) 64 Wash. 224, 116 Pac. 635, the following extract from the opinion sufficiently states the facts and the law: "It is alleged that a hospital fee was exacted and withheld; that the appellant was prostrated; that the respondent had a logging road with engines and equipment at hand for conveying the appellant to the hospital; that it know-

damages as far as possible, and to this end should engage a doctor. For the expense so incurred the employer will be liable.¹¹

Speaking generally, an employer who is administering a relief fund cannot be held liable for the fees of a physician engaged by a servant without his consent.¹² Nor can a doctor who is merely summoned in an emergency (see § 2004, *post*), and not regularly retained, recover for any services rendered after he is notified that his assistance is no longer needed.¹³

ingly left him lying prostrated for a period of twenty-four hours; and that his pain and suffering were augmented and his damages otherwise aggravated thereby. The rule of an implied liability to furnish free transportation to a hospital, when hospital fees are withheld from the wages of the employee, has usually been applied to common carriers. But we think the same obligation arises from the facts alleged here."

In a Quebec case it was held that where it is established that a physician engaged by an employer, upon a salary provided by means of deduction from the wages of the employees, for the purpose of affording medical care and attendance to the employees, was not a licensed medical practitioner, the employer is liable for damages sustained through the fault of the physician, unless he produces evidence to show that the engagement was made through error and without fault attributable to him. *North Shore Power & Nav. Co. v. Walhis* (1911) Rap. Jud. Quebec 20 B. R. 506.

An arrangement whereby the employer retains a certain portion of the wages, with the understanding that the employee when sick or injured shall be entitled to hospital benefits at the employer's expense, implies, in the absence of an understanding to the contrary, the continuance of the benefits while the sickness or injury requires it; and the employee is not bound by a rule, subsequently adopted, of which he had no notice, to the effect that treatment shall continue as long as the attendant or chief surgeon deems it necessary, and that benefits will not be given for injuries received in a fight. *Scanlon v. Galveston, H. & S. A. R. Co.* (1905) — Tex. Civ. App. —, 86 S. W. 930 (action for damages).

In *Missouri, K. & T. R. Co. v. Graves* (1909) 57 Tex. Civ. App. 395, 122 S. W. 458, it was held that although a railroad company did not take an injured employee to its nearest surgeon for twelve hours after the accident, yet it is not liable if a competent physician and surgeon gave him prompt and efficient aid at the place of injury.

¹¹ *Illinois C. R. Co. v. Gheen* (1902) 112 Ky. 695, 66 S. W. 639, rehearing denied in 112 Ky. 704, 68 S. W. 1087.

In *Jackson v. Pacific Coast Condensed Milk Co.* (1912) — Or. —, 37 L.R.A. (N.S.) 757, 120 Pac. 1, it was held that an employer who, under his contract with an employee, retains a portion of his wages for a hospital fund, the contract making him a member of the hospital association, membership in which entitles him to medical attention when injured, is liable for the expense of such attention when the employee is injured in his service; and that an employee who, under his contract of employment, is entitled to medical attention from his employer in case of injury, may employ a physician at his employer's expense, if the employer has no hospital service, and does nothing towards furnishing needed attention after receiving notice that the employee has been injured and needs treatment.

¹² *Struthers v. Canadian Copper Co.* (1903) 6 Ont. L. Rep. 374.

¹³ *Florida Southern R. Co. v. Steen* (1903) 45 Fla. 313, 34 So. 571. In that case a hospital department supported in part by the contributions of the employees of each of several railroad companies had been formed as an appendage to each company. Held, that the fees of a physician retained by one of the companies to attend upon a servant were recoverable from that company, and not from the association.

The contract between the employer and employee does not enure to the benefit of a physician employed by the servant.¹⁴

In one case it was held that, under a contract to treat an employee in its hospital, a mining company was not bound to provide a specialist at the hospital.¹⁵

The mere retention, by the employer, of a part of the servant's wages for the support of a hospital for the use of the employees, does not impose upon the employer the absolute duty to furnish each contributor all the medical or surgical attendance he may need or require, whether the fund provided is sufficient or not, as the only liability assumed in collecting the fund is to expend it for the purpose for which it is given.¹⁶

As to the extent of the liability of an employer for the negligence of the physicians and surgeons whom he engages for his relief department upon the right of an injured servant to recover damages, see § 2005, *post*.

¹⁴ *Thomas Mfg. Co. v. Prather* (1898) 65 Ark. 27, 44 S. W. 218. It is intimated, however, that the injured servant might be entitled to recover the amount paid for medical attendance. The court said: "Moreover, the contract here was 'to furnish medical attendance,' not to pay the wages or for the services of a physician whom Brown might employ. According to the express terms of the contract, the company did not surrender to Brown the right to bind it by a contract he might make with a physician, or constitute him its agent to employ a physician, and hence the company is not bound, according to the written contract, for the services of a physician whom Brown employed. But the court found 'that this employment of plaintiff as physician was known to defendant company, and by it, through its officers, fully approved.' This might be sufficient, in a suit brought by Brown against the company, to recover of it the sum which he had paid his physician, to estop the company from denying that it had waived its right to furnish its own physician, provided the company knew that the physician was called by Brown in reliance upon his contract for it 'to furnish him medical attendance.' But this finding cannot avail appellee, for he is suing upon an express written contract, which, as we have seen, was not for his benefit."

A dissenting opinion in the above case took the view that the contract of employment, which recited that the employer was insured against accidents resulting in bodily injury or death of the employees, and that he would pay certain sums in case of bodily injury and furnish medical attendance, was a contract to create a fund for the benefit of a third person, in consideration of services to be performed by him in the future; and that the servant was not the beneficiary contemplated, for he was one of the original parties who had engaged to raise the fund, and was in fact the only contributor to that fund, and that, therefore, the physician who rendered the medical assistance was the beneficiary, and should be entitled to recover from the employer for services rendered in caring for the injured servant.

¹⁵ *Miller v. Camp Bird* (1909) 46 Colo. 569, 105 Pac. 1105 (mining company held not liable for expenses of employee going from its hospital to a distant city to consult specialist, although he went on advice of physician at the hospital).

¹⁶ *Miller v. Beaver Hill Coal Co.* (1906) 48 Or. 136, 85 Pac. 502. In this case there was in fact no contract proved.

As to the effect of the acceptance of the benefits of a relief department upon the right of an injured servant to recover damages, see chapter LXXXIII., *ante*.

2001. Power of employing corporations to defray the medical expenses of their injured servants.—In cases where the employer is an individual, *sui juris* and competent to enter into a valid contract of hiring, there is obviously no possible ground upon which his right to defray the medical expenses of his servant can be disputed. But the question whether a corporation, an artificial legal entity, organized and subsisting for certain definite objects, should be regarded as having an implied power to devote its funds to such a purpose, is less simple.

In England this question has not been directly determined. But in several cases the doctrine has been recognized that, under some circumstances, certain agents of railway companies are invested with an implied authority to bind their principals by contracts for medical attendance on injured servants;¹ and as the plea that this use of the corporate property was entirely *ultra vires* was not put forward, it may be assumed that an expenditure of money for this purpose is regarded as being within the general powers of such companies.

In the United States, as will presently be shown, numerous decisions have been rendered which would justify a similar assumption for similar reasons. But the legality of such expenditures of money has also been categorically affirmed in cases in which it has been held that an express provision in the charter of a railway company is not necessary to entitle it to incur expenses for medical attendance on its injured servants.² This implication is declared to be justified by the

¹ *Walker v. Great Western R. Co.* (1867) L. R. 2 Exch. 228 (see § 2003, note 3, *post*); *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. 173 (see § 2004, note 1, *post*).

² *Toledo, W. & W. R. Co. v. Rodriguez* (1868) 47 Ill. 188, 95 Am. Dec. 484; *Toledo, W. & W. R. Co. v. Prince* (1869) 50 Ill. 26; *State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co.* (1903) 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93; *Maine v. Chicago, B. & Q. R. Co.* (1899) 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Vickers v. Chicago, B. & Q. R. Co.* (1885) 71 Fed. 139.

In *Atlantic Coast Line R. Co. v. Beazley* (1907) 54 Fla. 311, 45 So. 761, the question whether the defendant's contract guarantying the payment of the expenses of its relief department

was *ultra vires* was not determined by the court, as it was a foreign corporation, and the record did not show what its powers were. But the court would apparently have followed the above cases if the point had been directly involved.

In one case the somewhat restricted rule was propounded that the employment of a surgeon by a railway company in advance, to render his services to employees in case of injury in the course of their employment, without salary or compensation other than the value of his services actually rendered, is not *ultra vires*. *Bedford Belt R. Co. v. McDonald* (1896) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022. But it can scarcely be supposed that the court intended to suggest that there is, as regards the extent of a railway com-

consideration that "humanity, however, imposes upon the company engaged in such hazardous business a moral obligation, when a person in its employment, without fault on his part, is injured while rendering service, to provide such assistance as may be necessary to prevent loss of life, or irreparable injury. This much is demanded by humanity, fair dealing, and the conservation of the interests of the company."³ An additional reason for assuming the existence of such a power has been found in the fact that the financial interests of the company may often be subserved by defraying the medical expenses of an employee.⁴ It has also been held that a want of power

pany's powers, a distinction between cases where a medical man is employed before the need for his services arises, and those in which he is engaged after an accident. In fact, it quoted with approval the following passage in Thompson on Corporations: "An implied power will be ascribed to any corporation employing labor, to incur expense on account of injuries received by its employees in the line of their employment, in the absence of any express statutory grant of such power."

³ *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405. The precise effect which is here attributed to the two elements here specified is somewhat obscure. If the court intended to suggest that the "interests" of the company require "fair dealing" and "humanity," the standpoint is not a very lofty one.

The conception that the implied power of a railway company in this regard rests upon the existence of a moral obligation is also adverted to in a case, already cited, where it was laid down that, in order to bind a railway company, "there should at least be a request to perform the service. It is not such a duty resting on the company that any person, without authority from the company, may render the service and compel payment. The request should be . . . explicit, and from a person who is empowered to act for the company." *Toledo, W. & W. R. Co. v. Rodriguez* (1868) 47 Ill. 188, 95 Am. Dec. 484. The fact that an employee has been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, was there held to be a sufficient consideration to support a promise by its authorized agent to pay for the nursing and

medical attendance necessary to his cure.

⁴ In *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458, the court said: "It is not unfrequent for railroad companies and other corporations to furnish board and medical attendance to employees disabled in the service of such companies, even when the injuries are not the result of the negligence of the corporation. Such action, whether resulting from humane or selfish motives, is certainly to be commended; and no court would hold the contract of a railroad company, duly entered into for such an object, as *ultra vires*, and incapable of being enforced."

In the latter case of *Union P. R. Co. v. Beatty* (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, the same court reasoned as follows: "There is no legal obligation resting upon the company to provide medical or surgical care for those who have been injured in its service, but the grounds upon which the authority of the superintendent to make such contracts is inferred is that it is a reasonable thing for the company to provide for the care and cure of persons who are engaged in the hazardous employment of railroading. This risk is incurred by them while they are devoting their energies and labor to promote the interest of the company, and they are generally dependent upon the daily labor thus given for the support of themselves and families. Again, they are skilled in the particular branch of the service in which they are engaged, and their injury, to some extent, interferes with the business of the company, and retards the operation of the road. The company is therefore interested in the speedy cure of employees who have been disabled, and in their

cannot be predicated, as regards railway companies, on the ground that a beneficial association, conducted on the usual footing of a relief department, is an insurance company.⁵

The grounds upon which the implied power of a railway company to defray the medical expenses of its servants has, in the cases so far cited, been assumed to rest, are manifestly inapplicable where it is a question of the legality of its undertaking for profit the business of furnishing and operating hospitals and supplying medical attendance to its servants. Such a business is undoubtedly beyond its chartered powers.⁶

That a mining company also has the same implied power to incur expenses for medical attendance would also seem to be clear from the same reasoning as supports such power in railroads.⁷

early resumption of the duties for which they have been specially trained."

In *Beck v. Pennsylvania R. Co.* (1899) 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908, the court stated its position in the following words: "A contract by which an employee permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employees is provided, and by which the employer undertakes to manage the fund and furnish the agreed-on relief, is, in my judgment, within the implied powers of the employer, if a corporation. On the part of the employer, such a scheme may be deemed likely to increase the efficiency of the force it employs, and on the part of the employee it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not *ultra vires*."

Similarly, in *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 4 So. 394, 6 Ann. Cas. 804, it was observed: "We have been pointed to nothing in the charters of either of the companies which would prevent them from establishing such a relief hospital. The primary object of a railroad company is to build, equip, and operate its line for the transportation of freight and passengers. In doing so, a vast number of employees are employed, all of whom, while in service on the line, are subject to dangers in multiplied forms, and

to physical injuries, for which the companies are subjected to liabilities, and the injured often to irreparable loss. Any device or improvement which prevents, or is intended to prevent, these evils, is incident to the due exercise of their powers, and clearly within the scope of their organization."

See also the Alabama case cited in the preceding note.

The element of "interest" is viewed from a different standpoint in the cases cited in § 2004, note 3.

⁵ *State ex rel. Sheets v. Pittsburg, C. & St. L. R. Co.* (1903) 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93. For other cases in which, for other purposes, such departments were held not to be insurance companies, see *Harrison v. Alabama Midland R. Co.* (1906) 144 Ala. 246, 40 So. 394, 6 Ann. Cas. 804; *Donald v. Chicago, B. & Q. R. Co.* (1895) 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; *Johnson v. Philadelphia & R. R. Co.* (1894) 163 Pa. 127, 29 Atl. 854.

The general rule is that a beneficial association formed with the view of accumulating a fund which is to be used exclusively in granting relief to its members is not an insurance company. *Com. v. Equitable Beneficial Asso.* (1890) 137 Pa. 412, 18 Atl. 1112; *Northwestern Masonic Aid Asso. v. Jones* (1893) 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253.

⁶ *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, per Sanborn, J., *arguendo*.

⁷ *Gibson v. O'Gara Coal Co.* (1909)

And it has been held that a manufacturing corporation has the same implied power.⁸

2002. Obligation of individual employers under contracts made by their agents for medical attendance upon servants.—*a. In cases where no emergency is involved.*—On principle, there appears to be no adequate reason why the extent of the powers which, in the absence of the element of a special emergency, the general manager of the business of an individual may be presumed to possess in respect of binding his employer by a contract to pay for medical services rendered to his subordinates, should not be determined upon precisely the same footing as the powers of a similar functionary under a corporation. But the decisions which bear upon the subject reflect a doctrine which is distinctly less favorable to the party claiming compensation for such services than that which is indicated by the cases cited in the next section. The accepted doctrine seems to be that the authority of a general manager to make a contract in his employer's behalf cannot be predicated from the mere fact of his holding the position of general manager, but must be established by direct evidence.¹

151 Ill. App. 424. The court said: "What its chartered powers are, is not in proof. Assuming, however, that no such explicit powers were given it by its charter, it would be going very far to hold that a corporation for the purpose of mining coal simply, would not have the right and power to choose and hire a physician to treat men injured in its employ. It is most certainly liable to the employees for necessary physician's bill in an action for an injury caused by the negligence of the company. If, then, it is liable in such cases for such bills, it certainly will not be contended that in such cases it cannot bind itself for such services to a physician of its own selection, when the employee being treated accepts such treatment. We think such a contract would be within its implied powers. If so, the duty to determine when and in what cases it would be liable for the physician's bill would rest on the coal company, and not on the physician; and for any employment of a physician by it to treat its injured employees the company would be liable to the physician, although it might afterwards appear that the employee was not injured by the coal company's negligence. Our supreme court, however, has decided that corporations may incur such a liability

although their charters may not in terms authorize it, and further discussion is unnecessary."

⁸ *Weinsberg v. St. Louis Cordage Co.* (1909) 135 Mo. App. 553, 116 S. W. 461.

¹ In *Harris v. Fitzgerald* (1902) 75 Conn. 72, 52 Atl. 315, an action against a railroad contractor for medical services rendered to one of his laborers, under an alleged request from one of his sons, who was superintendent and general manager, the defendant testified that the duties of the employee were exclusively to make estimates for contracts, and to see that the work contracted for was carried on diligently and properly. Held, that the jury had been erroneously instructed that it was for them to determine whether the son, from the general scope of his employment, was authorized to employ plaintiff, and that they should have been told that, if they believed defendant, then the son had no such implied authority.

In *Malone v. Robinson* (1893) — Miss. —, 12 So. 709, it was held that, in the absence of proof that the manager of a plantation had received specific authority to make contracts for medical services to the workmen under him, the owner of the plantation could not be

The same rule is clearly applicable in the case of employees of a rank inferior to that of general manager.²

b. In cases where an emergency is involved.—The theory that the powers of agents of individual employers in respect to providing medical attendance for injured servants are enlarged whenever a pressing emergency arises was rejected in the only relevant decision which the present writer has been able to find.³ The circumstance that the employer was an individual was, however, not a differentiating element in the case. The position of the court was, that the rule regarding the liability of employers for the remuneration of doctors summoned in an emergency by one of their superior employees is applicable only to those occupations which subject servants to unusual hazard. The opinion was expressed that, in the absence of specific evidence, it could not be presumed that work in a laundry was an occupation of this description.

2003. Binding effect of contracts made in behalf of corporations. Question considered apart from the element of a special emergency.—

a. Contracts made by managing official of railway companies.—It is unnecessary to cite authorities to show that, if the general power to defray the medical expenses of a servant is conceded to belong to any given company, the validity of a contract which involves the exercise of that power cannot be questioned if it has been made in due form

held liable for such services, although he had in some instances furnished medical attendance for the hands on the plantation, and saw the physician while rendering such services, and did not object. It is submitted that, under the circumstances shown, there was at least a question for the jury, whether the manager had ostensible authority to engage a physician.

A verdict finding that one who was the general manager of a bakery and operated its plant, and on occasions previous to the one in question had employed physicians, was authorized to bind the corporation for services rendered by a physician to an employee, injured while engaged in its employ, was upheld in *Freeman v. Junge Baking Co.* (1907) 126 Mo. App. 124, 103 S. W. 565.

² In *Harris v. Fitzgerald* (1902) 75 Conn. 72, 52 Atl. 315, it was held to be error to leave it to the jury to determine whether one who was performing the duties of bookkeeper and timekeeper of

a contractor was authorized to make the given contract.

³ *Holmes v. McAllister* (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220. The court argued thus: "An employee in a bank, store, or shop, or upon a farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employee might properly deem immediate medical attendance necessary, and, in the absence of the employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such an employer would be liable if he himself sent for the physician to attend one of his employees. It is unnecessary upon this point to express an opinion. We do not, however, hesitate to hold that in those avocations of life unaccompanied by dangers, an employer is not liable for the services of a physician summoned by his manager or foreman or other servant to attend an employee in a case of sudden illness or injury, whatever his moral obligation may be."

by its directors, acting in their official capacity. It is also clear that a company having such a general power is bound by any contract relating to the medical care of a servant, which is made by an agent employed to supervise a department which is constituted for the very purpose of attending to such matters, and is not so improper and unreasonable, that it manifestly transcends the limits of any authority which can fairly be imputed to him.¹

But the extent to which such a contract should be deemed obligatory when entered into by an agent whose ostensible functions are primarily concerned with the operation of the road, or with the conduct of other portions of the company's commercial or financial affairs, is less easily determined. It seems permissible to lay it down that, if any class of agents to whom this description is applicable is to be regarded as possessing an implied power to provide medical attendance for servants, the power must necessarily be lodged in all agents who wield a large discretionary authority as respects the manner in which the whole business of the company, or an extensive department thereof, shall be carried on from day to day. It is apparently with reference to some such assumed principle as this that the courts have declared the company to be liable for the value of medical services rendered at the request of its president, vice president, secre-

¹An employee who is managing the claim department, and who has control of the doctors on the line, to the extent of appointing them and giving them general directions as to the disposal and treatment of injured employees, has been declared to have authority to empower one of those doctors to hire a nurse for an injured servant. *Bigham v. Chicago, M. & St. P. R. Co.* (1890) 79 Iowa, 534, 44 N. W. 805.

In *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456, in an action against a railroad company for the negligence of physicians furnished by its relief department, the answer alleged that the relief department had the option to furnish members surgical attention when injured, or refrain from doing so. The department's examining physician testified that, while it was customary to pay bills for medical treatment of members, such payment was made only when members were disabled by accident; and that if the physician was satisfied that

the member was receiving unskilful treatment, the fact would be reported to the department, which could advise, but could not change the physician against the patient's will. Medical examiners were authorized to certify bills for surgical treatment, and such examiner employed S. to treat plaintiff, whose bill for services was certified and paid by defendant. Held, that the question whether such examining physician had the authority to employ S. to treat plaintiff was for the jury.

In a case where passengers were involved, a claim agent visited them, employed doctors, and consulted with them as to the condition and treatment of the injured, and the railroad paid for the services of such doctors. Held, that the jury were warranted in finding that the agent, when he employed and agreed to pay a certain doctor for his attendance on an injured person, was acting within the scope of his authority. *Reynolds v. Chicago, B. & Q. R. Co.* (1905) 114 Mo. App. 670, 90 S. W. 100.

tary, and treasurer,² by its general manager,³ by its general superintendent,⁴ and by one of its division superintendents.⁵

² *Bedford Belt R. Co. v. McDonald* (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022 (general employment of doctor to attend to any case that might arise). It may be questioned, however, whether this decision, so far as it relates to the offices of secretary and treasurer, is correct.

That a solicitor has no power to bind a railway company by a contract for medical attendance on a passenger was held in *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092.

³ *Walker v. Great Western R. Co.* (1867) L. R. 2 Exch. 228 (laying down the broad rule that such an officer has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request on a servant of the company injured by an accident on their railway); *Louisville, E. & St. L. R. Co. v. McVay* (1884) 98 Ind. 391, 49 Am. Rep. 770 (holding that the courts will presume from the ordinary meaning of the term "general manager," that such an officer has the general direction and control of the affairs of the corporation, and authority to bind it by contracts for nursing, etc., of persons injured on the line of the railway); *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405 (*arguendo*).

Where a witness whose evidence was not rebutted described the employee in question as a "general agent," this term was deemed to be synonymous with "general manager," and as importing sufficient authority to enable him to bind the company by a contract for board and medical attendance upon an injured servant. *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458. The court considered that the medical attendant "was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employee before receiving him into his hotel, after the general agent of the company had agreed that the company would pay for the board and service."

⁴ *Toledo, W. & W. R. Co. v. Rodrigues* (1868) 47 Ill. 188, 95 Am. Dec. 484; *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405 (ap-

plying the principle that, in the absence of specific evidence, the extent of the power of an officer or agent to bind a railway company by contracts of this kind may be inferred from the nature and scope of his usual duties and functions, which in this instance had reference to the supervision of the general management and operation of the road).

The doctrine of the supreme court of Indiana is, that an officer of such high rank as the general superintendent of a railway is presumed to possess authority to employ surgeons and nurses to attend on persons injured by trains.

The facts that the right to make such contracts is vested in another officer, and that the company is not liable for the injuries in question, are immaterial. *Cincinnati, I. St. L. & C. R. Co. v. Davis* (1890) 126 Ind. 99, 9 L.R.A. 503, 25 N. E. 878 (rule laid down in a passenger case).

In *Pacific R. Co. v. Thomas* (1877) 19 Kan. 256, the court laid it down that the general superintendent of a railroad company would presumptively have authority to employ a surgeon to attend on an employee of the company who had been injured while in the employ of the company; but that this presumption might be rebutted by evidence showing that he had no such authority. The claim in this case was for services rendered until the servant's recovery.

In *Marquette & Q. R. Co. v. Taft* (1873) 28 Mich. 289, the court was equally divided upon the question whether, in the absence of evidence of an express delegation of the appropriate authority, or of some usage of the defendant company, or of circumstances tending to show the nature or scope of his powers and duties, it was permissible to infer that an agent described as a "superintendent" had power to bind the company by a contract for medical attendance on an injured servant for a considerable period. Cooley, J., one of the judges who held that no evidence to prove a special authorization was requisite, reasoned thus: "The nature of the powers of a railway superintendent is indicated by the title to his office. He has the general superintendence of the business of the corporation, and is

The cases cited in this subsection show that the supreme court of Indiana was mistaken in declaring that "no court, we think, has gone

the immediate representative of the corporation in all business transactions with the public. This is the general fact, though there are undoubtedly cases where these general powers are, in part, at least, conferred upon the president, or some other officer. There is no evidence that this case was exceptional, and we must consequently assume that this superintendent had the usual powers of general supervision. In all that pertains to the general management and operation of the road he speaks and acts for the company, and he must decide for it, and may make contracts on its behalf in the emergencies which unexpectedly arise, connected with, or growing out of, the running of their trains, the transportation of persons or property, and the management and control of servants." This view was affirmed in *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564.

In Kansas it has been held that a telegram from the general superintendent of a railroad to the foreman of a gang of laborers, directing him to employ a physician and do all he could to save the foot or one of the laborers, who had been injured, and make him comfortable, authorized said foreman to contract for the board and care of said laborer, while suffering from his injury. *Atchison & N. R. Co. v. Reecher* (1880) 24 Kan. 228.

It was, however, laid down in a case decided by the superior court of New York city that the company was not liable on a contract made by an agent of a railroad company, who stated that the title of his office was superintendent, and that, as such, he had a general supervisory control over the whole line of the road, everything connected with the running of the road being under his supervision and control, and that he paid money to drivers, conductors, and other persons employed by him as superintendent, but had no direction over the treasury. *Stephenson v. New York & H. R. Co.* (1853) 2 Duer, 341. The court argued as follows: "The only inference deducible from his description of his powers is, that they relate solely to making provision that trains are run as prescribed by the company, that

means and men are supplied for the purpose, and other things are provided which are essential or proper to effectuate this general result. His description of his powers, or of the business which he transacts, does not justify the inference that he is authorized, by his office, to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair or remedy the consequences of such negligence." This case was not carried to a higher court, and has never, so far as the writer is aware, been overruled in New York. But the decision is contrary to the weight of authority, as indicated by the cases cited above.

⁵ In *Pacific R. Co. v. Thomas* (1877) 19 Kan. 256, the court laid it down that presumptively a division superintendent possesses, in respect to matters happening within his jurisdiction, the same authority as the general superintendent, but that this presumption might be rebutted by evidence showing that he had no such authority. *Prima facie*, therefore, his contracts for medical attendance on an injured servant would bind the company, and he would also have power to ratify such contracts when made by inferior employees.

That a division superintendent has power to hire a physician or surgeon to attend on an injured servant was stated, *arguendo*, in *Union P. R. Co. v. Beatty* (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845.

The actual point decided in this case was that, since a railway company has no interest in a passenger, and therefore has no such concern for his health and soundness as it has in its employees who may be injured while in its service, neither a general nor a division superintendent has any implied power to provide medical care and treatment for passengers unavoidably injured. If this was formulated as a rule of general application, not to be qualified even in case of emergency, the doctrine of this court clearly conflicts with that of the English judges who decided *Langan v. Great Western R. Co.* § 2004, notes 1, 3, *post*. The Kansas court relied upon *Cox v. Midland Counties R. Co.* (1849) 3

so far as to hold that even the general manager of a railroad may, on behalf of the company, engage generally in providing medical aid to sick and injured employees and passengers," and that it is only in cases of emergency that the corporate officers have the authority to provide such aid.⁶

In none of those cases was the existence of an emergency treated as a differentiating element. Moreover, having regard to the facts involved in several of them, the actual conclusions arrived at are incompatible with the hypothesis that, in the view of the courts, the powers of the agents in question extended merely to the making of such contracts as might be necessary for the purpose of procuring medical attendance for a brief period immediately after accidents.

b. Contracts made by other employees of railway companies.—No implied authority to make contracts of this description is imputed to superior employees of a lower rank than those specified above,—such as station masters,⁷ conductors,⁸ roadmasters,⁹ yardmasters,¹⁰

Exch. 268, 18 L. J. Exch. N. S. 65, 13 Jur. 65. But there the *ratio decidendi* was the subordinate rank of the agent, not the fact that a passenger was the injured person. See note 7, *infra*. It was also suggested in *Beatty's Case*, *supra*, that, "if the injury to the passengers resulted from the negligence of the carrier, other considerations would enter into the case, which might warrant the implication of authority in the superintendent or some general agent of the company to provide medical attendance and entertainment for them." But the analogy of the most authoritative of the cases cited in § 1999, note 9, *ante*, is against ascribing any differentiating significance to this element.

The authority of a division superintendent to employ a surgeon to attend on an injured servant was again asserted in *Union P. R. Co. v. Winterbotham* (1893) 52 Kan. 433, 34 Pac. 1052.

In Missouri is has been laid down that no recovery can be had against a railroad company for drugs furnished, on the order of a division superintendent, to a traveler hurt by the company's locomotive, unless it is shown that he was authorized to give the order. The courts, it was said, cannot take judicial notice of the duties of such an officer. *Brown v. Missouri, K. & T. R. Co.* (1877) 67 Mo. 122. But possibly so strict a rule of evidence would not be applied by all courts.

⁶ *Cushman v. Cloverland Coal & Min. Co.* (1908) 170 Ind. 402, 16 L.R.A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

⁷ In an English case it was held that it is not incident to the employment of a station master, or other servants of a railway company, that they should bind the company by contracts for surgical attendance on injured passengers, and that the company is therefore not liable for such attendance, without evidence of express authority to their servant to employ the surgeon. *Cox v. Midland Counties R. Co.* (1849) 3 Exch. 268, 18 L. J. Exch. N. S. 65, 13 Jur. 65. That the doctrine here laid down is regarded by English judges as being equally applicable in a case in which a servant is the injured person may fairly be inferred from the fact that, in *Walker v. Great Western R. Co.* (1867) L. R. 2 Exch. 228, 36 L. J. Exch. N. S. 123, 16 L. T. N. S. 327, 15 Week. Rep. 769 (see note 3, *supra*), which was a case of that description, the earlier decision was distinguished solely on the ground of the station master's want of authority to make a contract binding his employers to pay for medical attendance,—a matter entirely beyond the scope of his employment,—and that no stress whatever was laid upon the fact that in the one case the injured person was, and in the other was not, a servant of the defendant. The comments made

upon *Cow's Case* in *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Exch.) 173, have impaired its authority, so far as it may be regarded as embodying the theory that, under no circumstances whatever, can a subordinate officer like a station master bind his employers by contracts for surgical attendance. But there is nothing in those comments to show that the court was prepared to concede to such an officer the power to make contracts of this kind in any cases except those which involved a necessity for prompt action.

That a station agent has no presumptive authority arising out of his position to employ a physician was also laid down in *Cooper v. New York C. & H. R. R. Co.* (1875) 6 Hun, 276. There an employee of the defendant had been injured, and one S., an engineer of a gravel train, telegraphed to M., the station agent at P., to "have Dr. Cooper (plaintiff) at depot, on arrival of No. 1, —a man injured." M. handed the telegram to a hackman, with directions to give it to plaintiff. No other communication was shown between M. or S. and the plaintiff, nor was it shown that either of them had ever undertaken to employ the plaintiff on behalf of the company on any previous occasion. Held, that the plaintiff could not recover from the company for services rendered to the employee, for the reason that no employment by the company was shown. Plaintiff offered to prove that he had previously attended persons injured on the defendant's road, and been paid therefor by the company, but did not offer to show that, in such cases, he had been employed by either S. or M. It was held that this evidence had been properly rejected, under the rule laid down in *Redfield on Railways*, vol. 2, p. 114, to the effect that evidence that the company had ratified similar contracts, made by some particular agent, might be evidence tending to show that it had given him authority to make similar contracts, but was not competent to prove that they had given authority to all their servants to do so.

Other cases in which the authority of a station master to make contracts of this class was denied are the following: *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458; *Tucker v. St. Louis, K. C. & N. R. Co.* (1873) 54 Mo. 177; *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092;

Hall v. New York, N. H. & H. R. Co. (1906) 27 R. I. 525, 65 Atl. 278.

In Scotland it has been laid down that a station master, under his ordinary employment as such, is not an agent entitled to employ a doctor to give continuous attendance either to a servant or to a passenger who is injured on the railway. *Montgomery v. North British R. Co.* (1878) 5 Sc. Sess. Cas. 4th Series, 796 (company was held to be liable to pay for only one visit, there being a rule to the effect that it would be responsible to that extent).

⁸ *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336, 8 N. E. 218; *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 107 (passenger hurt); *St. Louis & K. C. R. Co. v. Olive* (1891) 40 Ill. App. 82; *Peninsular R. Co. v. Gary* (1886) 22 Fla. 356, 1 Am. St. Rep. 194; *Tucker v. St. Louis, K. C. & N. R. Co.* (1873) 54 Mo. 177.

In one case it was held that a physician employed by the conductor of a train to care for a man injured by the train can recover against the railroad company for his services if, after knowledge of his employment by the conductor, the company failed to notify him that it would not be responsible. *Terre Haute & I. R. Co. v. Stockwell* (1888) 118 Ind. 98, 20 N. E. 650.

⁹ The supreme court of Indiana has held that, in the absence of specific evidence as to the duties and powers of such a functionary a court cannot from his designation judicially know or presume that he has authority to bind the corporation by a contract with a third party for nursing a person injured upon the line of the railway. *Louisville, E. & St. L. R. Co. v. McVay* (1884) 98 Ind. 391, 49 Am. Rep. 770.

The authority of a roadmaster to employ a physician was also denied in *Peninsular R. Co. v. Gary* (1886) 22 Fla. 356, 1 Am. St. Rep. 194.

¹⁰ *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 289.

In *Chicago, P. & M. R. Co. v. Kane* (1896) 65 Ill. App. 276, the defendant company was held to be bound by a contract for nursing made by a train master who was apparently clothed with authority. But the evidence upon which this apparent authority was pre-

master mechanics.¹¹ Except under the circumstances discussed in the following section, the company is not liable on contracts made by these and other subordinate employees, unless their action has been ratified by a superior agent who is himself competent to make the contracts.¹² Whether there has been such a ratification is a question of fact, to be determined from the evidence, considered with reference to familiar principles of the law of agency.¹³ "Presumptively, and in the absence of anything to the contrary, where an officer or agent

icated is not specified in the report. It may be doubted whether a train master would have such authority by virtue merely of his official position.

¹¹ Meridith, C. J., *arguendo*, in *Struthers v. Canadian Copper Co.* (1903) 6 Ont. L. Rep. 374.

¹² For instances in which the *ratio decidendi* was a ratification, see *Louisville, E. & St. L. R. Co. v. McVay* (1884) 98 Ind. 391, 49 Am. Rep. 770 (general manager); *Peninsular R. Co. v. Gary* (1886) 22 Fla. 356, 1 Am. St. Rep. 194 (general manager); and the cases cited in the following notes.

¹³ Upon receiving notice of the injury and the employment of a physician by a subordinate, the superior employee, if he desires to repudiate responsibility, should dissent, and notify the physician that the company will not be responsible. But this duty does not arise, and there can be no ratification, unless the superior employee has been informed of the circumstances connected with the employment. Where there is no evidence that he had any notice of these circumstances, until after the services were rendered, the company is not liable. *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405.

Compare the language of the court in *Toledo, W. & W. R. Co. v. Prince*, cited later in this note.

The fact that a railway company may, as respects servants who have been injured in the performance of their duties, especially those whose means are small, be regarded as subject to a moral obligation to furnish medical attendance, seems to be viewed by some courts as affording a sufficient reason for gauging the propriety of a verdict in favor of the plaintiff by standards less rigorous and severe than those which would be applicable in cases where the injured person is a stranger. In *Toledo, W. &*

W. R. Co. v. Prince (1869) 50 Ill. 26, the court argued thus: "Although a railway company is under no legal obligation to provide medical attendance for persons injured in its service, yet this would be so reasonable a thing to do, where the wounded employee is dependent upon his daily labor for support, that a jury will generally find, even upon somewhat slight evidence, that the act of the station agent in employing the surgical skill necessary to save human life was ratified by his superiors. In this case, however, the station agent reported the case to the general superintendent a few days after the accident, and he testifies that he heard no complaint in regard to his action until he afterwards presented the bills for payment. If the superintendent desired to save the company from being held responsible, he should, on receiving the report of the case, have dissented from the action of the station agent, and directed him to apprise the surgeon of such dissent, instead of allowing the latter to continue his services under the belief that he was in the employment of the company."

In another case the same court observed: "Where a day laborer has, by an unforeseen accident, been rendered helpless, when laboring to advance the prosperity and the success of the company, honesty and fair dealing would seem to demand that it should furnish medical assistance, . . . slight acts of ratification by the company will, ordinarily, satisfy a jury that the employment was the act of the company."

A ratification by the general superintendent of the employment of a surgeon by a station agent was held to have been properly inferred from evidence tending to show that, the day after the employee had been injured, the superintendent inquired of the station agent how the man was getting along, that, while he had

of the company has the power in the first instance to employ a physician and surgeon, and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services."¹⁴

A physician or surgeon employed by a railway company to attend to an injured servant cannot bind it by contracts for the payment of the various miscellaneous expenses which may be incurred while the patient is being treated.¹⁵ If he is empowered to make one particular contract of this nature, the special authority thus granted will not be extended by implication.¹⁶

In an Indiana case it was held that authority to employ a physician was reasonably incidental to the duty of visiting injured persons and settling claims, imposed upon an "assistant law agent," so

had information in regard to the character of the injury and the treatment by the surgeon, no objection whatever was interposed or complaint made by him in reference to the act of the station agent, and that afterwards, a few weeks subsequently, in a conversation with the surgeon, the superintendent informed him that the pay would be all right. *Cairo & St. L. R. Co. v. Mahoney* (1876) 82 Ill. 73, 25 Am. Rep. 299.

In *Hall v. New York, N. H. & H. R. Co.* (1906) 27 R. I. 525, 65 Atl. 278, the plaintiff, a physician, was summoned by a station agent to attend an injured servant. He procured a trained nurse for his patient, and the following day prepared a report of the case, which he sent to the principal offices of defendant. Twice after the accident the claim agent of defendant, together with the company's physician, visited the patient, but the plaintiff remained in charge of the case. The plaintiff sent several bills to the defendant for his professional services. The defendant remained silent throughout the proceedings. Held, that the question whether the defendant had ratified the employment of the plaintiff was for the jury. Evidence that the defendant had paid for services rendered in other cases in which the plaintiff had been called in by its station agents, and other officials at times subsequent to the commencement of the services for which the action was brought, was held to be inadmissible on the issue of ratification.

¹⁴ *Pacific R. Co. v. Thomas* (1877) 19 Kan. 256.

¹⁵ As, for example, his board. *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092.

In *Chicago & E. R. Co. v. Behrens* (1893) 9 Ind. App. 575, 37 N. E. 26, it was held that no recovery could be had for certain services rendered to an injured servant who required immediate attention, and who had been brought to plaintiff's house by one of the defendant's regular physicians, in whose charge the servant had been placed by a conductor. The ground upon which the decision was put was that the special verdict on which the claim was based did not find that the servant was injured while in the performance of his duty, nor that the physician had any authority to bind appellant by any agreement, nor that he said or did anything indicating an intention on his part to bind appellant for the payment of any part of the services performed or articles furnished by appellee.

¹⁶ From the fact that a physician in the service of a railway company is authorized to buy medicines on its credit, it will not be implied that he had power to bind the company by a contract for board, lodging, attendance, and nursing of a servant injured on the company's road. *Mayberry v. Chicago, R. I. & P. R. Co.* (1882) 75 Mo. 492.

that whether such agent acted within the scope of his authority in so doing was a matter of proof.^{16a}

c. Contracts made by managing officials of corporations not operating railways.—Some decisions proceed upon the theory that, under normal circumstances, at all events, managing officials have no implied power to bind their principals by contracts to pay for medical attendance upon injured employees. In this point of view a claim based upon a contract of that description will not be allowed, in the absence of specific testimony which warrants the conclusion that the authority of the official who made it was wider than usual.¹⁷

^{16a} *Southern R. Co. v. Hazlewood* (1909) 45 Ind. App. 478, 88 N. E. 636, 90 N. E. 18.

¹⁷ In *Harris v. Vienna Ice Cream Co.* (1904; Sup. Ct.) 46 Misc. 125, 91 N. Y. Supp. 317, recovery was denied on the grounds that the contract in suit could not be said to fall within the purpose of the creation of the defendant company, and that the evidence did not disclose any benefit to it or any authority, actual or apparent, in its president or secretary, to obligate it in the given instance.

In two cases the Indiana court of appeals refused to hold, as a matter of law, that the employment of a physician or surgeon for injured employees comes, ordinarily, within the scope of the duties of a general manager of a manufacturing business. *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1007; *New Pittsburgh Coal & Coke Co. v. Shaley* (1900) 25 Ind. App. 282, 58 N. E. 87 (deciding, on demurrer, that the power of the manager could not be implied, in the absence of an express allegation).

In *Spelman v. Gold Coin Min. & Mill Co.* (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597, the court said: "He [i. e., the manager] cannot, however, bind his principal by a contract to confer a gratuity or bestow a charity, however strong the promptings of humanity may be. He acts for and is virtually the company itself in those matters only which have to do with its ordinary business, and are within the scope of the duties delegated to him for performance. Unless the limits of his authority are shown to have been enlarged, the duties of the general manager are confined to the transaction of the business of the cor-

poration as distinguished from its mere ethical duties, and consequent imperfect obligations or supposed charities. The fact that a certain person is general manager of a mining company does not, in and of itself, imply authority in him to bind the company in matters other than those of business affairs. It may not be said, as matter of law, or declared as a fact judicially known, that general managers of mining corporations are usually clothed with such authority as that assumed by Loomis. So to hold would be to affirm that every general manager may contract with physicians and surgeons in behalf of the mining company for which he is agent, irrespective of the rights of the company, and without regard to whether it was at fault. If he has such authority by virtue of his office, then he may bind the company to pay for the services and expenses of surgeons, physicians, nurses, and others, rendered to and paid out for men who, through their own gross negligence, have suffered injuries in his company's mines, and his promise in the name of the company to pay any price that might be agreed upon by him and those employed would (in the absence of fraud) bind the corporation."

Where a corporation operates a mining plant, and does not authorize its superintendents to employ a physician at the expense of the corporation to attend an employee injured by the machinery of the plant, the law does not imply such authority, at least where there is testimony that such authority was not given or contemplated by those exercising the rights of the corporation. The liability of the corporation for negligence that proximately injures an employee may extend to medical services to an injured employee, but

Another theory is that the liability of the company upon a contract made by its general manager or superintendent may properly be inferred from evidence which goes no further than to show that he was invested with the normal powers of such an official.¹⁸

With regard to the significance of the fact that the injury treated was or was not due to the negligence of the company, there is authority for each of the following doctrines: (1) That in cases where the employee treated appears to have had a good cause of action against the company, its liability under a contract made by its principal executive officer may properly be predicated upon the ground that it is his duty to consult the general interests and welfare of the company, and that this duty under one of its aspects is fulfilled by lessening the damages for which it had become liable; ¹⁹ (2) that the general

this does not create a contract liability for such services. *Atlantic Ref. Co. v. Leffingwell* (1911) 61 Fla. 101, 34 L.R.A.(N.S.) 351, 54 So. 266.

¹⁸ In *Mt. Wilson Gold & S. Min. Co. v. Burbridge* (1898) 11 Colo. App. 487, 53 Pac. 826, this doctrine was propounded with regard to the general superintendent of a mining company, who had full charge of the business and property of the company, and had made arrangements for nursing and caring for a miner. The decision proceeded upon the broad ground that, "as to everything belonging to or growing out of its business, or the management of its property, he represented it, and, presumptively, at least, was authorized to act for it."

In *Hasler v. Ozark Land & Lumber Co.* (1903) 101 Mo. App. 136, 74 S. W. 465, 466, a lumber company was held liable for the fees of a surgeon who, as the evidence showed, had declined to render any services until an official who was both its president and its general manager had agreed to recompense him. The court took it for granted that the official in question had power to make the given contract, the actual point decided being that the case was not one for the application of the rule invoked by the defendant, viz., that unless the relation existing between the person who engages a physician and the person who is to be treated is such as raises a legal obligation to procure and pay for medical attendance upon the latter, the law will not imply a promise to pay the value of the services rendered. See § 537, *ante*.

In *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564, it was held to be for the jury to determine whether one who, for five years, has had charge of the affairs of a corporation as superintendent and general manager, and who was also a member of its board of directors, had authority to bind it by a promise to pay for the attendance of a nurse upon an injured employee. The court adopted the reasoning of Cooley, J., in *Marquette & Q. R. Co. v. Taft* (1873) 28 Mich. 289 (note 4, *supra*). But the case is not easy to reconcile, either with the language used or the conclusion arrived at in *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220, where the foreman of a laundry was held to have no authority to bind his employer, even in a case of emergency. See next section, note 7. The rationale of the more recent decision was that the power of managing officials to make contracts is predicable only in respect of those who control the affairs of companies engaged in extrahazardous occupations, and that there was nothing to show that a laundry company should be placed in this category. But it is obvious that much conflict of judicial opinion regarding similar states of fact must in practice result from the application of a test as vague as the one thus suggested.

See also *Fraser v. San Francisco Bridge Co.* (1894) 103 Cal. 79, 36 Pac. 1037, note 21, *infra*.

¹⁹ *Evans v. Marion Min. Co.* (1903) 100 Mo. App. 670, 75 S. W. 178.

In *Spelman v. Gold Coin Min. & Mill.*

rule under which an employer is exempted from any legal obligation to pay for medical attendance on a servant is subject to an exception in a case where the servant's condition is due to the negligence of his master; ²⁰ (3) that the highest executive officer of a company is presumptively authorized to make a contract respecting medical attendance upon an employee, even though his injury was not caused by its negligence; ²¹ (4) that the authority of a manager to make such a contract cannot be implied from evidence which merely shows that he had reasonable ground to believe that the company was liable for the injury in question, and that he employed the claimant to save it from pecuniary loss. ²² Having regard to the conflict of authority which is disclosed by the foregoing review of the cases, it is clearly

Co. (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597, it was remarked that, if a manager has the power to enter into a contract when the injured person has a valid claim for damages, this power must "rest upon the assumption or theory that, in appointing a general manager, the company impliedly delegates to him authority to lessen the extent of the injuries inflicted by the principal's wrong, and thereby diminish the amount of damages for which the latter would otherwise be liable."

²⁰ *Lithgow Mfg. Co. v. Samuel* (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906. (A case of ratification of the contract). The decision was to the effect that a general manager of a manufacturing company had power to hire or authorize the hiring of a physician or surgeon. But if so broad a doctrine as that enunciated by the court is to be adopted, there would seem to be no adequate reason for drawing the line sharply between such an official and other superior employees of lower grades.

²¹ *Fraser v. San Francisco Bridge Co.* (1894) 103 Cal. 79, 36 Pac. 1037, where the contract was made by the president of the company. As already stated (see § 1999, note 8), this decision was based on the existence of an assumed moral obligation on the employer's part. In so far, as it rests upon that ground, it is conceived that the decision cannot be regarded as a sound precedent. It should be observed, however, that the court also relied upon the consideration that the defendant, by paying one of the attendant physicians a certain sum for his services, and offering to pay the

plaintiff another amount, had "recognized, approved, and confirmed the authority of its president to write the letter and make the contract therein expressed." Upon the actual facts, therefore the decision was correct, irrespective of the grounds upon which it was based.

²² *Swazey v. Union Mfg. Co.* (1875) 42 Conn. 556. The plaintiff did not attempt to prove by specific evidence that the injury was the result of the defendant's negligence, or that the general manager had been authorized to pledge the defendant's credit for the payment of the plaintiff's bill, but relied simply upon the legal inference to be drawn from the fact that he was the defendant's business manager. The conclusions of the court were thus stated: "Upon this record there remained a question of fact as to the extent of Mr. Tuck's authority to bind the corporation by his agreement that it should pay the plaintiff for medical services to Middleton, which should have been submitted to the jury; for, the name given in the motion to the office held by Tuck, to wit, general agent or general business manager, does not furnish a fixed legal standard by which his powers can be measured; it does not put any definite limitations upon them; he did not hold an office known to the law, with duties prescribed with such certainty as that the court can assume judicial knowledge of them; nor does the reasonableness of his belief that the defendant was liable for negligence furnish the true test by which his powers are to be determined. He was a servant of the defendant, appointed by its directors. The extent of

impossible to formulate any definite rules. All that can be affirmed with reasonable certainty is that there is a strong trend of judicial opinion towards the doctrine that the implied powers of the managing agents of railway companies should be deemed to be more extensive than those of similar officers in other companies. Whether that doctrine will ultimately be recognized in other jurisdictions besides those in which it has been adopted remains to be seen. Several of the decisions discussed in the present subsection were rendered by courts which have as yet had no occasion to express their views upon the point, and it is still doubtful what position they will take. The writer ventures to think that there are no adequate grounds for predicated a distinction between railway and other companies.

The correctness of the decision that the manager of a business corporation has no implied authority to furnish medical aid and assistance to a servant who has been injured outside the line of his duties would presumably not be questioned in any jurisdiction.²³

d. Contracts made by other employees of corporations not operating railways.—Whatever may be the correct doctrine regarding the powers of managers of companies, it may be taken as settled law that no supervising agents of any lower grade are authorized to make contracts for medical services.²⁴

his power to bind the corporation depends in part upon its by-laws, if any such there be, touching his office; in part upon the language of the vote of the directors appointing him, if any such appears of record; in part upon their knowledge and approval of, or the acquiescence of the corporation in, acts performed by him; and in part upon usages which may be shown to exist, controlling the matter. Nor is there any rule of law by which the question as to his power to bind the corporation by his agreement in this case is made to turn upon the magnitude or the insignificance of the sum involved; no principle can be made to rest upon such an unstable foundation." No definite opinion was expressed as to the liability of a company in cases where the injury was, in point of fact, due to its negligence.

²³ *Chase v. Swift & Co.* (1900) 60 Neb. 696, 83 Am. St. Rep. 552, 84 N. W. 86. There the plaintiff had attended certain wounded men who had come to the city where the defendant's packing house was situated, to take the places

of employees who had gone out on a strike. The theory upon which the action was prosecuted was that the defendant's manager had agreed to take care of any of the new men who should be injured by the strikers in consequence of having engaged in the service of the company. The court said that the evidence did not show when, where, or why, the plaintiffs' patients were injured. It was certain that they were not hurt while in the actual service of the defendant, and as there was no proof that they were assaulted by the strikers, or that there was any causal relation between their injuries and the service in which they were engaged, it seemed quite clear that it was not within the apparent range of the manager's agency to employ a physician to attend them.

²⁴ In *Godshaw v. J. N. Struck & Bro.* (1900) 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781, the defendant was held not to be liable on a contract made by a foreman whom he had engaged to superintend the construction of a building. The court said: "There is a

e. Ratification of contracts by directors.—The question whether the agent who made the given contract for medical attendance was authorized ceases to be a material element if the evidence shows that his action was subsequently approved by the directors of the company.²⁵

In some cases the employer is estopped from denying that the employee had power to call a physician because of the authority which had been conferred upon the employee.²⁶

marked distinction between the power and authority of a general and special agent to bind his principal. A general agent is usually authorized to do all acts connected with the business or employment in which he is engaged, while a special agent is only authorized to do specific acts in pursuance of particular instructions, or with restrictions necessarily implied from the act to be done; but, in either case, if the agent exceeds the authority conferred, his acts will not bind the principal. Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are regarded as dealing with the power before them, and they must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power." As to this case, see further, note 5 to the next section.

In New Brunswick it has been held that the superintendent and bookkeeper of a mill owned by a nonresident who was represented by a general agent had no authority to hire a surgeon to attend an injured workman. *Guy v. Brady* (1885) 24 N. B. 563. The report does not state whether the general agent was residing at the mill,—a circumstance which would obviously have a very distinct relevancy.

²⁵ In *Scott v. Superior Sunset Oil Co.* (1904) 144 Cal. 140, 77 Pac. 817, a ratification of the contract was held to be a warrantable inference from testimony that the plaintiff was engaged as physician by one who was secretary, treasurer, and acting manager of the defendant; that the employment was sanctioned by the majority of the directors of the corporation; and that the board did not as a body dissent from

the employment. It was held not to be a prerequisite to recovery, that the employment of the plaintiff should have been made or ratified by the action of the board at a regular meeting. The separate assent of a majority of the board was all that was necessary, under the given circumstances.

See also *Fraser v. San Francisco Bridge Co.* (1894) 103 Cal. 79, 36 Pac. 1037, note 21, *supra*.

Although a station agent of a railway company has not been authorized to employ a surgeon to attend an employee injured in the service of the company, yet slight acts of ratification by the company will authorize a jury in finding that the employment was a corporate act. *Cairo & St. L. R. Co. v. Mahoney* (1876) 82 Ill. 73, 25 Am. Rep. 299. The holding was to the effect that while a railroad company is under no legal obligation to furnish a servant injured in the performance of his duties with medical attendance, honesty and fair dealing demand that such assistance should be given to a day laborer who has been rendered helpless by an accident while working for the company's interests. Under such circumstances the courts will not be severe in criticizing the evidence from which a jury has found that this moral duty has received recognition.

²⁶ In *Perkins v. Trenton Street R. Co.* (1911) 81 N. J. L. 36, 78 Atl. 666, it was held that a trolley company was liable on contract to a physician for the value of his services, where a printed rule of the trolley company required the conductor of the car in case of an accident to take the injured person to a physician, and the motorman met with an accident by which his leg was crushed, and the conductor telephoned plaintiff, who amputated the limb.

2004. Question considered with reference to the element of a special emergency.—*a. Contracts made by managing officials of railway companies.*—All that need be remarked under this head is that the obligatory quality of a contract made by a manager of a railway company in a case of emergency is a necessary deduction *a fortiori* from the doctrine under which his contracts are treated as valid even in the absence of that element. See § 2003, *a, ante*.

b. Contracts made by subordinate employees of railway companies.—By some courts the doctrine has been applied that certain subordinate employees of a railway company, who, under ordinary circumstances, are not empowered to bind it by contracts for medical attendance on its servants or passengers, have an implied authority to make such contracts in its behalf, in cases where there is an urgent necessity for the immediate employment of a physician or surgeon to attend to servants or passengers who have been injured by conditions or occurrences incident to the operation of the road.¹ In Indi-

¹ In several Indiana decisions it has been held that a conductor possesses this temporary authority whenever he is the highest agent of the company who is present at the spot where an accident occurs. *Terra Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752; *Louisville, N. A. & C. R. Co. v. Smith* (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; *Toledo, St. L. & K. C. R. Co. v. Mylott* (1892) 6 Ind. App. 438, 33 N. E. 135; *Evansville & R. R. Co. v. Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803.

The same doctrine has been enounced in Arkansas. *Arkansas Southern R. Co. v. Loughridge* (1898) 65 Ark. 300, 45 S. W. 907.

In *Southern R. Co. v. Humphries* (1901) 79 Miss. 761, 31 So. 440, an action for services rendered in caring for a railroad employee who was desperately wounded and had lain for several hours without medical aid, it appeared that the train master, who was shown, without contradiction, to be acting as local superintendent, told the plaintiff to take charge of the case for a certain fee. Held, that the train master, as superintendent, had authority to employ a physician, and that the railroad was liable for the services rendered. The court said: "Whether Francis, as train master, had authority to contract with Dr. Humphries as he did, we are not here called to decide; but, inasmuch

as, at the time, he was in the exercise of the functions of a division, or local, superintendent over that part of the road, we think it may be presumed that he had the power to so contract. Moreover, Dunn testified that Francis had such authority, and his testimony is not controverted or denied. This evidence, of itself, was sufficient to support the verdict." The fact that the company had surgeons regularly in its employ did not, it was held, affect the result, as it was shown that they were not within call.

In Alabama also it has been stated, *arguendo*, that a contract made by such an employee would be binding, provided that "exceptional circumstances justified it, and prevented communication with higher officials." *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405.

The principle that the existence of an emergency amplifies the ordinary powers of railway agents with regard to the making of contracts for medical attendance is recognized, *arguendo* in *Holmes v. McAllister* (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220.

A similar view is taken in Texas. *Texas Bldg. Co. v. Drs. Albert & Edgar* (1910) 57 Tex. Civ. App. 638, 123 S. W. 716 (physician engaged by foreman of construction work).

It would also seem to be the English doctrine that, under similar circum-

ana, as already mentioned in § 1999, *ante*, this doctrine is referred to the hypothesis of an actual juristic duty, arising from, and expiring with, the emergency.² But it would seem to be preferable to base it upon the notion that, having regard to the contingency that the

stances, a subinspector of railway police for the district within which the accident occurs, whose duty it is to attend at the scene of that accident, is to be regarded as the representative of his employers. This inference may reasonably be drawn from a case which, although it does not relate to the employment of a physician, involves facts which are so closely analogous to those which usually accompany the making of such a contract, that it may with propriety be cited in the present connection. *Langan v. Great Western R. Co.* (1874; Exch.) 30 L. T. N. S. 173. There certain passengers injured by a collision on the defendant's line of railway were carried into plaintiff's inn, partly by the help of the station master of the station where the collision took place. The subinspector ordered some brandy to be given to one of the injured persons, and, in reply to a question of plaintiff's as to who would pay for the maintenance of the injured persons, replied, "Don't trouble yourself about that; we'll see that all is right." Plaintiff having brought an action against the railway company for board, lodging, necessities, and goods supplied to the injured persons, it was held (affirming the judgment of the court of Queen's bench), that there was sufficient evidence to go to the jury in support of the plaintiff's claim, and to prove the authority of the subinspector to pledge the credit of the company for the board, etc., supplied to the persons injured. The reasons on which the decision was based are stated, note 3, *infra*.

In cases of this type the complaint is insufficient unless it shows that the services were rendered for workmen of defendant injured in the performance of duty, or for persons injured by its trains. *Bedford Belt R. Co. v. McDonald* (1895) 12 Ind. App. 620, 40 N. E. 821.

Several decisions relating to the authority of railway employees to make contracts in cases of emergency, for medical attendance upon persons other than their fellow employees, are collected in the note to *Bonnette v. St.*

Louis, I. M. & S. R. Co. (1908) 16 L.R.A.(N.S.) 1081.

² In *Ohio & M. R. Co. v. Early* (1894) 141 Ind. 73, 28 L.R.A. 546, 40 N. E. 257, the court observed that, "where . . . [an] employee has, by unforeseen accident to him, while engaged in the line of his duty as such employee, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it [the railway company] should furnish medical assistance." There it was held that the conscious and deliberate choice of an injured employee, while in possession of his mental faculties, of the time when, place where, and person by whom he will be treated, relieved the master of any liability for failure to provide other treatment, and that no liability on the part of a railroad company for failure to provide for an injured brakeman was shown, where it was in evidence that the best medical treatment that could be obtained at the little town where he was injured was procured, that he was removed as soon as possible, with his intelligent and conscious consent, without any objection of the physicians who had attended him thus far, to another town, where a place was provided for him and competent surgeons were awaiting him, that he insisted on being taken still further, to the town where he lived, and that he died soon after reaching the place, from loss of blood on the way. In this case the court remarked that the obligation is one which "arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. [It] . . . arises with the emergency and with it expires."

To the same general effect, see *Louisville, N. A. & C. R. Co. v. Smith* (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775.

The standpoint of this court is also indicated by the following extract from the judgment delivered in *Terre Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752: "Assuming, as we may justly do, that there are occasions

company may eventually be held liable to the injured person, its interests will be most effectually subserved by procuring the attendance of a medical man with the least possible delay.³

when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire, What is such an emergency as will clothe him with this authority and put him in the position designated? Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm,—would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely someone owes a duty to a man, imperiled as an engineer would be in the case supposed, to release him from peril, and is there anyone upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance; and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers? An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty,—and no one will deny that such a duty does exist,—the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent, upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once; and suppose the accident to occur at a point where there is no station, and when no officer superior to the conductor is present,—would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that someone must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that someone owes him this duty, since to assert the contrary is to affirm that

upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty; and surely when the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

The doctrine thus formulated has been strictly confined in its application to railway companies, which are regarded as occupying "a peculiar position with reference to such matters, exercising quasi public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers." *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1008.

In the preceding year the court of appeals had declined to determine whether or not the rule applied to private employers. *Toledo, St. L. & K. C. R. Co. v. Mylott* (1892) 6 Ind. App. 438, 33 N. E. 135.

At first sight it might appear that the doctrine enounced in the *Early Case*, *supra*, indicates a departure from that laid down in an earlier case in which it was declared that "railroads are under precisely the same obligation in respect to procuring medical and surgical aid for their employees as other employers under like circumstances, and the authority of a railroad employee is not different in that respect from the authority of one employed by any other corporation or person when placed in a like situation." *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336, 8 N. E. 218. But in this passage the court was merely formulating a general rule applicable to ordinary cases, and not to those in which there is an emergency.

³ This aspect of the matter is relied upon in *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Exch.) 173. The person injured was a passenger; but the reasoning of the judges is quite general and equally applicable to cases where servants have been injured. Discussing the facts already stated in note 1, *supra*, Bramwell, B., said: "Surely it is reasonable to say that the person who

In New York the rule is that the employer is not required to furnish medical aid to injured employees, in the absence of a contract

is chief in office where the accident takes place should have authority to do those things which must be done at once, and which are presumably for the benefit of the company. Take the case of a number of bystanding laborers who are asked to clear the line; that is not a matter of absolute necessity, but it is presumably for the benefit of the company. Take the case of a person in a state of collapse, to whom a glass of brandy may be of vital importance, could there not be authority to pledge the company's credit for that? And here the question of quantum is not raised. If, at the outset, Locke [the subinspector of police] had said that he was going to pledge the company's credit for six or seven weeks' maintenance of the sufferers, it may be that he would thereby have exceeded his authority. If it were his duty to report what he had done, the company might repudiate any further liability, and tell the plaintiff that if she continued to keep the persons injured beyond a certain time, she must do so at her own expense. I do not determine, therefore, whether the question of quantum, if it were raised, would be determined for or against the railway company. I go on the ground that under the circumstances of the case there was a necessity for immediate action, and there was no one to direct what should be done but Locke." In the same case Denman, J., said: "I think he [the inspector] had authority to do what was reasonable in the case of injured persons, and, *ex necessitate rei*, to take them to a place of security, and there have them properly attended to till the arrival of a doctor. I do not say that it necessarily follows that he would have authority to give orders for the supply of every possible thing that might be comfortable to persons under these circumstances. It depends very much, I think, on the condition of the persons taken in." Cleasby, B., viewed the circumstances from a different standpoint, remarking that the fact of the company's having allowed the plaintiff to continue the performance of the services after the inspector had made his report was evidence of his having been originally in-

vested with authority to make the contract.

In England the effect of this decision has been to destroy the authority of the earlier case of *Cox v. Midland Counties R. Co.* (1849) 3 Exch. 268, 18 L. J. Exch. N. S. 65, 13 Jur. 65, so far as regards its rejection of the theory that the existence of an emergency may be treated as a differentiating element. But, in view of the fact that only a small number of the American courts have, as yet, pronounced in favor of that theory, it may be well to give some extracts from the judgment which Parke, B., delivered for the court. Referring to the argument of plaintiff's counsel that, considering the nature of the railway traffic, each of the servants in question had, as incidental to his employment, an authority, in case anything occurred which would be prejudicial to the interests of the company, to do what was reasonably fit to be done under the circumstances, to remedy or diminish the damage done, the learned judge said: "It was contended, therefore, that, if one of these servants happened to be near at the time of the slip of an embankment, which, for the purpose of securing the safe and speedy traffic along the railroad, ought to be immediately removed, he would have an implied authority, when fresh laborers were required, to bind the company by a contract to pay them; and that, in like manner, any servant who was near, or, at all events, the head servant of the nearest station, would be authorized, if a passenger received personal damage, requiring immediate surgical attendance, to contract with a surgeon, and to bind the company by that contract to pay what was reasonably due to him, such authority being an incident to his employment, considering its peculiar nature, and it being for the benefit of the company that the damage and consequent loss to them from any occurrence for which they were responsible should be as much mitigated as possible. . . . We are all of opinion that the power to enter into this contract was not incident either to the employment of the guard or the superintendent. The simple employment of servants by a corporation carrying on a

so to do; and ordinary employees are not empowered to make contracts of that character, even in case of emergency.⁴

c. Contracts made by managing officials of companies other than those operating railways.—In Kentucky the accepted view is that the managing officers of companies other than those engaged in operating railways are not authorized, even in case of emergency, to bind their principals by contracts for medical services.⁵

The supreme court of Indiana has quite recently held that the doctrine was not applicable to a mining company under the circumstances disclosed by the evidence, but declined to lay it down abso-

business cannot give them, as incident to that employment, a larger authority than if the same appointment were made by a partnership of as many individuals as the shareholders of the company, nor does it appear to us to make any difference that it is carried on by fewer members, or even by a single individual. . . . Could it be maintained that a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horse-keeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not?—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power."

⁴ In *Voorhees v. New York C. & H. R. R. Co.* (1909) 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed in (1910) 198 N. Y. 558, 92 N. E. 1105, where the plaintiff had been summoned by the superintendent of a hospital to treat an employee of the defendant, who had been injured, the court said: "In a few of the states an exception to this rule has obtained in case of emergency treatment rendered by a physician to an employee, and it has been held that any employee present when the emergency arises may summon a physician on the responsibility of the employer. The exception has not prevailed in this

state, so far as my research has extended, and the trend seems to be against this invasion of the general rule."

And the fact that an employer admits his liability for injuries to an employee by settling with him therefor does not enure to the benefit of the physician treating the employee for such injuries. *Ibid.*

In *Cooper v. New York C. & H. R. R. Co.* (1875) 6 Hun, 276, it was held that evidence by the plaintiff, who had been summoned by a station agent and an engineer to attend another employee, that he had frequently attended other injured employees, and had been paid for such services by the defendant, was improperly admitted, where he did not offer to show that in such cases he had been employed by the same employees.

In *Stephenson v. New York & H. R. Co.* (1853) 2 Duer, 341, which was a case of an injured passenger, the court reasoned as follows: "No emergency arose which, but for this employment, would have interrupted or prevented the running of defendant's cars. If the injury was not caused by the negligence of its servants, contracting to pay for expenses to which they could not be subjected by law would be no benefit to the company. If caused by such negligence, this employment would not exonerate them from any liability which would otherwise have attached. The principle sought to be invoked has no application to the facts of this case."

⁵ In *Godshaw v. J. N. Struck & Bro.* (1900) 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781, the court said: "We are not therefore, prepared to hold as a matter of law that the employment of physicians or surgeons for injured employees comes within the scope of the duties of a general manager of an ordinary

lutely that "a case cannot arise with a mining or manufacturing company, or even with an individual, wherein the facts may be so unusual and extreme as to impose upon the employer a duty analogous to that imposed on railroad companies."⁶

manufacturing business. It seems to us that the rule that appellant seeks to have applied to this case is confined exclusively to railroad companies, and generally in cases which involve some act of negligence on the part of the company which occasioned the injury."

⁶ In *Cushman v. Cloverland Coal & Min. Co.* (1908) 170 Ind. 402, 16 L.R.A. (N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759, a complaint was held to be demurrable which averred that the plaintiff had been engaged by the superintendent of a mine to attend on a servant, and that this contract had been ratified by the president and general manager, but which did not allege any facts showing the existence of a special emergency which imposed upon the mining company the duty of employing a doctor. The court, after referring to the rule which imposes upon railway companies the duty of providing medical attendance in cases of emergency, proceeded thus: "But this exception relating to railroads has no bearing on the question before us. The appellee is a coal mining company, a strictly private corporation. Its business is stationary. Its employees perform their duties in one general working place, near their homes, family, friends, and acquaintances, and have all the facilities for hastily summoning medical and other aid, in time of pressing emergency, as may be possessed by the corporation. There is no greater or different reason for holding a private mining corporation responsible for supplying medical aid for its employees than appertains to all kinds of manufacturing bodies; and we perceive no reason why either class of corporations, under ordinary circumstances should be required to furnish their workmen with medical service any more than they should be required to furnish them with their dinner. The policy of the law is to protect the employee, equally with the employer, in the fullest freedom of choice in supplying his personal wants of every kind, whenever he is as capable and well prepared as his employer to act for

himself. . . . It is alleged in the complaint that the defendant is a corporation organized for, and engaged in, the business of mining coal; that a person was personally injured while at work for the defendant as one of its employees. There is no averment that either the mine superintendent or the president and general manager had received authority from the corporation to contract for or to ratify the employment sued upon, either expressly or by implication. We are not informed even of the nature of his employment, whether as engineer, blacksmith, miner, or other particular service. Neither are we informed of the nature or extent of his injury, nor the facts that created the emergency that imposed upon the coal company the duty of employing the plaintiff. It is not averred that the injured employee was unable to help himself, or that he had no money, or credit, or family, or friends present to give him assistance, nor is it shown by the complaint that there existed any other reason why he was not as able and competent to speedily summon a physician as the company. The averment that the injured party's wounds were so severe as to create an emergency for the immediate attention of a physician and surgeon in order to save life is but pleading the baldest conclusion. Facts, and not conclusions, must be stated."

The *Cushman Case* was followed by *Sourwine v. McRoy Clay Works* (1908) 42 Ind. App. 358, 85 N. E. 782 (contract made by superintendent of manufacturing company).

In *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1007, where the question arose whether or not the foreman of a manufacturing company had power to employ a physician for an injured employee, the court of appeals had remarked that except, perhaps, in an extreme case, there was no duty resting on the employer to furnish medical or surgical aid, and that therefore the authority of the foreman to employ such aid would not be presumed.

In Michigan and Nebraska the position has been taken that the existence of a special emergency enlarges the scope of the implied powers of employees, whenever the business in which their employer is engaged involves unusual risks analogous to those which are incident to railway work.⁷ A similar view has been expressed in Missouri.^{7a} That this view will ultimately prevail is reasonably certain. There is manifestly no logical ground upon which a hard-and-fast

⁷ In *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220, it was held that a laundry company was not bound by a contract made by its foreman. The court said: "We do not, however, hesitate to hold that in those avocations of life *unaccompanied by dangers*, an employer is not liable for the services of a physician summoned by his manager . . . to attend an employee in a case of sudden illness or injury, whatever his moral obligation may be." The loose phrase italicized is shown by other parts of the opinion to refer to an assumed distinction between employments which are and are not extrahazardous. The court did not refer to the earlier case of *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564, which seems to reflect a different doctrine. See § 2003, note 18, *ante*.

In *Salter v. Nebraska Teleph. Co.* (1907) 79 Neb. 373, 13 L.R.A.(N.S.) 545, 112 N. W. 600, the following statement of principles was formulated in the headnote written by the court: "When a serious injury requiring immediate medical or surgical services is incurred by the employee of a company engaged in a business dangerous to its employees, and the injury is received at a place distant from the home of the injured party, any general officer of the company then present may engage such medical or surgical treatment and care as the case requires, and bind the company for the reasonable value thereof, without any proof on the part of the party furnishing such treatment and care that such general officer of the company had special authority to make such contract, or that such action on his part came within the general scope of his power and duties. In case of serious injury to an employee under the circumstances above set out, if no general officer of the company is present, the highest officer, or person highest in

authority then present, may bind the company for such services as the emergency may demand." This statement had reference to the powers of the foreman of a working gang.

^{7a} The president of a manufacturing corporation has implied authority to employ a physician to attend an employee injured in the line of his employment. *Weinsberg v. St. Louis Cordage Co.* (1909) 135 Mo. App. 553, 116 S. W. 461. The court said: "There certainly ought not to be any question of doubt with respect to the authority of the chief executive officer of an incorporate company, of the character here involved, to execute the power. When a catastrophe occurs in its factory, the corporation ought not to be expected to assemble its board of directors in order to exercise the implied power referred to. There is certainly an emergency power incident to the office of president of such an institution, commensurate with the circumstances now in judgment. The proposition is entirely clear."

In *Meisenbach v. Southern Cooperage Co.* (1891) 45 Mo. App. 232, the defendant's liability for the fees of a surgeon called in by its superintendent was denied on the ground that no specific evidence was given that he had been previously authorized to summon a medical man in cases of emergency. This case may be distinguished from the *Weinsberg Case* upon several grounds. In the first place, the superintendent merely sent for the physician, and in no way agreed to pay for the services, either personally or through the company. Furthermore, the court lays stress upon the fact that for the several months that the plaintiff attended the wounded employee he had no communication at all with the company or its superintendent, it thus appearing that he did not intend to hold them liable.

distinction can be predicated between work on railways and work in other occupations in which risks of a similar nature are encountered.

d. Duration of the liability which is referable to the existence of an emergency.—It is fully settled that the enlarged liability of an employer which is predicated upon the existence of an emergency expires when the emergency ceases.⁸

⁸ *Bedford Belt R. Co. v. McDonald* (1895) 12 Ind. App. 620, 40 N. E. 821 (statement reiterated in s. c. (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022); *Cushman v. Cloverland Coal & Min. Co.* (1908) 170 Ind. 402, 16 L.R.A.(N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759; *Godshaw v. J. N. Struck & Bros.* (1900) 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781 (rule affirmed in a case where power of employee was denied even as regards the time immediately after the accident); *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220 (similar decision).

A surgeon who, at the direction of the conductor, amputates the leg of an employee injured in an accident to a construction train by which a large number are injured, there being only one surgeon of the company present, who is unable to attend to all the wounded, is entitled to compensation therefor, but not for services rendered after the emergency ceases. *Evansville & R. R. Co. v. Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803 (damages measured on the basis thus indicated).

In *Louisville, N. A. & C. R. Co. v. Smith* (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775, the court, in discussing the facts, said: "The conductor . . . had authority to do what the emergency demanded, in order to preserve his injured fellow-employee from serious harm; but he had no authority to do more. When the company had procured the services of a competent surgeon, it did all that it was morally or legally bound to do, and the conductor could not impose upon it any greater obligation. We hold that the conductor did have authority to at once employ the surgical aid demanded by the urgency of the occasion; but we hold, also, that his authority did not extend beyond this limit. . . . It is immaterial whether Dr. Judah [the surgeon first employed] was called by a brakeman or by the conductor in per-

son; for, if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon. It is possible that Dr. Smith [the second surgeon called in] may be entitled to compensation for one visit,—that made in obedience to the telegram,—for it may be that he had a right to act upon it at once; but when he found the injured man attended by a competent surgeon he had no right to continue to give the case attention, and charge the company. He was bound to know that, when the agent, who possessed limited special authority, had procured the services of a competent surgeon, his authority was exhausted; and if, with this knowledge, he continued to give the injured man attention, he did it at the expense of some other person than the agent's principal."

It has been held that the temporary powers possessed by a conductor in an emergency do not enable him to authorize a surgeon to employ assistance at the company's expense, and that, if the surgeon first employed finds it necessary or convenient to call in other assistants, in order to accomplish that which he had been employed to do, the assistants must look to him for compensation. *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336, 8 N. E. 218.

In *Salter v. Nebraska Teleph. Co.* (1907) 79 Neb. 375, 13 L.R.A.(N.S.) 545, 112 N. W. 600, the court stated its views in the headnote written by it: "While not attempting to formulate any general rule to determine what constitutes emergency treatment for which a company will be liable under employment made by an officer or agent of known limited authority, it ought generally to extend for a time sufficient for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured

2005. Liability of master for negligence and other tortious acts of practitioner employed to attend on a servant.—This question may present itself with reference to one or the other of the following situations:

(1) The master may deduct a certain amount from the wages of his servants, for the purpose of forming a relief fund, and so administer that fund as to derive a direct pecuniary profit from it. The effect of such an arrangement, it has been held, is to subject the master to the responsibility of a person who agrees to perform a specific duty for a valuable consideration. The conclusion arrived at in this point of view is that he is absolutely bound to see that the sick or injured servants whose money he is expending are treated with proper care, and that this obligation is not discharged, by merely engaging doctors and surgeons whom he is warranted in believing to be competent.¹ It is scarcely necessary to remark that a court which deems a given case to be a proper one for the application of this doctrine

party is entitled to public care." In that case the trial judge had directed a verdict for its plaintiffs for the full amount of their claim for services rendered to the injured servant during the whole time he was in the hospital, and refused to admit evidence offered to show that the defendant had informed them that it would not be responsible for any services except the first treatment. The verdict was set aside.

¹ In *Richardson v. Carbon Hill Coal Co.* (1893) 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012, the court observed, *arguendo*: "If . . . the company was conducting a hospital with its own physician for the purpose of deriving profit therefrom, or if it contracted with the appellant to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him."

The doctrine that a corporation which contracts, for a consideration, to treat its employees for any injury they may receive while in its employ, is liable for the malpractice of a surgeon employed by it, was applied in *Sawdey v. Spokane Falls & N. R. Co.* (1902) 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972. The evidence in that case showed that the deductions made from the wages, amounted to a sum which considerably exceeded that which was expended in

caring for sick and injured servants, and that the relief fund was mingled with the general fund of the company. The action was brought for the recovery of damages caused by the unskillfulness of a hospital surgeon in treating an injury received by the plaintiff when going home from his work. No special contract defining the nature and extent of the company's undertaking had been entered into; but it was shown that the plaintiff had understood that he was entitled, in consideration of the deduction made from his wages, to hospital accommodations and surgical treatment at the company's expense, in the event of his falling sick or receiving an injury while in its employment. Neither he nor any of the other servants had deduction made from his wages, to host them only for injuries in the course of their employment. Nor was he told, while at the hospital, that the company only engaged to treat for injuries in the course of employment, and was treating him gratuitously. It was held to be a question for the jury whether, having regard to the circumstances under which the injury was received, the treatment was gratuitous, or in pursuance of the contractual undertaking of the company. In the *Wells Case* (see note 3, *infra*) the court said that the word "consideration" was used in the *Sawdey Case* as synonymous with "profit."

should so frame its judgment as to insure that the damages awarded shall be a charge upon the estate of the master himself, and not upon the relief fund. Otherwise the interests of the servants as a body will suffer in a manner which will certainly be incompatible with purposes to be subserved by the arrangement to which they are parties.

(2) The whole cost of medical attendance upon the servants may be defrayed by the master himself. All the authorities are agreed that, if he pursues this course, he cannot be held liable for the negligence of the practitioners whom he employs, unless he has failed to exercise due care in selecting them.² This doctrine would seem to be preferably deduced from the notion that, having regard to the

In *Texas & P. Coal Co. v. Connaughten* (1899) 20 Tex. Civ. App. 642, 50 S. W. 173, where the balance of the relief fund which remained after the expenses of administration had been defrayed was regularly placed to the credit of the defendant company, and no rebates were allowed to the servants, the employer was held liable for the negligence of the doctor retained by it.

The *Sawdey* and *Connaughten* Cases were approved in *Zumwalt v. Texas C. R. Co.* (1909) 56 Tex. Civ. App. 567, 121 S. W. 1133, 132 S. W. 112. See further as to this case, note 9a, *infra*.

² *South Florida R. Co. v. Price* (1893) 32 Fla. 46, 13 So. 638; *Cummings v. Chicago & N. W. R. Co.* (1899) 89 Ill. App. 199, writ of error dismissed in (1901) 189 Ill. 608, 60 N. E. 51 (only a point of local practice was discussed by the supreme court); *York v. Chicago, M. & St. P. R. Co.* (1896) 98 Iowa, 544, 67 N. W. 574; *Clark v. Missouri P. R. Co.* (1892) 48 Kan. 654, 29 Pac. 1138 (servant attended first by a local surgeon, and afterwards by one regularly retained by the defendant); *Quinn v. Kansas City, M. & B. R. Co.* (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036.

In *Eighmy v. Union P. R. Co.* (1895) 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056, the court observed: "It does not appear that the defendant was under any obligation by contract to furnish surgical and hospital accommodations for its injured employees, and, so far as is shown, its doing so was wholly voluntary. Its employees were under no obligation to avail themselves of the facilities for treatment offered, and paid

nothing for them when accepted. That the defendant maintained its medical department for its own advantage, and not for charitable purposes only, may be presumed, but that does not alter what appears to be the fact, that it was not maintained to discharge any statutory or contractual obligation." So far as the last sentence of this extract may be taken to imply an adoption by the court of the doctrine that the defendant would have been liable if the hospital had been maintained in pursuance of a contractual obligation, the view of the court would be in conflict with those which involve the element of a deduction from the wages of the servants. It is submitted that a contract by an employer to provide medical attendance for which he is to pay himself would bind him merely to use reasonable care in selecting practitioners.

In *Chicago, B. & Q. R. Co. v. Howard* (1895) 45 Neb. 570, 63 N. W. 872, where it was conceded that the selection had been a judicious one, the court said that the plaintiff in error was not responsible for the manner in which the knowledge and skill of the surgeon were employed, "in the absence on its part of any express limitations or directions to their surgeons, and of the possession of such knowledge as would lead a reasonable, careful person to suspect that there would probably be negligence or malpractice."

In *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (1894) 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138, a complaint was held to be demurrable which alleged that the doctor retained by the employer to render serv-

given circumstances, the extent of his undertaking is merely to give his servants an opportunity of being treated by practitioners who, so far as he knows, are competent. In this point of view it will follow that, as he does not assume the ulterior duty of seeing that his servants received proper treatment, and the professional men whom he retains are engaged on the footing of independent contractors, their unskilfulness or carelessness cannot be imputed to him.

(3) The master may make deductions from the wages of his servants, and, without deriving any direct pecuniary profit from the fund thus created, administer it for the benefit of those who fall sick or sustain injury while in his employment. The decided preponderance of authority is in favor of the doctrine that, under an arrangement of this character, he is not accountable for the negligence or unskilfulness of physicians or surgeons employed by him, unless he has failed to exercise due care in selecting them.³ One of the considerations to which his restricted liability has been referred is,

ices to injured employees had wrongfully and unnecessarily amputated the plaintiff's arm. The court said: "There is an entire absence in the complaint of any facts to establish that Dr. Fertich was employed by the appellant to discharge any legal or contractual duties which it, as a corporation and common carrier, owed to appellee, as its servant. . . . The appellant was engaged in the business of a common carrier, and the presumption must, at least, be that it was engaged in that business alone, and such other as was necessarily incident thereto or connected therewith. The acts complained of are in no manner governed by the law which applies to the omission of the master to provide his employees with safe machinery and appliances. . . . Appellant having assumed the duty to provide a physician, and tender to its injured or sick employees his services, which they were free to reject or accept,—a duty which was voluntarily assumed, and one which was not due from appellant to its employees,—its liability cannot be extended beyond its negligence, if any, in the selection of the physician or surgeon. In other words, the appellant would be liable only, if at all, for its negligence in the employment, in the first instance, of an incompetent person, and not for his negligence or tortious acts in the treatment of its servants who had accepted his professional services. When

this duty is voluntarily assumed by a corporation such as appellant is shown to be, it is only bound to exercise reasonable care and diligence, and is not required to select a physician of the highest skill and longest experience in the practice of medicine. If it exercised this required care and diligence, its duty terminated, and it was not liable for the subsequent malpractice or wrongs of the physician, committed in or about the treatment of its servant."

In *Zumwalt v. Texas C. R. Co.* (1909) 56 Tex. Civ. App. 567, 121 S. W. 1133, 132 S. W. 112, the court laid down as a general proposition that where a railroad company or person undertakes as a pure charity to furnish medical treatment to a sick or injured person, the duty of such company or person only requires the exercise of due care in the employment of a prudent and careful physician, and that such company or person cannot be made liable beyond this for negligence on the part of the physician. See further as to this case, note 9a, *infra*.

³ *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Secord v. St. Paul, M. & M. R. Co.* (1883) 18 Fed. 221; *Maine v. Chicago, B. & Q. R. Co.* (1897) 109 Iowa, 260, 70 N. W. 630, affirmed on rehearing in (1897) 109 Iowa, 269, 80 N. W. 315; *Atchison, T. & S. F. R. Co. v. Zeiler* (1894) 54 Kan. 340, 38 Pac.

that persons engaged in business enterprises cannot be supposed to possess the technical skill required for proper treatment of the sick

282; *Illinois C. R. Co. v. Buchanan* (1907) 126 Ky. 288, 11 L.R.A.(N.S.) 771, 103 S. W. 272; *Southern P. Co. v. Mauldin* (1898) 19 Tex. Civ. App. 166, 46 S. W. 650 (writ of error dismissed in [1898] 92 Tex. 267, 47 S. W. 964); *Galveston, H. & S. A. R. Co. v. Hanway* (1900) — Tex. Civ. App. —, 57 S. W. 695 (writ of error dismissed in (1900) 94 Tex. 76, 58 S. W. 724); *Poling v. San Antonio & A. P. R. Co.* (1903) 32 Tex. Civ. App. 487, 75 S. W. 69; *Big Stone Gap Iron Co. v. Ketron* (1903) 102 Va. 23, 102 Am. St. Rep. 839, 45 S. E. 740.

In *Wells v. Ferry-Baker Lumber Co.* (1910) 57 Wash. 658, 29 L.R.A.(N.S.) 426, 107 Pac. 869, it was held that an employer who retains from the wages of his employees a certain amount with which to pay for the services of a surgeon if they are injured discharges his full legal obligation when he selects a competent surgeon to attend a particular injury, and cannot be held responsible for the surgeon's negligence. The court said: "We think, under the decisions of this court, that the implied duty of the respondent was to select a competent physician and surgeon, and that when it did so it had discharged its full legal obligation. It is not claimed that there was any express contract between the company and the appellant, and the complaint expressly excludes the inference that any profit resulted to the respondent. It was, therefore, a noncompensated or gratuitous trustee, and is liable only for a failure to use reasonable care in the selection of a competent surgeon."

In *Barden v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 318, — L.R.A.(N.S.) —, 67 S. E. 971, it was held that a railroad maintaining a relief department for the benefit of injured employees, to which they are required to contribute of their earnings, is not liable, on the ground of the charitable nature of the enterprise, to an injured employee for injury due to the negligence of surgeons and nurses, if it has exercised reasonable care in selecting them. The court said: "We have, then, a relief department or association, supported by the mutual contributions of employee and employer, maintained for

the sole purpose of relieving and mitigating the suffering of its members,— a charity whose noble purposes are untainted by selfish interest. . . . With the character of the relief association thus defined, what is the extent of the duty of the defendant in selecting the physicians and surgeons and attendants who perform the offices cast upon them in their respective positions? The law is well settled that the only duty imposed upon the defendant is the duty to exercise reasonable care in the selection of the physicians and surgeons who are reasonably competent, and, having exercised this duty, the company is not chargeable with the want of skill of the physician or surgeon whom it has selected, in the performance of the service he is required to render."

In *Miller v. Beaver Hill Coal Co.* (1906) 48 Or. 136, 85 Pac. 502, the court thus discussed the effect of evidence which went no further than to show that a certain sum each month was contributed by the plaintiff and his fellow employees, or exacted by the defendant for the maintenance of a hospital for their use: "The transaction . . . constituted in law nothing more than a subscription by the plaintiff and the other employees for the charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford. And the only liability assumed by the defendant in collecting the fund was to expend it for the purpose for which it was subscribed, and no other. The mere fact that it received or exacted the contribution did not impose upon it the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not. A sick or injured employee was entitled to the use and benefit of the hospital and the medical services there provided, to the extent of the money contributed for that purpose, but he was not obliged to go to the hospital or to accept the accommodations. He could, if he chose, go elsewhere and employ physicians and attendants other than those provided by the company, and, if he did so, the company would not be liable to re-

imburse him therefor. The only duty of the company was to use ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, and it is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another."

In *Arkansas Midland R. Co. v. Pearson* (1911) 98 Ark. 399, 34 L.R.A.(N.S.) 317, 135 S. W. 917, it was held that a railroad company which attempts to maintain a hospital service for injured employees with a fund secured by deducting a small amount monthly from the wages of each employee is not liable for the malpractice of physicians employed, if it uses ordinary care to select competent and skilful ones; and upon the question of the company's liability, testimony of the one having charge of the disbursement of the funds, to the effect that they were all expended in the service of the hospital, and that the railroad company realized no gain or profit therefrom, is competent.

In *Richardson v. Carbon Hill Coal Co.* (1895) 10 Wash. 648, 39 Pac. 95, it was held to be error to nonsuit a plaintiff where the evidence raised a presumption that the physician had been selected without due care. On the first appeal of this case (1893) 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012, it had been laid down that for negligence in employing a surgeon at a hospital maintained by an employer for the benefit of employees, from whose wages a small sum is deducted monthly to create a fund for that purpose, the employer is liable, if, by reason of the surgeon's unfitness, an employee sustains damages, although he is treated, not at the hospital, but at the home of friends, where the surgeon is allowed to attend him. Two judges, however, dissented on the ground that the only contract between the parties was that the servants, if injured, should become entitled to the privileges of the hospital supported by their compulsory contributions. On the hearing of the case reported in (1897) 18 Wash. 368, 51 Pac. 402, 1046, the court dealt principally with points of procedure, but reiterated the doctrine that the employer could be held liable for negligence in selecting the surgeon.

In *Wabash R. Co. v. Kelley* (1899) 153 Ind. 119, 52 N. E. 152, rehearing denied in (1899) 153 Ind. 132, 54 N. E.

752 (malpractice resulting from incompetency due to excessive use of intoxicants and narcotics), it was held that a railway company could not escape liability to a servant, on the ground that the deduction from his wages was made without his written consent, in contravention of the provisions of §§ 2300, 2301, Burns's Anno. Stat. (Ind.) 1894. The court said: "Such undertaking to provide surgical and medical care is not, by the statute, made void as a part of the contract of service. The provision of the statute is that it shall be unlawful for a railroad company 'to exact from its employees, without first obtaining written consent thereto in each and every instance, any portion of their wages for the maintenance of any hospital, reading room, library, gymnasium, or restaurant.' If the appellant did, indeed, exact any such contributions without the written consent of appellee,—which does not appear from the complaint,—that was not a wrong for which appellee can be held liable. It was the act of appellant; and it is a familiar principle that one cannot take advantage of his own wrong."

Instructions which ignored the theory that the liability of the defendant company depended on whether it exercised due care in selecting physicians, and which permitted the jury to find it liable for their incompetency, however cautiously they might have been chosen, were held erroneous in *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456, 464.

In *Wabash R. Co. v. Reynolds* (1908) 41 Ind. App. 678, 84 N. E. 992, a complaint alleging that a surgeon in a hospital maintained by contributions from the wages of the defendant's servants had negligently treated the plaintiff, and after an examination which showed that he was not cured, discharged him from the hospital, causing him great expense for subsequent medical attention, etc., was held to be demurrable, on the ground that it did not aver or show that the defendant owned the hospital. The ulterior question, whether, if the complaint had been properly framed, the defendant would have been liable under the given circumstances, was not adverted to.

A doctrine different from that applied in the above cases was adopted in *Phillips v. St. Louis & S. F. R. Co.* (1908) 211 Mo. 419, 17 L.R.A.(N.S.) 1167, 124

and injured, and must perforce rely on practitioners who possess the requisite qualifications.⁴ But it is manifest that, unless the practitioners retained by a master are independent contractors, the mere fact that the work required was such as to demand the exercise of special skill would not necessarily involve, as a corollary, the master's exemption from liability for their negligence. It would seem to be preferable therefore, to rely directly upon the same conception as that which is adverted to in the preceding paragraph, and treat his exemption as an appropriate deduction from the fact that the physicians or surgeons employed by him are not his servants.⁵ If his nonliability for the unskilful treatment of his servants is placed upon this ground, it will be unnecessary to determine a question to which much importance has been attached in some of the cases, *viz.*, whether a relief department supported by the

Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742. See note 9, *infra*. In the *Wells Case*, *supra*, the court said that the *Phillips Case* announced a different rule, but that, in the opinion of the court, the rule of the Washington decisions "was a better and a juster one."

⁴ In *Atchison, T. & S. F. R. Co. v. Zeiler* (1894) 54 Kan. 340, 38 Pac. 282 (company maintained hospital system supported by assessments on the servants), the court reasoned thus: "The care of persons suffering from wounds, bruises, or illness is a matter altogether distinct from the transportation of persons and property. To provide for the needs of such, we have the learned profession of physicians and surgeons. The law requires that those who assume to practise medicine and surgery shall possess certain qualifications of skill; shall have received education and training fitting them for their calling. Can a railroad company, then, be held liable for the mistakes of physicians whom it may call to care for its passengers? In the treatment of an injured brakeman, should the managers of the railroad comply with the directions of the surgeons who are called to attend him, or should they assume superior knowledge, with reference to his proper treatment, and act in accordance with their own judgment?"

Compare also the following passage in the opinion of the court in *Chicago, B. & Q. R. Co. v. Howard* (1895) 45

Neb. 570, 63 N. W. 872: "It would be absurd to insist that not only this selection should be prudent, but that the company should guarantee that the surgeons selected would make no mistake and be guilty of no negligence. The very fact that there was required of the surgeons, in the line of their duties, the possession of a superior degree of skill and of knowledge of medicine, precludes the possibility that the officers or employees of the railroad company should have exercised a supervisory control and direction of the time when, and the mode in which, the necessary surgical operation should be performed."

The consideration that employers who maintain a hospital system must, *ex necessitate rei*, "leave the treatment of the patients to the superior knowledge and skill of the physicians," was also adverted to in *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

For other remarks of a similar tenor, see *Cummings v. Chicago & N. W. R. Co.* (1900) 89 Ill. App. 199; *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456.

⁵ This consideration was relied upon in *Quinn v. Kansas City, M. & B. R. Co.* (1895) 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456.

contributions of servants, and managed by the master in connection with his business, or a relief association deriving its funds from the same source, and controlled by him, is a charitable institution in such a sense as to entitle it to the benefit of the doctrine under which institutions of that description are immune from responsibility for the torts of their agents.⁶

The position taken by one of the Federal courts of appeals is that "those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them."⁷ But the contrary view has been adopted in Massachusetts,⁸ in Missouri,⁹ and in Texas.^{9a}

⁶ For a discussion of this doctrine with relation to the right of third persons to recover damages against a master for the torts of his servant, see the subsequent chapters of this treatise.

⁷ In *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365, where the hospital was supported partly by the voluntary contributions of the employer, the court said: "Under the evidence in this case, the medical department and hospitals of the Union Pacific Railway Company fall fairly within this rule, and the reasons that support the rule apply to this case with all their force. The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operation, it is charitable. Tried by this test, the hospitals and medical department of this company are a great public charity. . . . If it be urged that this gift may have been prompted by an ulterior and selfish motive,—that the company may have thought that the operation of its medical department would protect it from excessive claims for injuries resulting to its servants,—the answer is that the true test of a public charity is not the motive of the donor, but the purpose to which the money given is to be applied." This decision was followed in *Pierce v. Union P. R. Co.* (1895) 13

C. C. A. 323, 32 U. S. App. 48, 66 Fed. 44, where the same facts were involved.

⁸ *Coe v. Washington Mills* (1889) 149 Mass. 543, 21 N. E. 966. There, however, merely the proprietary rights of a relief association were involved.

⁹ In *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456, the following remarks were made: "It is obvious . . . that neither the defendant railroad company nor its relief department is the trustee of public funds put into its hands to use in a prescribed manner. But the argument is pressed that the relief department organized, and controlled by the company was of a charitable nature, and hence, by the principle of some of the cases, the defendant is exempt from liability for the negligence of the surgeons, even though they treated the plaintiff under its employment, unless it was negligent in selecting them. Some countenance is lent to this contention, which would otherwise strike us as plainly fallacious, by the opinion of the United States circuit court in *Union P. R. Co. v. Artist* (1894) 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365 [see preceding note], in which an arrangement in most respects similar to the one in hand was regarded as a charitable enterprise. The test of whether such an enterprise is charitable is said to be its purpose; and, if the purpose is to make a profit, it is not charitable; if it is to relieve the sick and disabled, without gain, it is charitable. The definition of a charity

For the purpose of ascertaining the extent of a master's liability, it is immaterial whether the relief fund is administered directly by

given in *Jackson v. Phillips* (1867) 14 Allen, 556, is generally accepted, and is as follows: 'A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.' . . . In our judgment the relief department organized by the defendant company, in view of the regulations provided for its government, cannot be classed as a charity without doing violence to every significance that word bears, either in popular or legal usage. It is not a charity within the definition of Justice Gray, above quoted, because the fund administered is not a gift by the employees, who make contributions; much less by the railroad company, which does not make any unless a deficit occurs. The fund is made up from sums contributed by the members for their mutual benefit, and is to be enjoyed by them if they suffer from sickness or accident. It is, in effect, a provision made by the employees to insure a stipend for them to live on if they are disabled, and a benefit to their families if they die. In addition to this, if disabled by accident, their medical attendance is paid out of the fund. This strikes us as a purely business arrangement on the part of the employees of the railroad company. But to call the enterprise a charity on the part of the company itself is extravagant, when we note that one of its purposes, as carved in high relief on the face of the regulations, is to prevent damage suits. Enterprises much more benevolent have been excluded from the lists of charities by the courts. *Chapin v. Young Men's Christian Assn.* 165 Mass. 280, 42 N. E. 1130; *Donnelly v. Boston Catholic Cemetery Asso.* (1888) 146 Mass. 163, 15 N. E. 505; *Newcomb v. Boston Protective Dept.* (1890) 151 Mass. 215, 6 L.R.A. 778, 24 N. E. 39" The court, however, although it declined to accept

the contention that the hospital was a charitable institution, was of opinion that, as the doctors employed were independent contractors, the defendant was not liable for their malpractice.

In a later case, *Phillips v. St. Louis & S. F. R. Co.* (1908) 211 Mo. 419, 17 L.R.A.(N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 142, the supreme court followed the earlier decision to the extent of holding that a hospital managed by an association which was, to all intents and purposes, a department of the defendant railway company, was not a charitable institution, but deduced the different conclusion that the company did not discharge its liability by merely employing competent doctors. It must go further, and treat in a proper manner the patients received. It was regarded as occupying the position of ordinary physicians and surgeons, and as being subject to the same obligations as they are. The point taken by the court of appeals, that the doctors retained for the hospital were independent contractors, was not discussed in the opinion,—an omission which constitutes a serious, if not fatal, flaw in the reasoning of the opinion.

9a In *Zumwalt v. Texas C. R. Co.* (1909) 56 Tex. Civ. App. 567, 121 S. W. 1133, 132 S. W. 112, where a part of the wages were retained for the support of a hospital for the benefit of the employees, and the latter had no control over it or in the employment of the physicians, it was held to be a question for the jury whether the hospital department was conducted as a mere charity or for profit, notwithstanding the evidence before the court showed that all of the deductions made in the wages went to the support of the hospital. The court said: "The evidence certainly tends to show that the hospital was conducted as a distinct department of appellee's business as a carrier; that it distinctly agreed with the employers, including appellant, for the sum of 50 cents per month to be deducted out of the wages due such employees, to furnish them medical and surgical treatment in case of sickness or injury during employment. It does not appear that the employers were permitted to have any control whatever over the fund

himself, in connection with his business, or by an organization ostensibly separate, but in reality under his own control. This rule has been affirmed both in a case in which he was held liable for the negligence of the attendants in a hospital,¹⁰ and in a case in which his obligation was asserted to be limited to selecting them with due care.¹¹

thus raised, or in the employment of the chief surgeon or other attendants, nor did they have voice otherwise in the distribution of the fund so contributed. While it appeared that during the life of the present contract with Dr. Webb [the chief surgeon] all proceeds of the fund are to be devoted to the payment of his services and the services of his assistants, neither the contract nor appellee's general plan in the management of the department furnishes any evidence that it is thus always to be continued, or that, in event of a future contract whereby the company should be able to secure the services of a sufficient number of physicians and surgeons to conduct its hospital department for a less sum than should be derived from deductions made from the wages of its employees, the excess should belong to the employees rather than to the appellee company. By the terms of the agreement between the company and its employees, as the evidence tends to show, the deductions were at all events to be made, and at all events went to the credit of appellee's general fund in the bank, and in the very contract made with Dr. Webb appellee recognizes that certain of its employees, who include appellant, were 'entitled' to treatment. If so entitled by virtue of an 'understanding' or agreement on appellee's part with its said employees in consideration of the monthly deductions from their wages, as appellant's evidence at least tends to show, then appellee cannot escape from its obligation to the employees to furnish suitable medical and surgical services, in event of their sickness or injury, whatever might be the state of the accumulated fund. The fact that it does not appear, as in the *Connaughten Case* (1899) 20 Tex. Civ. App. 642, 50 S. W. 173, that there, is under the contract with Dr. Webb, a distinct pecuniary profit in the conduct of the hospital department, should not, it seems to us, be conclusive. As an incident to its main business it may be deemed to be otherwise beneficial and profitable. We would feel a hesi-

tancy in saying that as so incidental to its business as a railway carrier it is outside of the scope of its corporate powers to maintain a hospital department. Aside from charitable purposes, for which railway companies are not organized, it may be said to be in the pecuniary interest of such a company to maintain a state of health and capability among its employees as instrumentalities of its business. Why should it be said that this is in no sense of profit to appellee? True, perhaps no direct pecuniary benefit is received, but the same may be said to be the case in the conduct of its machine shops and other departments, where its insensate physical properties are repaired when injured. At least it seems to us that it was for the jury and not the court, to say from all the circumstances, including its general plan, whether appellee's hospital department was conducted as a mere charity, and not for profit."

In *Texas & P. R. Co. v. McWain* (1909) 57 Tex. Civ. App. 512, 124 S. W. 202, the court went even farther, as will be seen from the following quotation: "If there was a contract whereby this appellant undertook, in consideration of the monthly deduction from appellee's wages, to furnish him medical treatment, then appellant is liable for the negligence of its physicians supplied by it in discharge of such undertaking, notwithstanding it may be that no profit accrues to it from the deductions thus imposed upon its employees. Indeed, its liability would be the same if no deduction whatever was made. It is inherent in the very contract of employment, and to furnish careful treatment where it has contracted to do so is as much a part of its duty as to exercise care in furnishing a safe place to work and safe tools and appliances with which to labor."

¹⁰ *Phillips v. St. Louis & S. F. R. Co.* (1908) 211 Mo. 419, 17 L.R.A.(N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 41 Ann. Cas. 742.

¹¹ *Illinois C. R. Co. v. Buchanan*

In one case it was held that a railroad company was not liable for acts of its surgeon who had been sent by it to a wreck, in mutilating the corpse of one of the employees who had been so severely injured that he subsequently died and the surgeon sent the body to an undertaking establishment.¹²

The extent of the liability of charitable and noncharitable hospitals to third persons is discussed in chapter CXII.

2006. Duty to provide medical aid for seamen.—The general rule of maritime law is that a seaman who has contracted a sickness, or received an injury, while in the service of his ship, is entitled to be cured at the expense of the ship and the shipowner.¹ The right conferred by this rule constitutes "a part of the contract for wages, and

(1907) 126 Ky. 288, 11 L.R.A.(N.S.) 711, 103 S. W. 272.

¹² *Louisville & N. R. Co. v. Blackmon* (1907) 3 Ga. App. 80, 59 S. E. 341.

¹ Lord Mansfield in *Paul v. Eden* (1785), an unreported case cited in *Abbott on Shipping*, *619; *Chandler v. Grieves* (1796) 2 H. Bl. 606, note (a), 6 T. R. 325, note 3, Revised Rep. 525; *Hart v. The Littlejohn* (1800) 1 Pet. Adm. 115, Fed. Cas. No. 6,153; *The Nimrod* (1822) 1 Ware, 9, Fed. Cas. No. 10,267; *Holmes v. Hutchinson* (1833) Gilpin, 447, Fed. Cas. No. 6,639; *Brunent v. Taber* (1854) 1 Sprague, 243, Fed. Cas. No. 2,054; *Croucher v. Oakman* (1861) 3 Allen, 185; *Somerville v. The Francisco* (1870) 1 Sawy. 390, Fed. Cas. No. 13,171; *Brown v. The D. S. Cage* (1872) 1 Woods, 401, 405, Fed. Cas. No. 2,002; *The North America* (1872) 5 Ben. 486, Fed. Cas. No. 10,314; *Brown v. The Bradish Johnson* (1873) 1 Woods, 301, Fed. Cas. No. 1,992; *Longstreet v. The R. R. Springer* (1880) 4 Fed. 671; *The Explorer* (1884) 20 Fed. 135; *The W. L. White* (1885) 25 Fed. 503; *The Neptuno* (1887) 30 Fed. 925; *Sanders v. Stimson Mill Co.* (1903) 32 Wash. 627, 73 Pac. 688; *The Charles H. Klinck* (1909) 172 Fed. 1019, and the cases cited *passim* in the following notes.

The expenses which are deemed to be a charge upon the ship include medical advice, as well as medicine, diet, lodging, and attendance. *The William Harris* (1837) 1 Ware, 367, Fed. Cas. No. 17,695.

In *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047, Story, J., stated that his researches into the mari-

time laws of foreign countries had not disclosed a single instance in which they threw the expenses of sick or injured seamen upon themselves. His summary of the effect of those laws may be usefully quoted: "(9) I am not satisfied that Spain forms an exception. Her marine ordinances have not been within my reach. And the language cited by Cleirac from the *Laberinto del Comercio* contains a denial only of wages during sickness. Cleirac *Us et Cout.*; *Commentaire sur Hanseat. Ord.* art. 45, p. 104. On the contrary, the positive ordinances of the principal maritime nations expressly make these expenses a charge upon the ship. This is certainly the law of France, Denmark, Sweden, the Hanse Towns, Prussia, Holland, and probably of the Italian states. (10) *Code de Commerce*, b. 2, title 5, art. 262, 263; *Ord. de la Marine*, lib. 3, title 4, art. 11, 1 Valin, 721; 1 Emerigon, chap. 12, § 41, art. 15, p. 633. Cleirac, *Jugements d'Oleron*, arts. 6 & 7, p. 16; Old Hanseat. *Ordin.* [1591] art. 39, 45; New Hanseat. *Ord.* title, 14, art. 2, and Kuricke *Jus. Marit. Hanseat.* pp. 678 & 821; Targa. *Pond.* chap. 17, § 16, chap. 85, § 7; Jacobsen, *Sea Laws*, b. 3, chap. 2, p. 144 [Frick's translation]; Pothier, *Louage de Matelots*, n. 189 [Cushing's translation, p. 114]; *Ordin. Rotterdam*, 1721, arts. 224, 246, 2 Magens, 115, 118. The same principle is recognized in the ancient laws of Wisbuy (11), *Laws of Wisbuy*, art. 19, and in those of Oleron, which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence (12), *Laws of Oleron*, arts. 6, 7, 1 Bl.

is a material ingredient in the compensation for the labor and services of the seamen.”² The rule is applicable, irrespective of whether

Com. 419; 4 Bl. Com. 423; *Walton v. The Neptune* (1800) 1 Pet. Adm. 142, 144, Fed. Cas. No. 17,135. . . . The Consolato del Mare does not speak particularly on this point; but from the provisions of this venerable collection of maritime usages in cases nearly allied, there is every reason to infer that a similar rule then prevailed in the Mediterranean (13). Consolato del Mare, chaps. 124, 125, Boucher, Consulat de la Mer, chaps. 127, 128. Molloy evidently adopts it as a general doctrine of maritime law (14); Molloy, b. 2, chap. 3, § 5, p. 243.”

The maritime laws of Oleron, Wisbuy, and the Hanse Towns are printed at length in the Appendix to 1 Pet. Adm. 1.

See also the Commentary of Pardessus, I., 474, II., 521, 556, IV., 366.

By § 4552 of the U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3089), it is declared that a discharge by a shipping commissioner at the end of the voyage “shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto on account of wages, in respect of the last voyage or engagement.”

By the Dingley act June 26, 1884, § 3, chap. 121, 23 Stat. at L. 54, U. S. Comp. Stat. 1901, p. 3109. “Whenever a seaman is discharged by a consular officer in consequence of any hurt or injury received in the service of the vessel, such consular officer shall require the payment by the master of one month’s [extra] wages for such seaman over and above the wages due at the time of discharge.”

It has been held that neither of these provisions can be construed as absolving the vessel from liability for the expenses of the seaman’s medical treatment for a hurt received before the discharge. *The W. L. White* (1885) 25 Fed. 503. The court was also of the opinion that the ship’s liability was not diminished by U. S. Rev. Stat. § 4581, as amended by the 7th section of the act of June 26, 1884 (23 Stat. at L. 55, chap. 121, U. S. Comp. Stat. 1901, p. 3107), which provides that “if any seaman, after his discharge, shall have incurred any expense for board or other necessities at the place of his

discharge, before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose, and the balance only paid over to such seamen.”

In *The Henry B. Fiske* (1905) 141 Fed. 188, it was held that an injured seaman who had been discharged from a hospital as cured of certain injuries was entitled to recover from the vessel for the expense subsequently incurred in being treated for other injuries received at the same time, but not treated at the hospital.

In *The Troop* (1904) 63 C. C. A. 584, 128 Fed. 856, affirming (1902) 118 Fed. 769, it was held that an American court of admiralty may, in its discretion, entertain jurisdiction of a suit by an alien seaman against a foreign ship to recover damages for gross negligence or misconduct of the master in failing to furnish libellant proper care, nursing, and medical treatment after his accidental injury while in the service of the ship, and that the assumption of such jurisdiction will not be held an abuse of discretion by an appellate court, where the circumstances were such that otherwise the libellant, who was left in this country, permanently injured, and without money, would probably have been without effective remedy.

Whether a suit *in personam* for the recovery of such expenses should be brought against the owner of a chartered ship or the charterer must be determined with reference to the same principles which determine the proper incidence of liability in case of contracts made, or torts committed by, the members of the crew of such a ship. See §§ 932 *et seq.*, *ante*.

In *Walton v. The Neptune* (1800) 1 Pet. Adm. 142, Fed. Cas. No. 17,135, it seems to be laid down that a seaman who, without any misconduct on his part, is accidentally disabled, while in the service of the ship, is to be cured at his own charge. By all the other authorities, however, cases of injury and sickness are assimilated.

² *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047, where Story,

the sickness or injury of the seaman was or was not due to the fault of the shipowner or his agents.³ But in a case where such fault is shown, he may recover damages in addition to the expenses of medical treatment.⁴

The duty to furnish a seaman with proper care, treatment, and supplies is one which belongs to the class of those which are regarded as being nondelegable. (See generally, chapter LXIV., *ante*.) Accordingly a seaman is entitled to maintain an action against the ship

J., held that a claim of this sort was one in the nature of additional wages during the period of sickness, and was just as proper to be enforced in a court of admiralty as a claim for additional pay. He considered that it stood upon the same analogy as the compensation allowed by the laws of the United States, by which it was provided that, in cases of short allowance of provisions and water, the amount should be recoverable in the same manner as wages. Act July 20, 1790, chap. 29, § 9.

That the right is one to be enforced by an award of additional wages was also laid down in *The Ben Flint* (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299.

In *Sanders v. Stimson Mill Co.* (1904) 34 Wash. 357, 75 Pac. 974 (a rehearing of the same case, as reported in [1903] 32 Wash. 627, 73 Pac. 688), the court reversed its former decision on the ground that it was apparent from the complaint that the plaintiff had sued in tort, that the action was brought to recover for damages sustained by the alleged negligence and wrongful acts of the respondent, and that there was no element of maritime contract expressed or intimated either in the complaint or in any of the succeeding pleadings. The point that he was entitled to recover on the ground of contract having been raised for the first time on the appeal was treated as not being open to consideration.

That wrongfully withholding suitable medicines from a seaman, and wrongfully setting him ashore in a foreign country, are violations of a contract of hiring, was held in *Crapo v. Allen* (1849) 1 Sprague, 184, Fed. Cas. No. 3,360.

The fact that a seaman's disease is of a malignant and infectious variety will not justify the master in putting him ashore without any provisions for his subsistence, or proper medical attend-

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ance. *Tomlinson v. Hewett* (1872) 2 Sawy. 278, Fed. Cas. No. 14,087.

In *Harden v. Gordon*, *supra*, Story, J., approved the view of Judge Peters, that the words "deducting charges, etc.," in the 7th art. of the Laws of Wisbuy, refer to extra charges for more delicate diet than usual. *Walton v. The Neptune* (1800) 1 Pet. Adm. 142, 144.

³ *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483.

Sanders v. Stimson Mill Co. (1903) 32 Wash. 627, 73 Pac. 688, and the cases cited *passim* in this chapter. See especially § 2009, *a*, *post*.

⁴ See cases cited in §§ 2009, *b*, and 2010, *post*.

In *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, it was observed that by English and American judges "a departure has been made from the Continental codes, in allowing an indemnity beyond the expense of maintenance and cure, in cases arising from unseaworthiness." The court added: "We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

A seaman injured while on duty, although through no fault of the vessel, is entitled to recover for cost of maintenance and cure, regardless of the termination of the voyage, although he cannot recover damages in addition. *The Teviotdale* (1909) 166 Fed. 481.

In *Brown v. The Brandish Johnson* (1873) 1 Woods, 301, Fed. Cas. No. 1,992, it was laid down that, in the absence of fault, damages in the nature of extra wages cannot be recovered.

Where the seaman's injury was not caused by any negligence on the part of the shipowner or his agents, his hospital expenses cannot be recovered under a declaration which merely claims damages for the injury. *Wyman v. The Duart Castle* (1899) 6 Can. Exch. 387.

for damages caused by its non-performance, even though the party to whom such non-performance was attributable was for other purposes his coservant.⁵

By one of the English courts of common law it has been held the general authority which the master of a ship possesses to pledge the owner's credit for "such matters as are necessary for the due prosecution of the voyage" does not empower him to bind the owner by a contract for the supply of medicines and provisions to a sailor who is left behind to be cured of an injury received at the port of departure.⁶ Unless the fact that the injury in this instance was received at the port of departure is to be regarded as a differentiating element, it is difficult to reconcile this decision with the rule of maritime law which is stated at the commencement of this section. That the master of a ship should be deemed to have an implied power to make

⁵ *The Troop* (1904) 63 C. C. A. 584, 128 Fed. 856, affirming (1902) 118 Fed. 769 (non-performance of duty after accidental injury); *The Matterhorn* (1904) 63 C. C. A. 331, 128 Fed. 863 (non-performance of duty after maltreatment by master); *Gabrielson v. Waydell* (1895) 67 Fed. 342.

In *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, this doctrine was laid down in the exceptive form, that "all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants; and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of their maintenance and cure." The appellants in *The Troop*, *supra*, relied upon this case as having committed the Supreme Court to the doctrine that a seaman is not entitled to pursue a vessel *in rem* for injury caused by the neglect of the master to furnish him with proper medical treatment. But it was pointed out that the actual question involved was merely whether a suit *in rem* can be maintained against a vessel for an injury received by a member of the crew, as a result of the improvident and negligent order of the master, in directing that the gangway be unshipped while the vessel was at sea, running against the wind. It could not "be presumed that it was the intention of the court to overrule, without referring thereto, a long line of American decisions in which it has been uniformly held for

nearly a century that a seaman injured while in the service of his ship is entitled to proper care and medical attention at the expense of the ship, and that, if this be neglected, the ship may be held in consequential damages."

⁶ *Organ v. Brodie* (1854) 10 Exch. 449. There, several sailors having met with a serious accident in weighing the anchor at the port of departure, were taken on shore by the captain and left at the house of the plaintiff, who was told by the captain that the owner of the vessel would pay for what the sailors had. The captain immediately afterwards hired some fresh hands, and proceeded on the voyage. At the time the sailors were intrusted to the care of the plaintiff, there was no probability that they would be able to resume their duties for that voyage, and they remained at his house for several weeks. An action against the owner of the vessel for food and medicine supplied to the sailors was held not to be maintainable. Parke, B., said: "The facts show that it was not necessary that these seamen should be cured, in order that the vessel might proceed on her voyage. If that had appeared to be the case, the owner would have been responsible for all necessary supplies of medicine ordered by the captain, and perhaps even for provisions. But as there is no ground for saying that these matters were necessities in that sense, the captain had no authority to pledge the owner's credit."

the medical expenses of a seaman a charge upon the ship, or to pledge the shipowner's credit for their payment, seems to be a necessary consequence of treating the ship and the shipowner as being ultimately liable for those expenses. The doctrine that this is one of the implied powers of the master has been recognized in one case by an American court of admiralty.⁷

2007. What persons are within the scope of the rule.—The general rule stated in the preceding section is applicable to the crews of all sea-going vessels, however short may be the voyages in which they may be engaged.¹ In the United States, it has been extended so as to cover persons employed on the Great Lakes and on navigable rivers.² But its operation in respect to such waters is limited to cases in which the contract of employment relates to a definite voyage of some length.³

⁷ See *The Laura Madsen* (1901) 112 Fed. 72, where, however, the actual point decided was that the master of a ship has no authority to pledge the credit of the ship for the expenses of the medical treatment of a stowaway whom he has compelled to sign articles. The legal position of a stowaway under such circumstances is merely that of one who is voluntarily and wrongfully on board the ship.

Reference may also be made to two other cases which are somewhat pertinent in the present connection.

In one it was held that a sick or injured seaman is entitled to be reimbursed for any outlay which he himself may have made, and to be indemnified against any personal responsibility which he may have incurred, in respect to his own medical expenses. *The Atlantic* (1849) Abb. Adm. 451, 478.

In the other it was conceded that, under some circumstances, a shipowner will be bound to recoup the consignee of the ship at a foreign port, who has paid the expenses of the sickness and funeral of the master. *Winthrop v. Carleton* (1815) 12 Mass. 4. The decision was put upon the ground that the owner is presumed to authorize everything to be done by the consignee which the custom of the place where the vessel is shall require to be done.

¹ *The Mars* (1907) 79 C. C. A. 435, 149 Fed. 729, affirming (1905) 138 Fed. 941, and (1906) 145 Fed. 446 (crew of tug).

² For cases in which the rule was applied with reference to the crews of lake vessels, see *The Ben Flint* (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299; *The J. F. Card* (1890) 43 Fed. 92.

For cases in which men serving on river boats were concerned, see *Meyers v. The Lizzie Hopkins* (1871) 1 Woods, 170, Fed. Cas. No. 9,993; *Longstreet v. The Springer* (1880) 4 Fed. 671 (steamboat between Cincinnati and New Orleans); *Moseley v. Scott* (1866) — Ohio —, 5 Am. L. Reg. N. S. 599. (steamboat on the Ohio river); *The Centennial* (1881) 4 Woods, 50, 10 Fed. 397; *The Troy* (1902) 121 Fed. 901.

³ It does not apply to the case of an employee hired for a couple of hours to assist in moving a barge a short distance along a river. *Hanson v. The John B. Lyon* (1887) 33 Fed. 184. The court said: "This ship was not bound upon a voyage, within the meaning of the cases in which this rule has been applied, or of the circumstances out of which the rule originated. . . . It was not a case where it was expected to earn freight, or in any way engage in commerce. No shipping articles were signed; no special employment as seaman was given to the libellant. The barge, as the libellant must have known, was proceeding from one location in the harbor to another by the aid of tugs, and the main burden of handling the barge was upon the tugs. As a matter of special precaution, the captain secured the services of these few men, . . . and the libellant was directed

The rule embraces the officers of the ship, and all the members of the crew who have been employed in the ordinary manner, whether their duties pertain to navigation or not,⁴ and whether they are compensated by wages of a specific amount, or by a share of the earnings of the vessel.⁵ But there is no obligation to furnish medical aid to a stowaway.⁶

2008. Limits of the shipowner's liability. Generally.—The shipowner's obligation to provide medical attendance for an injured seaman is predicated only with respect to cases in which the injury was received while he was in the service of the ship.¹

The ship is chargeable with the medical expenses incurred by a seaman on shore, if no proper means for treating him on board were

to take his place in the wheelhouse. This did not make him a seaman, or put him in such a relation to this vessel as to entitle him to all the rights of a seaman who had been duly shipped for a voyage. He was merely in the position of an employee rightfully on board of the vessel, and if, while there, he had been injured, by reason of the fault or negligence of the officers of the barge, he might have had this action either at law, or his libel in admiralty, to recover damages for such injury."

A tug under 30 tons burden, making short trips of less than 40 miles on an inland lake, is not liable to an injured hand because of failure to have on board medicines and appliances necessary to treat the injury. *Lapier v. Beaubien Ice & Coal Co.* (1910) 162 Mich. 533, 35 L.R.A.(N.S.) 199, 127 N. W. 692.

⁴*Babcock v. Terry* (1866) 1 Low. Dec. 66, Fed. Cas. No. 702 (chief officer); *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047 (chief officer); *The George* (1832) 1 Sumn. 151 Fed. Cas. No. 5,329 (mate); *Callon v. Williams* (1871) 2 Low. Dec. 1, Fed. Cas. No. 2,324 (mate); *The Atlantic* (1849) Abb. Adm. 451, Fed. Cas. No. 620 (carpenter's mate); *Holt v. Cummings* (1883) 102 Pa. 212, 48 Am. Rep. 199 (engineer of steamer); *Sanders v. Stimson Mill Co.* (1903) 32 Wash. 627, 73 Pac. 688; *The North America* (1872) 5 Ben. 486, Fed. Cas. No. 10,314 (fireman of steamer); *Longstreet v. The Springer* (1880) 4 Fed. 671 (fireman of steamer); *The Mars* (1907) 79 C.

C. A. 435, 149 Fed. 729, affirming (1905) 138 Fed. 941, and (1906) 145 Fed. 446 (fireman of steamer); *Moseley v. Scott* (1866) — Ohio —, 5 Am. L. Reg. N. S. 599 (cabin boy).

⁵*The Atlantic* (1849) Abb. Adm. 452, Fed. Cas. No. 620; *Knight v. Parsons* (1855) 1 Sprague, 279, Fed. Cas. No. 7,886 (fishermen on fishing schooner, paid according to their catch).

⁶*The Laura Madsen* (1901) 112 Fed. 72.

¹In a standard treatise it is stated that the effect of the marine ordinances is that a seaman is not entitled to be cured at the expense of the ship, where he receives an injury in the pursuit of his own private concerns. Abbott, Shipping, 11th ed. p. 167, citing the Laws of Oleron, art. 6, Laws of Wisbuy, art. 18, Laws of the Hanse Towns, art. 39; 2 Pet. Adm. pp. xiv., lxxiv., cv., App. x.

In *Reed v. Canfield* (1832) 1 Sumn. 195, Fed. Cas. No. 11,641; Story, J., expressed the opinion that this statement of the law is fully borne out by the authorities relied on.

An injury inflicted by an officer in punishing a seaman in an improper manner was held to have been received "in the service of the ship," this phrase not being confined in its application to acts done for the benefit of the ship, or in the actual performance of duty. *Ringgold v. Crocker* (1848) Abb. Adm. 344, Fed. Cas. No. 11,843.

See also *Lombard S. S. Co. v. Anderson* (1904) 67 C. C. A. 432, 134 Fed. 568, § 2009, note 12, post.

available,² or, irrespective of that question, if he left the ship with the consent of the officers.³ On the other hand, a seaman who, instead of accepting the master's offer of assistance, abandons the service of the vessel and seeks medical aid on shore, forfeits his right to be cured at the ship's expense.⁴

A shipowner is not liable for the medical expenses of a seaman whose gross negligence or wilful misconduct was a contributory cause of his sickness or injury.⁵ But his claim is not barred by evidence

² *Babcock v. Terry* (1866) 1 Low. Dec. 66, Fed. Cas. No. 702.

³ In *The North America* (1872) 5 Ben. 486, Fed. Cas. No. 10,314, a fireman was held to be entitled to his wages for the whole voyage, although he had gone to a hospital at the place where the ship touched on the outward voyage, and the expenses of treatment exceeded the amount of his wages, the proof being that he had gone to the hospital upon the judgment of the officers of the ship as well as upon his own, and for the convenience of the ship. In this case it was conceded that the seaman would have had no claim against the ship if he had gone into a hospital against the expressed judgment of the officers.

See also *Harden v. Gordon* (1823) 2 Mason. 541, Fed. Cas. No. 6,047, and *The George* (1832) 1 Sumn. 151, Fed. Cas. No. 5,329, the effect of which is stated in § 2012, notes 1, 4, *post*. In the former of these cases Story, J., states that the various marine ordinances which are evidence of the general maritime law declare that a sick seaman, when he is put ashore, is entitled to receive suitable sustenance and attendance from the ship and crew during his illness. By art. 7 of the Laws of Oleron, it is provided: "If it happens that sickness seizes on any one of the mariners while in the service of the ship, the master ought to set him ashore, to provide lodging and candle-light for him, and also spare him one of the ship's boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship." Other provisions to the same effect are art. 19 of the Laws of Wisbuy, and art. 45 of the Hanseatic ordinance.

The fact that the seaman, upon being given his choice between remaining on board the ship, and being sent on shore to a hospital, chooses the latter, will

not exempt the ship from liability for expense while there. *Johnson v. Doubty* (1827) 1 Ashm. (Pa.) 165.

No allowance will be made to an injured seaman for medical attendance if he was sent to a hospital at the expense of the ship. *The Centennial* (1881) 4 Woods, 50, 10 Fed. 397.

Or if he was treated at a hospital gratuitously. *Davis v. The Erie* (1840) Fed. Cas. No. 3,632a.

⁴ *The Cambridge* (1877) 4 Sawy. 252, Fed. Cas. No. 2,335 (abandonment of service was treated as a renunciation by the seaman of any further claim upon the ship for the expenses of his cure).

⁵ *The Mars* (1907) 79 C. C. A. 435, 149 Fed. 729, affirming (1905) 138 Fed. 941, and (1906) 145 Fed. 446; *The City of Alexandria* (1883) 17 Fed. 390 (this exception to the general rule was recognized by the court, *arguendo*).

In *The Ben Flint* (1867) 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, it was laid down that to produce a forfeiture of the claim, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience to orders, persistent neglect of duty.

The rule, as laid down in *Walton v. The Neptune* (1800) 1 Pet. Adm. 142, Fed. Cas. No. 17,135, is that, if the sickness, disability, or death of a seaman was due to "vicious or unjustifiable conduct," he or his heirs must bear the loss.

In *Johnson v. Huckins* (1843) 1 Sprague, 67, Fed. Cas. No. 7,390 it was held that in case of sickness produced by the seaman's own fault, he would be charged with the expenses of subsistence; and while there is no express ruling on the question of medical attendance, some expressions of the court

which merely goes to show that he was guilty of ordinary carelessness.⁶

It has been held that, where the expenses in question were incurred in the treatment of a sickness, it is not necessary to show, as a prerequisite to recovery, that it originated while the seaman was actually in the service of the ship, but merely that it existed during that period, and that it was not due to any fault or misconduct on his part.⁷ Whether a similar rule prevails where the conditions which demanded the treatment were the result of a bodily injury received before the time when the seaman entered the service is a point which has apparently not been decided. But it is apprehended that the obligation of the shipowner would extend to such a case also.

A freighting vessel is not bound to provide a physician or nurses for sick seamen on the voyage. The care and attention of the master are all that the crew have a right to demand.⁸

2009. Limits of liability in respect of time.—*a. Question considered apart from the element of fault on the part of the shipowner or his agents.*—It is agreed by the courts that, except in cases where the

would seem to imply that subsistence was regarded as including medicine.

That the vessel is not chargeable with the expenses of the cure of a seaman who contracts disease by his own vices or faults, and in defiance of the counsel and command of his superior officers, was held in *Pierce v. Patton* (1833) Gilpin, 435, Fed. Cas. No. 11,145.

Similarly it has been laid down that a sailor is not entitled to be treated at the expense of the ship, nor to wages, while disabled by disease brought on by his own vices, nor when, being in a diseased state, unknown to the master and owners, he ships as an able man. *Chandler v. The Annie Buckman* (1853) Fed. Cas. No. 2,591a.

A seaman who disregards the advice of his physician, and uses a wounded foot, cannot recover of the ship for its subsequent care and cure. *Richardson v. The Juillette* (1842) 2 N. Y. Leg. Obs. Fed. Cas. No. 11,784.

The expenses of his curing himself from any illness or injury occasioned by his own improper conduct are thrown upon the seaman by the Laws of Oleron, art. 6; Laws of Wisbuy, art. 20; Marine Ordinances of France, liv. 3. F. 4, art. 12; Code de Commerce, art. 264.

⁶ *Reed v. Canfield* (1832) 1 Sumn.

195, Fed. Cas. No. 11,641; *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645; *The Ben. Flint* (1867) 1 Biss. 562, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299; *The City of Carlisle* (1889) 5 L.R.A. 52, 14 Sawy. 179, 39 Fed. 807 (ship liable where seaman's injury resulted from his failure to notice that a clew iron was hanging loose); *The City of St. Louis* (1893) 56 Fed. 720 (ignorance of methods of the boat, contributing to the injury of a deckhand on a steamboat, held not to constitute a fault of such character as to debar him from recovering his expenses); *The Wanderer* (1884) 20 Fed. 140; *The Chico* (1905) 140 Fed. 568; *The Mars* (see preceding note).

One of the propositions which were recently declared by the Supreme Court of the United States to have been settled by the English-American authorities was stated thus: The seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

⁷ *Neilson v. The Laura* (1872) 2 Sawy. 242, Fed. Cas. No. 10,092.

⁸ *The Wensleydale* (1890) 41 Fed. 602.

seaman's sickness or injury is the result of his own wilful misconduct, the duty of the shipowner to furnish him with medical or surgical attendance continues, at least up to the time when the voyage is ended and he is discharged from service.¹ Nor is it disputed that the liability of a shipowner for the medical expenses of a seaman whose sickness or injury was not the result of the shipowner's tortious acts terminates with the cure of the seaman.² But under the authorities, as they stand, it seems to be a matter of considerable uncertainty whether the shipowner's liability for medical expenses is to be considered as one which is coextensive in point of duration with the contract of employment, and ceases to subsist when the seaman is discharged, or whether in some circumstances the shipowner remains subject to that liability for a further period. An examination of the

¹ *The Osceola* (1902) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; *The City of Carlisle* (1889) 5 L.R.A. 52, 14 Sawy. 179, 39 Fed. 807; *The W. L. White* (1885) 25 Fed. 503; *Harris v. Capen* (1857) Fed. Cas. No. 6,118 (seaman injured during a voyage, and left sick in a foreign port, held to be entitled to wages during such sickness, and up to his arrival home, together with medical expenses, deducting wages actually earned on the return voyage).

The same doctrine was also taken for granted in many of the decisions cited in the preceding sections.

In *Reed v. Canfield* (1832) 1 Sumn. 195, Fed. Cas. No. 11,641 (where a seaman had his feet frozen in the home port before he was discharged), Story, J., thus disposed of the contention that the maritime law applies only to sickness, accidents, and injuries which occur during the voyage, and not to those which occur when she is in the home port, either at the commencement or termination of her voyage: "I know of no such qualification ingrafted upon the rule of the maritime law. It embraces all sickness and all injuries sustained in the service of the ship, and while the party constitutes one of her crew, without in the slightest manner alluding to any difference between their occurring in a home or in a foreign port, upon the ocean, or upon tide-waters. . . . The voyage of the ship must, so far as the seaman are concerned, be deemed to commence when

they are to perform service on board, and to terminate when they are discharged from further service. The title to be cured at the expense of the ship is coextensive with the service in the ship. The seaman is to be cured for injuries and sickness occurring while he is in the ship's service. It is the benefit from the service which constitutes the groundwork of the claim. And I am wholly unable to perceive any principle upon which a distinction can be maintained between a service in a foreign and a home port."

In a Pennsylvania case it has been held that, if a seaman is injured at the home port, and the captain of the ship summons a physician, who attends the man on board the boat, and subsequently, after his removal to his home, the ship will be liable for the whole amount of the bill. *Holt v. Cummings* (1883) 102 Pa. 212, 48 Am. Rep. 199.

In *The Atlantic* (1849) Abb. Adm. 451, Fed. Cas. No. 620, the court mentions that, according to the commentary of Pardessus, the French maritime law limits the obligation of the master, in case of a seaman left sick aboard, to the providing for the charge of his sickness, and for the expense necessary to place him in a condition to return home. 1 Pardessus, § 688; 1 Boulay Paty, 202; *Hart v. The Littlejohn* (1800) 1 Pet. Adm. 117, Fed. Cas. No. 6,153.

² *Lord Advocate v. Grant* (1874) 1 Sc. Sess. Cas. 4th series, 44.

decisions bearing on these points shows that they may be arranged under the following heads:

(1) Those in which the language used is such as seems on its face to indicate the adoption of an absolute rule to the effect that the obligation does not extend beyond the time when the seaman's contract has been fully performed.³

(2) Those which embody the doctrine that, under ordinary circumstances, the obligation ceases when the seaman's contract is dissolved, but that there may be exceptional instances in which his medical expenses will continue to be a charge on the ship after that time.⁴

³ *The J. F. Card* (1890) 43 Fed. 92 (obligation of vessel navigating the Great Lakes held not to extend beyond the time when the seaman returns to his home port or to a marine hospital); *Sullivan v. The Neptuno* (1887) 30 Fed. 925; *The Tammerlane* (1891) 47 Fed. 822.

In *Nevitt v. Clarke* (1846) Olcott, 316, Fed. Cas. No. 10,138, Betts, J., referring to the language used by Story, J., in *Reed v. Canfield* (1832) 1 Sumn. 202, Fed. Cas. No. 11,641 (see note 7, *infra*), said that the unqualified terms in which the doctrine was there stated seemed to involve the corollary "that the owner remains chargeable with the expenses sustained by a seaman in employing medical means to effect a cure, so long as the necessity for such expenses abides." Betts, J., then proceeded to point out some of the inconvenient consequences of adopting such a rule: "It is manifest that a construction of this law which should charge owners of vessels with the support of sick crews without limitation of time would be most oppressive in its consequences, if it did not also tend to impair to a serious degree the maintenance and prosperity of a merchant marine, and thus become a public evil. The ship and owner would be rendered liable for the support of sick seaman out of each successive crew and voyage, who would be made pensioners upon the owner so long as their infirmities remain uncured. . . . A liability so hazardous would be oppressive and disastrous to navigation and trade." It was accordingly held that the right of the libellant to wages, and his right to support or medical treatment at the expense of the respondents, supposing his cure not then

completed, ended on his arrival at the home port. The reasoning in this case, it will be observed, is quite unsatisfactory in this respect,—that it assumes the only two possible alternatives to be the absolute denial of any liability on the shipowner's part after the shipping contract is terminated, or the admission of a liability unlimited in point of time. This view of the logical situation is by no means accepted by all the authorities. See *infra*.

Doubts as to the correctness of the doctrine laid down by Story, J., were also expressed in *The J. F. Card*, *supra*.

⁴ In *The Ben Flint* (1867) 1 Biss. 562, 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, conclusion reached after a review of the American cases was that, "in the absence of misconduct or neglect on the part of the officers, the obligation of the vessel to provide for a disabled or sick seaman should only be coextensive in duration to that of the seaman to the vessel. The privileges and liabilities of the parties are, in contemplation of law, measured by the shipping articles. Interests of commerce do not require that the privileges and duties of shipowners and seamen should be extended beyond reason, nature, and terms of the shipping contract, unless for fault, misconduct, or neglect on the part of officers of vessels towards their seamen: or perhaps, when the removal of a sick or disabled seaman from the vessel, or a change of treatment then being practised, might prejudice his recovery within a reasonable time. Humanity and equity might require indulgence in extreme cases."

In *The Lizzie Frank* (1887) 31 Fed. 477, the court disapproved the above exposition of doctrine in so far as it may have been intended to embody the

(3) Those in which it is declared, without any qualifying words, that a seaman injured in the service of the ship is entitled to be "cured at the expense of the ship,"⁵ or that he is entitled to be taken care of until the end of the voyage, or longer, if necessary, to effect a cure.⁶ But in spite of the generality of the language used in such cases as these, it can scarcely be supposed that the courts really intended to stand sponsor for the broad principle that the shipowner's obligation invariably continues until the seaman's cure is complete, whatever the length of the period which may be requisite to restore him to his normal physical condition. It may at all events be asserted with some confidence that such a principle cannot reasonably

rule that the ship is in no case liable for a seaman's medical expenses after his discharge.

In *The Atlantic* (1849) Abb. Adm. 452, Fed. Cas. No. 620, the subject was thus discussed: "The expression often employed in the various ordinances and in the decisions is, that mariners are entitled to be 'cured' of sickness and wounds received in service of the ship. This statement is clearly not to be taken in an absolute sense. That would involve impossibilities. Diseases and injuries so incurred are frequently in their nature, and in their direct consequences, incurable. An exposure to unusual labor or privations on the voyage may induce maladies permanent or irremediable in their character; thus, broken limbs, or bodily debility resulting from services in the ship, are very often the sailor's heritage for the residue of his life. . . . The term 'cure' was probably employed originally in the sense of 'taken charge' or 'care of' the disabled seaman, and not in that of positive healing. The obligation of the ship to the mariner would then be coextensive in duration to that of the mariner to the ship. Natural reason would seem to point to that limitation, it being the one consonant to the relation in which the law places the parties to each other, and by which it measures their privileges and liabilities under a shipping contract. This rule may undoubtedly be subject to variations. When a course of medical treatment, necessary and appropriate to the cure of the seaman, has been commenced and is in a course of favorable termination, there would be an impressive propriety in holding the ship chargeable with its

completion, at least for a reasonable time after the voyage is ended or the mariner is at home. So, also, in case due attention to his necessities has been unjustly omitted by the ship abroad, or his case has been improperly treated, the courts may properly enforce against the ship this great duty towards disabled mariners, even after her contracts are terminated, upon the ground of a failure to perform towards them the obligation in the shipping contract. These particulars, however, are not stated as ingredients in the present case, but are referred to in illustration of the doctrine involved in some of the authorities, and to show they are not inconsistent with the general principle that a seaman has no claim upon the ship or her owner for the cure of his sickness or disabilities after his contract has terminated, and he is returned to his port of shipment or discharge, or has been furnished with means to do so."

⁵ In many of the cases in which this phraseology is found, the court was simply laying down the general rule, and the circumstances were not such as to direct its attention to the question of the duration of the shipowner's obligation. See the cases cited at the beginning of note 1 to 2006, *ante*.

⁶ *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645.

That a ship is liable for the expenses of a seaman at a quarantine hospital until he is cured, and not merely until he is able to sit up, and could leave the hospital if he had a place to go and friends to take care of him, was declared in *The Wensleydale* (1890) 41 Fed. 829.

be read into the ancient rule of maritime law to which these unqualified statements have reference, and that, if purely rational considerations are to control the matter, the arguments set forth in the passages quoted in note 4 are amply sufficient to discredit the theory of an obligation subsisting for an indefinite time.

(4) Those in which the position is taken that a "temporary or permanent disability" occasioned by the sickness or injury is not a ground for indemnity from the owners; that "they are liable only for expenses necessarily incurred for the cure;" that, "when the cure is completed, at least, so far as the ordinary medical means extend," they are freed from all further liability; and that they are "not in any just sense liable for consequential damages."⁷ This theory of the duration of the shipowner's liability is similar to that which is propounded in the last paragraph, with the important qualification indicated by the concluding words of the statement. The particular conception implied in those words also renders it necessary to segregate the doctrine which they limit from the one which is adverted to in the next paragraph.

(5) Those in which the court adopts the doctrine that the shipowner's liability does not necessarily cease when the seaman is discharged at the home port, and at the same time qualifies its statement by language which distinctly shows that the liability is not viewed as being unlimited in point of time,—as where it is laid down that the seaman is entitled to the expenses of his cure "as far as pos-

⁷ This is the doctrine enunciated by Story J., in *Reed v. Canfield* (1832) 1 Sumn. 195, Fed. Cas. No. 11,641. "It has been asked," said the learned judge, "if, in a claim of this sort, the expenses of cure are to be paid by the ship, what are the limits of the allowance? May they be extended over years or for life? Are they to be, like the pensions allowed by some of the marine ordinances in cases of wounds and other injuries, received by seaman in defending the ship from the attacks of pirates? My answer to suggestions of this sort is, that the law embodies, in its very formulary, the limits of the liability. The seaman is to be cured at the expenses of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party while in the ship's service; and he is not to receive any compensation or allowance for the effects of the injury. But so far, and so far only, as expenses are in-

curred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship."

In *The Lizzie Frank* (1887) 31 Fed. 477, the court, while conceding that, by the maritime law, a seaman who is injured or disabled in the service of the ship is entitled to be healed at its expense, and that this liability continues after the voyage is ended and the seaman is discharged, recognizes the limitation that a seaman is not entitled to receive any allowance for the permanent effects of his injury, and that when the cure is complete as far as ordinary medical means extend, the ship and owner are freed from liability.

In *McCarron v. Dominion Atlantic R. Co.* (1905) 134 Fed. 762, the court adopted the doctrine enunciated in *Reed v. Canfield*, *supra*.

sible,"⁸ or that the expenses incurred in treating and curing a seaman "within a reasonable time" after his discharge at the end of the voyage must be paid by the ship,⁹ or that the ship is not bound to defray for an indefinite period the expenses of medical attendance, where the seaman is suffering from a chronic disease.¹⁰

The duration of the shipowner's liability under the English merchant shipping acts referred to in § 2011, *post*, does not seem to have been judicially discussed. But the phraseology used is perhaps suggestive of the meaning that in no case is the liability to extend beyond the time when the seaman reaches the port where he is to be discharged.¹¹

The expenses incident to a sickness which supervened after the rightful discharge of a seaman in a foreign port will not be allowed, although he may, under a clause of his contract, be entitled to wages up to the time of his arrival at the place where he was engaged.¹² Whether such a claim would be enforceable in a case where the discharge was wrongful is a question with regard to which there seems to be no decision.¹³

⁸ *The W. L. White* (1885) 25 Fed. 503; *Whitney v. Olsen* (1901) 47 C. C. A. 331, 108 Fed. 292.

The doctrine laid down in one case is, that the obligation of a vessel to furnish medical attendance, etc., to a seaman injured in her service, does not end with the termination of the voyage, where there was not sufficient time or facilities for the vessel to have then performed its duty. *The Mars* (1907) 79 C. C. A. 435, 149 Fed. 729, affirming (1905) 138 Fed. 941, and (1906) 145 Fed. 446.

⁹ *The W. L. White* (1885) 25 Fed. 503; *Raymond v. The Ella S. Thayer* (1887) 40 Fed. 902.

¹⁰ *Raymond v. The Ella S. Thayer* (1887) 40 Fed. 902.

¹¹ In *The Atlantic* (1849) Abb. Adm. 451, Fed. Cas. No. 620, this construction was put by the court upon an earlier English enactment the language of which was essentially the same as that found in the statutes of 1854 and 1894.

¹² *Lombard S. S. Co. v. Anderson* (1904) 67 C. C. A. 432, 134 Fed. 568.

¹³ As shown in chapter XIV., *ante*, there is a conflict of opinion with regard to the right of a wrongfully discharged seaman to recover wages, *eo nomine*, for the unexpired residue of his

term. If that right should be recognized, it might be argued with some plausibility that, as it is referable to the hypothesis of a constructive continuance of the service, it should be deemed to carry with it the subsidiary right to hold the ship liable for such medical attendance as should be required up to the end of the term; or, at least, to the date of the seaman's return to the port of departure. If, on the other hand, the correct doctrine is, that the seaman is restricted to an action sounding in damages, it would in most instances be impossible to establish any causal connection between the breach of contract and the expenses of an illness, which, in the nature of the case, would have had no direct relation to the conditions under which the stipulated work was to be performed. But it would seem to be not wholly unreasonable to take the position that a discharge which entails an enforced sojourn in a specially unhealthy place should be regarded as the proximate cause of a malady contracted there; at all events, if it were one peculiarly associated with the locality. In this point of view the seaman might be regarded as being entitled to recover the expenses to which he was subjected by reason of his sickness.

b. Question considered with reference to such fault.—The reports contain several decisions which proceed upon the theory that, where the sickness or other physical disability of the seaman is caused by the neglect or misconduct of one of the officers of the ship, he may be entitled to an allowance for the expenses of his cure, even after the termination of the voyage.¹⁴ A similar rule has also been applied in a case in which the effects of an illness were aggravated by the failure of the officers of the ship to take proper care of the sick person.¹⁵ But under such circumstances damages may also be recovered upon the footing explained in the next section.

2010. Liability of shipowner for improper treatment of a seaman after he falls sick or is injured.—A servant who is improperly treated after he has fallen sick or sustained an injury is entitled to recover damages in addition to the expenses of his cure.¹ In several

¹⁴ In *Meyers v. The Lizzie Hopkins* (1871) 1 Woods, 170, Fed. Cas. No. 9,993, where an injury was received by an employee on a river steamer while in the discharge of his duty, owing to the negligence of the officers, the boat was held to be liable for the expense of his keeping and medical attendance until he was restored.

In *The Centennial* (1881) 4 Woods, 50, 10 Fed. 397, where an employee on a river steamer running between St. Louis and New Orleans was injured by a defective gangway, and left disabled at an intermediate port, the court charged his hospital expenses for six months on the ship, and apparently proceeded on the theory that the liability continued until he had completely recovered from his injury.

In *Croucher v. Oakman* (1861) 3 Allen, 185 (sailor had been shot at and wounded by his captain at a foreign port), it was held that the trial judge had correctly instructed the jury that, if the plaintiff was prevented from performing the voyage by the unlawful act of the master, and the injury rendered his removal on shore necessary to receive proper medical treatment, he was entitled to recover wages, deducting such as had been paid to him by the owners or consul, without reference to the termination of the voyage, up to the time when he was sufficiently recovered to sail for home, and to such further time as was reasonable for obtaining a passage, and making a voyage to the United States, and also to

recover for the expenses of his board, nursing, medicines, and medical attendance, until he had so recovered, and for his passage home.

In *The Troy* (1902) 121 Fed. 901, where a sailor on a ship plying on Lake Superior was injured owing to the inexperience of a deckhand, and the insufficiency of the crew, it was held that the ship's duty was not ended by placing him in a hospital at Duluth, nor by carrying him to his home port. The ship was bound to take charge of and care for him until his wounds were healed.

¹⁵ In *The Ben Flint* (1867 1 Abb. (U. S.) 126, Fed. Cas. No. 1,299, the court referred with approval to an Ohio decision (*Moseley v. Scott* [1866] 5 Am. L. Reg. N. S. 599) in which a cabin boy on a river steamer contracted smallpox, and while in bed was so neglected by the officers that his feet were frozen, and ultimately amputated in a hospital, to which he was confined for several months. It was held that the shipowner was liable for the expenses of his treatment in the hospital.

¹ In *The Eva B. Hall* (1902) 114 Fed. 755, a seaman had his arm broken through being struck with a capstan-bar by the mate of the vessel, and the master, during the eleven days it was at sea before reaching port, required him to continue work to some extent, threatening to put him in irons unless he did so. The perfect rest necessary to insure a natural reunion of the disunited parts of the bone was thereby

cases under this head the question for determination has been whether, under the given circumstance, it was the duty of the master of the ship to interrupt the voyage and deviate from his course, for the purpose of reaching a port at which expert medical or surgical treat-

prevented, and the injury greatly aggravated. Libellant told the master that his arm was broken, and it became swollen and inflamed immediately, and remained constantly in that condition. Held that, though there was no fault on the part of the vessel as far as the blow itself was concerned, it was liable for the master's misconduct in compelling the libellant to continue work after he was injured, instead of permitting him to have the necessary rest.

In *The Svaland* (1904) 132 Fed. 932, affirmed in (1905) 69 C. C. A. 97, 136 Fed. 109, an adult seaman on a steamer on a return voyage from a Mexican port to New York, fell and broke his ankle when off Cape Hatteras. The vessel proceeded to New York, which was the end of the voyage, and was reached in forty-eight hours after the injury. A doctor was called, who considered it a sprain, and libellant was not sent to a hospital, although he requested that this should be done, but was kept in his bunk in the forecastle, and the vessel started on another voyage. After reaching Norfolk, at his insistence, other physicians were called, and ten days after the injury he was taken to the hospital. It was then found that the bones had improperly united, and they were broken again and reset. Libellant suffered severe pain, and was permanently crippled, and remained in the hospital for six months. Held, that the vessel was not at fault for not deviating from its course to take libellant to Norfolk after the injury, but was liable for the failure to procure prompt and efficient treatment and care at the end of the voyage. As an excuse for taking the libellant away from New York instead of sending him to the hospital there, the respondent relied upon the fact of his having omitted to ask to be either formally discharged or sent to the hospital. But the court said that no formal discharge was necessary, as the voyage had ended, and that it was unnecessary for him to demand to be sent to a hospital, for the reason that the duty imposed upon the ship was an affirmative one.

In *The Sarnia* (1906) 77 C. C. A. 332, 147 Fed. 106, reversing (1905) 137 Fed. 952, a seaman sustained a trifling injury to his hand before leaving port, and was treated by a doctor at the first port touched. He expressed a desire to remain at that port, but the doctor advised that this was unnecessary, as the injury might be satisfactorily treated on board. During the voyage to the next port, however, it grew steadily worse, and upon his arrival was again treated by a doctor, who recommended him to stay in the hospital. This recommendation he refused to comply with, for the reason that he feared the yellow fever, which was prevalent. Held, that the ship was not liable either for the failure to leave him at the first port, or to overrule his objection to stay at the second port.

In *Johnson v. Holmes* (1899) 173 Mass. 514, 53 N. E. 1000, an action against the master of a vessel by a seaman whose hand was frozen while pounding ice from the rigging during a wintry gale, it appeared that, when the seaman came from the rigging, the steward put his hand in a pail of cold water and afterwards applied a potato dressing to the hand. Held, that the facts that the usual method of treating a frozen hand, as testified to by a physician, was not followed by the master, and that no oil was put on the hand, although there was castor oil on board the vessel, did not prove that the master was guilty of negligence which aggravated the injury. This conclusion was based upon the grounds (1) that there was nothing to show that the application would have had any effect in curing the frostbite or in preventing the injury which resulted, and (2) that there is no evidence that the application of oil to a frostbite was known to the master, or was so commonly in use for such a purpose that the master should have known of it. The same position was taken on the second appeal of the case (1905) 188 Mass. 170, 74 N. E. 364.

If in a suit by a seaman in a court of admiralty to recover damages for

ment could be procured for an injured seaman. As is shown by the decisions, there is sometimes no little difficulty in arriving at a conclusion which shall be in keeping with the dictates of humanity, and yet shall not be suggestive of a standard of duty which sometimes could not be satisfied without inflicting serious damage upon the financial interests of the shipowner, and endangering the ship and her crew. If the voyage has only just been commenced when a seaman receives an injury so severe that it manifestly cannot be properly treated except by an expert, there is doubtless a peremptory obligation on the part of the master to put back for the purpose of placing the seaman under the care of a surgeon.² So also it is clearly the duty of the master to procure such medical attendance as may be

the injury, it is determined that the ship is not liable, it is competent for the court, under a prayer for general relief, to award him compensation for the failure of the ship to furnish him proper support, medical attendance, nursing, and care while his wounds were healing, and for the additional suffering he endured for lack of such attendance and care. *The Troy* (1902) 121 Fed. 901 (syllabus).

In *Petersen v. Swan* (1884) 18 Jones & S. 46, the seaman's claim for damages was based partly on the fact that an injured arm was negligently and improperly treated by the master of the ship.

If, upon the ship's arrival at a port, the necessity of immediate surgical attention to an injured sailor is ascertained, the owner of the vessel will be liable for injuries caused to him by the master's sailing away without procuring for him the required attention. *Scarff v. Metcalf* (1887) 107 N. Y. 211, 1 Am. St. Rep. 807, 13 N. E. 796.

Damages will be allowed for neglecting, in a case where it was necessary, to send an injured seaman to a marine hospital for treatment at the expense of the ship, for an unreasonable period (here twelve days) after her arrival in port. *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645.

Punitive damages will not be given a seaman on account of the roughness of the master when first informed of an injury, and the master's serious mistake in regard to his treatment, where he afterwards showed great kindness and consideration with respect to other misfortunes of the seaman during the

voyage. *The Scotland* (1890) 42 Fed. 925.

A shipowner is not liable for injuries to a seaman, which, on final examination by a skilled surgeon, proved more serious than the steward and officers, or even the seaman himself, supposed, where simple remedies adapted to the supposed injuries were applied with beneficial results, and the conduct of the seaman in voluntarily performing light labor and failing to ask for medical attendance at a port was such as to deceive the officers as to the seriousness of the injuries. *Campbell v. The Frank Gilmore* (1890) 43 Fed. 318.

² In *The Troop* (1902) 118 Fed. 769, damages to the amount of \$4,000 were awarded against a ship for the gross inhumanity of the master to a seaman who had received a severe injury when the ship was only 6 miles from the port of departure, where there was a hospital, but was kept on board for the remainder of a voyage of thirty-six days, under circumstances which were quite unsuitable for a person in his condition, and which caused him intense suffering and permanent physical disability.

In *The Fullerton* (1908) 92 C. C. A. 463, 167 Fed. 1, it was held that the vessel was liable for the refusal of the captain of a vessel to put back into port after he was 582 miles out, so as to secure surgical aid for the first mate, whose arm had been crushed, where the wind was favorable, the cargo consisted of a nonperishable staple article, and the return could have been made in six or seven days less than the time necessary to reach the port of destination.

available at ports where the vessel touches.³ A similar obligation is predicable in respect of cases where the vessel's course brings it within sight of a place where a surgeon can be procured.⁴ But where an accident happens in midocean, the failure of the master to make a considerable deviation from his course, for the purpose of placing an injured seaman under the care of a surgeon, does not necessarily imply a breach of duty. Whether the deviation is obligatory will depend upon the circumstances of the case, such as the nature of the injury, the means available for treating it on board, and the probability of being able to reach a port in time for his relief. But the authorities show that if the injury is such that a person of ordinary judgment would know that, unless it is treated by a surgeon, it may cause the death or permanent disability of the seaman, it is the imperative duty of the master to make even a deviation of several hundred miles to reach the nearest port where the services of a surgeon can be obtained, and that the loss of time and possible risk to the cargo are matters which will not be permitted to outweigh this duty.⁵ The general principles upon which the liability of the ship is determined

³ *The Vigilant* (1887) 30 Fed. 288.

In *The M. E. Luckenbach* (1909) 174 Fed. 265, affirmed in (1910) 101 C. C. A. 663, 178 Fed. 1004, the court said: "In cases of emergency, voyages have to be deviated from; and there would certainly seem to be no good excuse why, upon arrival at a port with a sick man on board, medical advice should not be had at once, and the seaman sent to a hospital if necessary."

⁴ *Brown v. Overton* (1859) 1 Sprague, 462, Fed. Cas. No. 2,024.

In *Danvir v. Morse* (1885) 139 Mass. 323, 1 N. E. 123, the plaintiff sustained a serious fracture of the leg, near the entrance of Chesapeake bay, and a few hours later he could have been put ashore at Norfolk by making a deviation of one hour; but the master kept him on board until the ship reached its destination, two days later. A verdict for the plaintiff was upheld.

⁵ In *Whitney v. Olsen* (1901) 47 C. C. A. 331, 108 Fed. 292, a sailor's leg had been broken in two places at a point 500 miles distant from a port. The master, although the wind was favorable, refused to comply with his request to be taken there, and continued the voyage for more than two weeks longer, the consequence being that his injury was rendered permanent. Held, that

the master's failure to proceed to the nearest available port was a breach of duty.

In *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645, where a seaman sustained a fracture of the thigh bone, which was so unskillfully treated by the master that the leg was ultimately shortened 3 inches, it was laid down that, if the ship could have made a port in five or six days, it would have been the duty of the master to have gone there and obtained aid; but that if this could not have been done in less than two weeks, he was not bound to make the deviation.

In *The Iroquois* (1904) 194 U. S. 240, 48 L. ed. 955, 24 Sup. Ct. Rep. 640, affirming (1902) 55 C. C. A. 497, 118 Fed. 1003, which affirmed in (1902) 113 Fed. 964, where a seaman on a ship near Cape Horn sustained a fracture of two ribs as well as of both bones of a leg, it was held that the master should have taken him to Valparaiso or put back to Port Stanley, Falkland Islands, which could have been reached in two or three days, although, if the latter course had been followed, four or five weeks would, owing to the strong head winds, have been required to regain the place where the accident occurred. The master, it was said, must

in this class of cases have been thus stated by the Supreme Court of the United States: "We cannot say that in every instance where a serious accident occurs the master is bound to disregard every other consideration and put into the nearest port, though if the accident happen within a reasonable distance of such port, his duty to do so would be manifest. Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing

be presumed to have known that the injury was so serious as to need scientific treatment, and his omission of the duty to put into port, regardless of the loss of time, and the expense incident to such deviation, was not excused by the fact that the seaman made no demand to be taken on shore. In this case ten weeks were spent in reaching the ship's destination, and the master's unskilful treatment of the leg rendered amputation ultimately necessary. The district court said: "Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life or limb; and he cannot be charged with negligence simply because he erred in judgment as to the necessity for putting into port, when the nature of the disease or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon." The Supreme Court affirmed this decision with some doubt as to its correctness. (1904) 194 U. S. 240.

In *The Erskine M. Phelps* (1904) 65 C. C. A. 239, 131 Fed. 1, a seaman on a ship which was then near Cape Horn met with an accident by which both bones of his leg below the knee were broken. The mate, who had some surgical skill and experience, took charge

of the injured man, and set the bones, which united firmly, but, by reason of the fracture being oblique, overlapped, producing a shortening of the leg. The contention that the master was chargeable with a breach of duty because he did not return to Port Stanley, Falkland Islands, which was the nearest port, and 540 miles distant, was rejected, on the ground that although the ship could probably have made the islands in two or three days, the season was midwinter, when the days were short and cold and storms prevailed, and it was further shown without contradiction that the entrance of the harbor at Port Stanley by a ship of her size was very dangerous and likely to take several days at that season, and that vessels went there only as a last resort, and in cases of extreme necessity. The case of *The Iroquois*, *supra*, was distinguished on the grounds that the injury there was more severe, that there was no one on board who possessed any surgical knowledge or experience, and that there was no evidence before the court regarding any difficulty in entering Port Stanley, and that the accident in the earlier case occurred in the summer.

In *The Cuzco* (1907) 83 C. C. A. 181, 154 Fed. 177, reversing (1906) 148 Fed. 914, the libellant, the cook on a steamship, was injured while the vessel was lying in Fortescue bay, Straits of Magellan, by falling through a hatchway. His shoulder was dislocated and his head injured, the latter injury not being serious. The injuries were examined and treated by the master and steward, who came to the conclusion that there was no dislocation of the shoulder, but merely a sprain, and the vessel proceeded on her course to the

in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and

westward until she reached Coronel, 1,100 miles distant, when surgical treatment was obtained. The time ordinarily required to reach such port was five days, but owing to bad weather it took seven or eight days. By returning upon her course 70 miles in the Straits to Punta Arenas, medical aid could have been obtained. Held, that having regard to the belief of the master, that the injury was not serious, and to the dangers of navigation of the Straits in the winter season, the decision to continue the voyage, rather than expose the vessel and cargo to the risks of a return, was not unreasonable. The court said: "It should be borne in mind that when the master was called upon to decide whether he should go on or turn back with the libellant, and thus add 140 more miles of dangerous navigation to the risks of the adventure, he had to take into consideration all the various interests which were committed to his charge. He was called upon to exercise sound judgment, not indeed on a question of pure seamanship, but on a question which involved maritime knowledge. A deviation for the purpose of succoring the distressed has been held not to release underwriters of ship or cargo who have insured for a specified voyage, but 'to make such excuse valid and effectual it must, without doubt, be shown that there was a real necessity for the departure of the vessel from her proper course. The exigency which demands relief must be equal in importance to the intervention which is required in its behalf.'"

In *The Kenilworth* (1905), 137 Fed. 1003, it appeared that, at a point about 100 miles northeast of Cape Horn, the libellant was swept by a wave against the ship's side and suffered an injury to

his leg which was really a fracture of such a description that it could only have been detected by a skilled practitioner. The captain diagnosed it as a bruise and treated it accordingly. Held, that no negligence was imputable to him on account of his having failed to discover the true nature of the injury, or on account of his not having deviated from his course to reach the Falkland Islands, which were about 400 or 500 miles distant.

In *The Shenandoah* (1904) 134 Fed. 304, another case in which the accident occurred to a seaman on a ship making the voyage around Cape Horn, the master concluded that the only consequences of the injury were a severe bruise of his thigh and the nervous shock. In point of fact he had sustained a lesion in the region of the hip joint, but only a professional man could have discovered his real condition. Held, that there was, under the circumstances, no duty on the part of the master to deviate from his course and make for Port Stanley, or any of the other ports mentioned in the libel.

In *The Drumelton* (1907) 158 Fed. 454, where a seaman serving on a bark on a voyage from New York to South Africa had his leg broken, the bones were set by an officer, and he was carefully tended. Held, that there was no obligation, two or three weeks afterward, to take the ship 200 miles out of her course to obtain medical treatment at Cape Verde Islands, of which the master had no chart, there being no request therefor by the injured man, nor apparent necessity for it, nor any evidence that competent medical attendance could have been there procured.

For a case in which the master of a coasting vessel was held to be justified

the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen." The court also expressed the opinion that it is the duty of the master "to look out for the safety and care of his seamen, whether they make a distinct request for it or not;" and that in determining the liability of the ship, it is immaterial whether the injured man had or had not asked to be taken into an intermediate port.⁶

2011. Liability of master as affected by statutory provisions in England and the British possessions.—In England the liability of ship-owners for the medical expenses of seamen has been defined in a series of statutes, the most recent of which is the merchant shipping act of 1894. The provisions contained in these statutes are of two different kinds, *viz.*, (1) those which are simply declaratory of the general maritime law, and (2) those which formulate rules which experience has shown to be necessary for the purpose of effectuating fully the beneficial objects of that law.

By §§ 200, 204 of the act of 1894, the owner of every ship navigating between the United Kingdom and any place out of the same is declared liable to a penalty if he fails to provide a supply of medicine in accordance with a scale to be published from time to time by the board of trade. The owners of all foreign-going ships (with certain exceptions) are also required to provide a sufficient quantity of antiscorbutics. These provisions supersede those contained in §§ 4-6 of the amending act 1867, which had replaced § 224 of the act of 1854.

It has been held that a seaman who has received an injury by reason of the breach of these provisions is entitled to maintain an action to recover damages.¹

in not deviating from his course to reach an intermediate port, see *The Svaeland* (1904) 132 Fed. 932, note 1, *supra*.

⁶ *The Iroquois* (1904) 194 U. S. 240, 48 L. ed. 955, 24 Sup. Ct. Rep. 640 (see note 5, for facts).

¹ *Couch v. Steel* (1854) 3 El. & Bl. 402, 2 C. L. R. 940, 23 L. J. Q. B. N. S. 121, 18 Jur. 515, 2 Week. Rev. 170 (decided with reference to the Statute 7 & 8 Vict. chap. 112, § 18, an enactment having the same general object as those already mentioned in this note). But since the criticisms on this case in *Atkinson v. Newcastle & G. Waterworks Co.* (1877) L. R. 2 Exch. Div. 441, 46 L. J. Exch. N. S. 775, 36 L. T. N. S.

761, 25 Week. Rep. 794, it is somewhat questionable how far this case can be regarded as a correct exposition of the law in England. See § 1905, *ante*.

In Massachusetts the doctrine of the civil liability of the shipowner for a breach of the requirements of this English statute has been accepted. *Baxter v. Doe* (1886) 142 Mass. 558, 8 N. E. 415 (decided with the reference to the act of 1867 [30 & 31 Vict. chap. 104], which, as already stated, was incorporated in the act of 1894). For a general discussion of the right to maintain a civil action for an injury caused by the violation of a penal statute, see § 1905, *ante*.

The provisions of § 207 of the act of 1894 are as follows:

Subsec. (1). If the master of, or a seaman or apprentice belonging to, a ship, receives any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master, seaman, or apprentice until he is cured, or dies, or is brought back, if shipped in the United Kingdom, to a port of the United Kingdom, or if shipped in a British possession, to a port of that possession, and of his conveyance to the port, and in case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages. (A re-enactment almost verbatim of the merchant shipping act 1854, § 228, subsec. 1).²

Subsec. (2). If the master of a seaman or apprentice is, on account of any illness, temporarily removed from his ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns to his duty, the expense of the removal and of providing the necessary advice and attendance and medicine, and of his maintenance while away from the ship, shall be defrayed in like manner. (The same provision is found in § 228, subsec. 2, of the act of 1854.)

Subsec. (3). The expense of all medicines, surgical and medical advice, and attendance, given to a master, seaman, or apprentice whilst on board his ship, shall be defrayed in like manner. (Corresponding to § 228, subsec. 3 of the act of 1854.)

Subsec. (4). If a seaman or apprentice is ill, and has, through the neglect of the master or owner of the ship, not been provided with proper provisions and water according to his agreement, or with such medicines, medical stores, anti-scorbutics, or accommodation, as are required by this act, then the owner or master, unless it can be proved that the illness has been produced by other causes,

² The words "hurt or injury in the service of the ship" have been held to apply not only to any hurt sustained by a casualty, but to any illness brought on a seaman while doing his duty in the service of the ship,—as here, by bad provisions. *Board of Trade v. Sundholm* (1879) 41 L. T. N. S. 469, 4 Asp. Mar. L. Cas. 196. The words of the statute were said to have been intended to distinguish such an injury as that which was under review from one received by a seaman while on shore for his own pleasure.

Where a vessel is shipwrecked, the seamen are not deemed to be discharged until it is finally abandoned. Up to that time the master is entitled to command their services, and the liability of the shipowner to them still subsists. Accordingly, where the same occurrence which converted the ship into a wreck injured several of the crew, it was held that their injuries were received "in the service of the ship." *Lord Advocate*

v. Grant (1874) 1 Sc. Sess. Cas. 4th series, 447.

Where a seaman is injured in the service of the ship, his right to recover expenses is limited to expenses incurred for necessary surgical and medical advice and attendance. He cannot recover the amount charged for a private room in a hospital, where there is nothing to show that he could not have been treated in the public ward without any additional expense. *Wyman v. The Duart Castle* (1899) 6 Can. Exch. 387.

In *The Magna Charta* (1872) 2 Low. Dec. 136, Fed. Cas. No. 8,953, Lowell, J., said that he understood the effect of §§ 228, 229 of the English merchant shipping act of 1854 to be this,—that the ship was liable for the expenses of seamen who were hurt, but not for their wages. Yet it is expressly stated that the medical expenses of a seaman shall be paid "without any deduction from his wages."

shall be liable to pay all expenses (not exceeding on the whole three months' wages) properly and necessarily incurred by reason of the illness, either by the seaman himself or by the Crown or any parochial or local authority on his behalf, and those expenses may be recovered as if they were wages duly earned; but this provision shall not affect any further liability of the master or owner for the neglect, or any other remedies possessed by the seaman or apprentice. (This provision is substantially a re-enactment of § 7 of the act of 1867, by which the act of 1854 was amended.)

Subsec. (5). In all other cases any reasonable expenses duly incurred by the owner for any seaman in respect of illness, and also any reasonable expenses duly incurred by the owner in respect of the burial of any seaman or apprentice who dies whilst on service, shall, if duly proved, be deducted from the wages of the seaman or apprentice. (Corresponding to § 228, subsec. 4 of the act of 1854.)

By § 208 it is provided that, if any expenses which the owner is required to bear in respect to the illness or injury of a seaman are paid by a consul or other person in behalf of the Crown, such expenses may be recovered from the owner. (A similar provision is found in § 229 of the act of 1854.)

In an American case the opinion was expressed that the English merchant shipping acts do not take away the right which a seaman had under the maritime law to maintain a suit *in rem* against the ship to recover damages caused by the failure of the master to furnish him with proper care, treatment, and supplies after he had received an accidental injury in the service of the ship.³

³ *The Troop* (1904) 63 C. C. A. 584, 128 Fed. 856, affirming (1902) 118 Fed. 769. The court drew attention to the fact that the statute gives to any British consular officer who pay such expenses a lien on the ship therefor, as it declares that such expenses shall be a charge upon the ship, to be recovered in the same court and manner as wages due seamen. The court also relied upon the circumstance that, although it was provided that the expenses of medical advice and attendance to a hurt or sick sailor should be defrayed by the owner of the ship, and that damages might be recovered to a limited extent, for the failure so to do, this was not necessarily inconsistent with the existence of a right to pursue the vessel *in rem*,—especially as it is expressly enacted that "this provision shall not affect any further liability of the master or owner for the neglect, or any other remedies possessed by the seaman or apprentice." With regard to the con-

tention of counsel that a different construction had been placed upon the statute in *The Osceola* (1903) 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483, the court considered it clear that the discussion in that case had relation solely to the question which had been certified to the court, *viz.*, whether the ship was liable for an injury to a seaman, occasioned by the negligent act of the master in navigating the ship. It was not concerned with the wholly different question which was involved in the case under review, *viz.*, the nature and extent of the duty of the ship to a seaman after he has been injured in the performance of his duty. These views were reiterated in *The Matterhorn* (1904) 63 C. C. A. 331, 128 Fed. 863. The writer has not found any English decision relating to the point. But there is no apparent reason for questioning the propriety of the conclusion thus arrived at.

2012. —in the United States.—Several statutes relating to the medical treatment of seamen have been enacted by Congress.

The Navigation acts July 20, 1790, chap. 29, § 8, 1 Stat. at L. 134, provided that American vessels of a certain burthen and crew, bound on foreign voyages, "shall be provided with a chest of medicines, . . . accompanied by directions for administering the same; . . . and in default of having such medicine chest so provided and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner." By the act of March 2, 1805, chap. 88, this provision was extended to vessels of a smaller burthen and crew, engaged in the West India trade.

The construction put upon this provision was, that it had modified the general maritime law to the extent of relieving a ship whose owner complied with it from the burden of furnishing medical advice, but had left intact the liability imposed by that law, so far as the other expenses of treating seamen were concerned.¹ This doctrine is possibly to be taken as subject to an exception in cases where danger-

¹ In the case of *Walton v. The Neptune* (1800) 1 Pet. Adm. 152, Fed. Cas. No. 17,135, it was admitted that, according to the weight of authority, the proper construction of these statutes was that the ship was bound either to furnish medicines or pay the physician's bill; but that the sailor, when the ship is so furnished, was liable for the expense of such surgical or medical advice and assistance.

In the elaborate judgment which he delivered in *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047, Story, J., used the following language: "The acts under consideration do indeed make a new provision; for independently of them there does not seem to exist any obligation on the part of the owner to provide a medicine chest for the use of the ship during the voyage; and it is obvious that unless medicines are so provided, seamen taken sick at sea will be without any means of obtaining suitable remedies. In this view the provision is auxiliary to that of the maritime law, and is a substantial benefit to seamen by enlarging the means of recovery. In any other view it is a serious diminution of their antecedent rights, giving them medicine, but charging them for medical advice, and thus

abridging their most important permanent interests. It cannot readily be believed that Congress, which has on so many occasions manifested a solicitude to guard the interests and secure the safety of this invaluable though improvident class of men, can have intended to increase their burdens, narrow their privileges, or expose them to the danger of still harder sufferings. . . . Assuming, then, that medicines and medical advice are not a charge on the ship, where a proper medicine chest is on board, it does not follow that other charges of sickness are entitled to the same exemption. That would be carrying the doctrine of constructive repeals far beyond what courts of justice have hitherto thought it reasonable to assert. In the next place, the clause itself applies in terms only to the expenses of advice, medicine, and attendance of physicians. It considers the medicine chest and medical directions (very erroneously, as experience has shown) to be equivalent to the regular administration of medical advice. They may be, as has been already hinted, of great utility at sea; but when the aid of a physician, as well as medicines suited to the particular case, may be obtained in port, it is almost trifling with life to intrust

ous diseases require and compel extraordinary remedies and assistance. But on this point there is a conflict of authority.² In order to entitle himself to the benefit of this partial exemption, the shipowner was required to prove that a medicine chest was on board, furnished

the management of diseases to the unskilfulness or rashness of a ship's crew." The conclusion of the learned judge was that there was nothing in the statutes that affected charges for board, lodging, and nursing sick seamen while on shore, and that these expenses accordingly remained a charge upon the ship, and were to be borne by the owner, upon the principles of maritime law.

In *Holmes v. Hutchinson* (1833) 1 Gilpin, 447, Fed. Cas. No. 6,639, the court said: "It must now be taken to be the law of the United States under our act of Congress, that, in the case of an ordinary sickness, not infectious or dangerous to the crew, so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest according to the act of Congress, the medical advice of the sick seaman is not chargeable to the ship." The circumstances noted in this case as a foundation for the judgment were as follows: (1) The sickness was not produced by the fault of the seaman, nor contracted previous to his shipment. (2) It was not produced by any accident while engaged in service on board of the brig and in the discharge of his duty. (3) It was not an endemic disease of the climate to which the seaman was exposed. (4) It was not a contagious disease, dangerous to the crew, which made it necessary for their safety to remove the man from the vessel, thereby incurring extraordinary expenses. (5) It was an ordinary disease which the man might have had anywhere, in any other place or employment. The court said that there was no precedent for charging the ship, in such a case, with the physician's bill for advice and attendance.

"It seems to be well settled that the general obligation of the law merchant remains in force, unless the medicine chest is provided with medicines and means of medical treatment which the particular case requires, and there is sufficient skill on board to make a proper use of those medicines." 2 Parsons. Shipping & Adm. pp. 81, 82.

The master of a ship has no authority to pledge the credit of the ship for the hospital expenses of a stowaway, even though he may have compelled such stowaway to sign articles. The signing of the articles does not attach him to the vessel. *The Laura Madsen* (1901) 112 Fed. 72.

² That such an exception should be made was asserted by Peters, J., in a note to *Swift v. The Happy Return* (1799) 1 Pet. Adm. 253, Fed. Cas. No. 13,697. This was merely an extrajudicial expression of opinion. But the acceptance of this doctrine seems to be indicated by the language quoted *supra* (note 1), from the opinion of the court in *Holmes v. Hutchinson*.

On the other hand, in *Pray v. Stinson* (1842) 21 Me. 402, it was laid down that the rule which requires the bill of the physician for attendance upon a seaman, sick on board at a port, to be paid by the seaman, is the same, whatever may be the nature of the disease, even if it be a violent and dangerous one, as the yellow fever; and that the desire of the seaman to be removed on shore cannot change the rights and the relations of the parties. His judgment, in such case, must necessarily be subjected to that of those who are by law intrusted with the prudential concerns of the vessel and crew for the common good of all. The court remarked: "Although learned judges have expressed their doubts whether the act ought to have received such a construction, their reasons have never been deemed sufficient to authorize a change; and this has been admitted to be the general and well-established construction, subject to certain exceptions. And if such were not the original intention, there has been ample time for legislative interposition to effect a change and correct the error. The fact that there has been no such interference in this commercial country for so long a course of years tends strongly to establish the accuracy of the construction made by the judicial tribunals."

with suitable medicines. It was held that, in the absence of specific evidence, the fact of compliance with the statutory condition would not be presumed.³ It was also laid down that this provision was intended to apply only to cases in which the seaman was on board, or in a position to avail himself of the medicines and the directions for their use, and that, if he was removed ashore for the convenience of the ship, whether with his own consent or without it, and did not draw his medicines from the chest, he was entitled to an allowance equal to his expenditure for medicines.⁴ On the other hand it was held that, where a seaman was taken on shore at his own request, from a vessel properly provided with a chest of medicines, and there received medical attendance and advice, the expenses thereof were to be deducted from his wages.⁵

In one case a stipulation in the shipping article that the seamen should pay for medical advice and medicines, without any condition that there should be a medicine chest on board the vessel, was held to be void, as being contrary to the policy of the act of Congress.⁶

By more recent enactments it is provided that vessels belonging to certain specified classes shall be provided with a medicine chest, and with a sufficient

³ *The Nimrod* (1822) 1 Ware, 9, 20, Fed. Cas. No. 10,267; *The William Harris* (1837) 1 Ware, 373, Fed. Cas. No. 17,695.

In *Pray v. Stinson* (1842) 21 Me. 402, it was held that if the vessel had on board the requisite medicine chest it was not liable for physician's bills, although the physician was called without request from the seaman, because the danger was such that the law of the place as well as the feelings of humanity required that he should be called.

⁴ *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047, per Story, J., who observed that, under such circumstances, "the nonexistence of the medicine chest, and the incapacity to obtain the use of it, are precisely equivalent."

This doctrine was reiterated by the learned judge in *The George* (1832) 1 Sumn. 151, Fed. Cas. No. 5,329, where the mate, being sick, went on shore for his own relief, for the safety of the crew, and for the interest of all concerned, and it was decided that all the expenses of the cure, including medical advice and attendance, were a charge upon the vessel, although she was pro-

vided with a chest of medicines, as the act required.

In *The Forest* (1837) 1 Ware, 420, Fed. Cas. No. 4,936, the court considered that the act exempted the owners from the charge for medical advice and attendance only "when the seaman can have the benefit of the medicine administered under the printed directions for its use by the master, or some person fit to be intrusted with so delicate a duty." It was accordingly held that, as the master, mate, and four seamen were sick and unable to administer the medicines, the vessel was chargeable for medical advice and attendance upon the seamen on board, although properly provided with a chest of medicines.

But the sickness of the master, and his absence on shore, are immaterial. The law devolves his duties, during such absence, upon the mate, who, in the absence of evidence to the contrary, it presumes is able to perform them properly. *Pray v. Stinson* (1842) 21 Me. 402.

⁵ *Pierce v. Patton* (1833) Gilpin, 435, Fed. Cas. No. 11,145.

⁶ *Harden v. Gordon* (1823) 2 Mason, 541, Fed. Cas. No. 6,047.

In line with this decision are two

quantity of antiscorbutics to be served out daily to the crew. Act of Congress, June 7, 1872, chap. 322, Secs. 36, 37, U. S. Rev. Stat. Secs. 4569, 4570, U. S. Comp. Stat. 1901, p. 3100.⁷

Marine hospitals are now regulated by U. S. Rev. Stat. §§ 4801 *et seq.*, U. S. Comp. Stat. 1901, p. 3321, which provides for collecting from vessels 50 cents per month for each seaman, in order to form a fund for the relief of sick and disabled seamen.⁸ The hospital service organized under this and the earlier enactments *in pari materia* is not intended to supersede the maritime law which imposes the obligation on a vessel to take care of a seaman becoming injured in its service.⁹ A seaman, therefore, is not obliged to accept an offer of treatment in such hospitals.¹⁰ But a seaman who has declined an offer of the master to procure a physician for his treatment on board ship, and has afterwards been discharged at his own request from a marine hospital, cannot make claim for medical expense thereafter in some other hospital.¹¹ Nor is the ship responsible for unskilful treatment received by an injured seaman at a marine hospital to which he has been taken with his own consent.¹²

The provisions as to medicine chests do not apply to fishing vessels, which are generally not far distant from a port.¹³

others to the effect that a stipulation in the shipping articles that seamen should pay for their own medicines beyond what might be furnished from the medicine chest was void (*The Sarah Jane* (1833) Blatchf. & H. 401, Fed. Cas. No. 12,348); and that an express promise made by a sick seaman to the master to pay the physician's bill was without consideration and void (*Freeman v. Baker* (1833) Blatchf. & H. 372, Fed. Cas. No. 5,084).

⁷ It is no excuse for not serving out lime juice to the crew daily, that the seamen preferred to receive coffee instead of lime juice. When no lime juice is served, and the crew are attacked with scurvy, the ship is liable for the damage the seamen sustain on account of the disease, in the absence of any proof that they had contracted scurvy before the voyage began. *The Renée* (1890) 14 Sawy. 476, 46 Fed. 805.

⁸ The dates of the various acts relating to marine hospitals up to 1864 are specified in Parsons, Shipping & Adm. vol. 2, p. 80, note 3.

⁹ *Reed v. Canfield* (1832) 1 Sumn. 195, Fed. Cas. No. 11,641 (maritime law held to be controlling in a case where an injury was sustained in a home port); *The Chandos* (1880) 6 Sawy. 544, 4 Fed. 645.

¹⁰ *Holt v. Cummings* (1883) 102 Pa. 212, 48 Am. Rep. 189, where it is stated that this view of the effect of the legislation is adopted in Parsons, Shipping & Adm. vol. 2, p. 80.

¹¹ *Raymond v. The Ella S. Thayer* (1887) 40 Fed. 902.

¹² *Campbell v. The Frank Gilmore* (1890) 43 Fed. 318.

¹³ *Welch v. Fallon* (1909) 181 Fed. 875.

CHAPTER LXXXVIII.

CHARACTER OF THE SERVANT. BLACKLISTING.

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A. DUTY OF MASTER TO GIVE CERTIFICATE OF CHARACTER TO A SERVANT.

2013. Master not bound to give a character to his servant.—The doctrine of the English and American courts is that a master is morally, but not legally, bound to give a character to his servant when he is discharged from or leaves the employment.¹ It follows, therefore, that the master's refusal to furnish a character does not constitute a cause of action in favor of the servant, however faithfully and efficiently he may have performed his duties, and however clear and specific may be the proof of the injury resulting from such refusal.²

¹ *Pullman v. Hill* [1891] 1 Q. B. 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263, per Lord Esher; *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (1898) 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; and other cases cited in this section.

For some remarks as to the injustice of refusing a character to a faithful servant, see Paley's *Moral & Political Philosophy*, Bk. III., pt. 1, chap. 11.

A modern text writer has undertaken to justify the common-law rule in the following manner: "The reason for this rule is to be found in the consideration that, if a master were compelled to give a character, it would necessarily follow that he must be held to the proof of the character he gives. The burden thus cast on the master would often give rise either to much litigation, on the

one hand, or to the giving of false characters, on the other." Parkyn, *Mast. & S.* 132. No authorities are cited for this theory of the learned author. It is not easy to see why the consequence here held out *in terrorem* should necessarily follow if the present rule were changed. So far as appears, the burden of proving the falsity of the character given would in any event continue to rest on the servant.

² The earliest reported case in which an explicit recognition of this rule is found seems to be *Carrol v. Bird* (1800) 3 Esp. 201, 6 Revised Rep. 824, 17 Eng. Rul. Cas. 245, in which it was shown that, after the plaintiff's wife had been dismissed from defendant's service, another party, who was willing to employ her upon the presentation of satisfactory information regarding her char-

The withholding of the requested statement cannot be treated, for the purposes of enabling the servant to maintain an action, as an act which is equivalent to a slander.³

The extreme severity with which the rule may sometimes operate has recently been shown in a very striking manner by its application in that class of cases in which several employers in a certain line of business enter into a mutual agreement that no person who has previously been in the service of one of them shall be hired by any other, unless he can produce what is known as a "clearance card" from his last employer. Although it is evident that an arrangement of this kind may render it extremely difficult, or even virtually impossible, for a servant who has not received the requisite certificate to obtain work similar to that which he has been doing, the courts have declined to qualify the common-law doctrine.⁴ The lawful act of refusing the

acter, had declined to take her into his service, on account of the defendant's failure to give her a character. Upon the admission of the plaintiff's counsel that he had no precedent for such an action, Lord Kenyon said that there was no case; nor could the action be supported by law. By some old statutes (see § 2021, note 1, *post*), regulations had been established respecting the character of laborers; but in the case of domestic and menial servants there was no law to compel the master to give the servant a character. It might be a duty which his feelings might prompt him to perform; but there was no law to enforce the doing of it.

That the obligation of a master to give a servant a character belongs to the imperfect class, and is not enforceable by law, has been held in Scotland also. *Fell v. Ashburton* (1809; Sc. Ct. of Sess.) F. C. (Se.) 249, cited in *Fraser, Mast. & S.* 129.

To the same general effect see *Moult v. Halliday* [1898] 1 Q. B. 125, 62 J. P. 8, 67 L. J. Q. B. N. S. 451, 77 L. T. N. S. 794, 14 Times L. R. 109, 46 Week. Rep. 318 (per Hawkins, J., *arguendo*); *Iambeck v. Gerry* (1896) 15 Misc. 663, 39 N. Y. Supp. 95; *Illinois C. R. Co. v. Ely* (1904) 83 Miss. 519, 35 So. 873; and cases cited in the following notes.

³ *New York, C. & St. L. R. Co. v. Schaffer* (1902) 65 Ohio St. 414, 418, 419, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036.

⁴ In *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (1898) 174 Ill. 398, 62 L.R.A.

922, 66 Am. St. Rep. 296, 51 N. E. 811, the court thus discussed the rights of the servant: "From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter, be it good, bad, or indifferent, given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment. . . . An action for failure to give an employee either of the above forms of letters must be based either upon the common law or the statute, or arise out of the contract of employment, or be required by usage or custom. By the common law no such duty was imposed upon the employer. . . . A character is not given for the benefit of the ex-employee, although he

clearance card is not converted into a tort by the fact that the refusal in such cases is the result of a mutual understanding previously arrived at by the employers.⁵

Both on principle and authority, it is clear that, if the existence of a custom on the part of employers of a certain class to give characters to their servants is proved, this custom enters into every con-

may be either injured or benefited by reason of such a character being given; nor does the right to give such a character arise out of a duty to the employee; but the right or moral duty, such as it is, is a duty in the interest of society and the public good, and neither the proposed employer nor the employee has a legal right to demand it. Such communications have been made not only by an ex-employer, but also by any person possessing the information and the belief that such information is true. They may be made either with or without request, in the interest of the public good, and as a moral duty to society, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information." In the lower court, see (1897) 70 Ill. App. 415, the decision which was reversed by the above judgment was put upon the ground that the evidence warranted the inference that there was a general custom prevailing on all roads, including that of the defendant, to issue, on discharge, and demand the presentation before employment, of clearance cards. It was admitted that, in the absence of proof of such a custom, the action could not have been maintained. But it was held that, as the existence of the custom must be taken as proved, and as the evidence showed that the railroad company had no other causes of complaint against the employee than that several indictments were brought against him, under all of which he had been found "not guilty," and that previously he had served the company with a good record for ten years, the company had violated its duty in refusing to give him a clearance card.

In *Hebner v. Great Northern R. Co.* (1899) 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128, the court remarked that "the real purpose of the service

card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause, or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shown by one seeking employment, for this is a matter optional with the holder."

⁵ In *New York, C. & St. L. R. Co. v. Schaffer* (1902) 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036, commenting upon the charge of the trial judge to the jury, that the plaintiff could recover if the defendant, in pursuance of a conspiracy with other railway companies, refused to furnish a statement of his record, with intent to prevent the plaintiff from obtaining employment from any or all of those companies, the court said: "It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish; and he cannot be called upon to answer to the public or to individuals for his judgment. Nor can the motives which prompt his action be considered. In general terms, such rights is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient, or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person. . . . If the defendant, by fraud, falsehood, or force, had brought about a refusal to employ the plaintiff, it would have com-

tract of service, and a refusal to give a character constitutes a breach of duty for which an action will lie.⁶ To justify the admission of an exception to the general rule on this ground, it must appear that the alleged custom was established, uniform, general, and presumptively known to the parties to the contract,⁷ and not contrary to good morals or public policy.⁸

mitted a positive wrong against the plaintiff, which would have been actionable. Of this, however, there is not a scintilla of proof. But an agreement to tell the truth about the plaintiff, or a refusal to say anything about him, would not make an otherwise legal concert of action an illegal one, and authorize a recovery against the defendant."

In *McDonald v. Illinois C. R. Co.* (1900) 187 Ill. 529, 58 N. E. 463, the declaration, after alleging a conspiracy between the railway companies having lines running into Chicago, to the effect that the employees of any and all of said companies would not be employed by any of them without a clearance given by the railway company by which any employee was last employed, alleged that the defendant company refused to give the plaintiff employee such an instrument as would "enable him to obtain employment in the railroad business." The plaintiff insisted that the point for decision was whether it was lawful for all the employers in any line of industry to combine for the purpose of punishing a man who leaves their service during a strike by refusing him employment unless his former master gives his consent to his employment. But the court held that no such question was presented by the pleadings, and that, as there was no allegation that the company refused to grant the plaintiff a "clearance card," setting forth truthfully all the facts proper to be stated in a "clearance card," or that it had been agreed by the two defendant companies that the consent of either should be the prerequisite of employment by the other, the declaration did not state a cause of action. This ruling, in so far as it implies that, if the declaration had embraced these allegations, it would have stated a cause of action, is inconsistent with the last-mentioned case, and is not easy to reconcile with the decision of the same court, cited in note 4, *supra*.

⁶ *Hundley v. Louisville & N. R. Co.* (1898) 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429, and cases cited in following notes.

⁷ In *Cleveland, C. C. & St. L. R. Co. v. Jenkins* (1898) 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811, the following points were decided: That it is the duty of a court to hold, as a matter of law, that an alleged usage or custom is not established where the proof consists of a few isolated transactions; that a letter of recommendation by a railway company to an employee, which is purely personal, and shows on its face it is not a general form which would be given to other employees, does not tend to establish a custom on the part of the company to issue clearance cards to employees leaving the service; that the fact of a railway company's requiring the production of certificates of recommendation by persons seeking employment does not create any legal duty on its part to issue the same to retiring employees, nor tend to establish a custom of issuing them.

⁸ In *Thornton v. Suffolk Mfg. Co.* (1852) 10 Cush. 382, a discharged employee relied on the employer's breach of an implied agreement arising from custom, to the effect that if she faithfully performed her duties for the term of at least twelve months, she would, upon giving a fortnight's notice, be entitled to leave, and to receive from her employers "a line" or honorable discharge, by means of which she might obtain employment in the other mills in a given city. The court, in sustaining a nonsuit, said: "The ground relied on is, in consideration of services, the employer engages that, if the operative remains in the service a certain time, he would give her an honorable discharge; or, in other words, that her service and conduct have been good and satisfactory. Were such a contract made in express terms, intended to be absolute, it seems to us that it would

In cases where a servant has been successful in an action for wrongful dismissal, it is apparently proper, as a general rule, for the trial judge to order the master to restore a character handed to him by the servant when he entered the employment.⁹ But a custom by which an employer whose servant is leaving him to take another situation should be bound to hand over to the new employer the character brought by the servant has been pronounced unreasonable.¹⁰

2014. Master's duty as affected by statute.—In some jurisdictions the common-law rule has been modified by statutes applicable either

be bad in law, as plainly contrary to good morals and public policy. Such a discharge is a certificate of a fact; but if the fact is otherwise, if the conduct of the operative has not been satisfactory it would be the certificate of a falsehood, tending to mislead, and not to inform, other employers. Besides, if such a custom were general, such a discharge would be utterly useless to other employers and utterly useless to the receiver. It could give other employers no information upon which they could rely. To avoid such illegality, it must be taken with some limitation and qualification; to wit, that the conduct of the operative has been such in all respects, including not only skill and industry in the employment, but conduct in point of morals, temper, language, and deportment, and the like, so that a certificate of good character would be true. Then it stands upon the same footing with the custom which governs most respectable persons in society,—upon the termination of the employment of a servant, to give him a certificate of good character if entitled to it. In such case, it is for the employer to give or withhold such certificate, according to his own conviction of the truth, arising from his own personal knowledge, or from other sources. . . . If an assurance of an employer on engaging a servant, that, at the end of the time, he will give him a certificate of good character, if he should then think him entitled to it, could in any respect be deemed a contract, and not the promise of an ordinary act of courtesy, it would be no breach of such contract to aver and prove that the servant, after the termination of the service, demanded such a certificate and was refused it." It was also observed: "The fact that, on account of the peculiar situation of the

various companies in Lowell, in relation to each other, the common interest they have in maintaining their discipline, the certificate of good character is of so much more importance to the servant than elsewhere, can make no difference to the servant, in regard to his rights. In the same proportion in which it is important to the servant out of employment, to hold a certificate of good character and honorable discharge, it is important to corporations, their agents and servants, and all interested in them, to be cautious and conscientious in giving such discharges and recommendations, when they are honestly deserved, and in withholding them when they are not."

⁹ Such an order was made by Hill, J., in *Gordon v. Potter* (1859) 1 Fost. & F. 644.

¹⁰ In *Moult v. Halliday* (1898) [1898] 1 Q. B. 125, Hawkins, J., thus referred to a point which had been incidentally discussed in the lower court: "I cannot say I think that would be a reasonable custom. There is no obligation on a master or mistress to give a character to a servant, but, if a character is given, it should be a true one. A character may be true this month and false next. A servant may come into service with a good character, and yet during the first month circumstances may come to the master's knowledge which show that it was undeserved and should be forfeited. It would be a scandalous thing if the master was bound after that to hand over the character which he knew was false. If the good character which the servant brought with her is handed over, it must be handed over in good faith. I think, therefore, that such a custom would be unreasonable, and, indeed, not honest, and therefore bad."

to employers generally, or to employers of a particular class; and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by anyone who is of opinion that it is proper to protect employees by legislation against "blacklisting." See § 2028, *post*. Manifestly the refusal to give a character may often be virtually the equivalent of "blacklisting" so far as regards the injury inflicted on the servant. The statutes which have already been passed may be conveniently classified under two heads:

(1) Those which cover both the cases in which servants have been discharged, and the cases in which they have voluntarily left the employment.¹

(2) Those which deal only with the duty of employers to servants whom they have discharged.²

Where a statute of this kind merely imposes a penalty for its vio-

¹ A very comprehensive specimen of this class is the employers and employees act 1890, of Victoria (Australia), in which it is provided, under the penalties specified:

§§ 20, 21. That every servant shall receive at the termination of his service a certificate of discharge.

§ 22. That the servant shall produce the certificate on any new hiring.

§ 23. That a servant shall not be hired without the production of the certificate.

§ 24. That false certificates shall not be given.

Nearly two hundred years ago it was provided by the Irish statute, 2 Geo. I., chap. 17, § 4, that "on the discharge or putting away of any servant from his or her service, or upon such servant's regularly leaving his or her service, the master or mistress of such servant shall give a certificate in writing under his or her hand, that such person who is therein named was his or her servant, and that he or she is discharged from the said service, and shall in the said discharge certify, if desired, or such master or mistress think fit, the behavior of such servant." This statute, however, seems to have remained virtually a dead letter for a century and a half; as the court stated in *Handley v. Moffat* (1872) Ir. Rep. 7 C. L. 104, 21 Week. Rep. 231, that no action in which its provisions had been

relied upon had been brought during that period.

By the Missouri act of April 14, 1905, it is provided that, whenever any employee of any corporation doing business in the state shall be discharged or voluntarily quit the service, it shall be the duty of the superintendent or manager of said corporation, upon the request of such employee (if such employee shall have been in the service of said corporation for a period of at least ninety days), to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation, and the duration thereof, and truly stating for what cause, if any, such employee has quit such service.

It may be mentioned that in Germany the law is that on the termination of an agreement for continuous services, the employee is entitled to a testimonial as to the length and nature of his services, and as to his conduct and efficiency. See Schuster's Principles of German Civil Law, § 225.

² *Colorado*.—By Laws 1897, chap. 31, § 2, it was provided that any dismissed employee should on demand be furnished by the employer with specific reasons in writing for the dismissal; Provided. That no person or corporation should be held liable either civilly or criminally for any of the reasons so given.

lation, the question whether a servant who has been injured by such violation can maintain an action for damages against the delinquent employer is determined with reference to the considerations discussed in 1905, *ante*.

Georgia.—By a statute passed in 1890 (Acts 1890-91, vol. 1, p. 188), railroad, express, and telegraph companies were required to give to their discharged employees or agents the causes of their removal or discharge, when discharged or removed, and the amount of \$5,000 was fixed as the penalty or damages for noncompliance with this requirement. In *Wallace v. Georgia, C. & N. R. Co.* (1893) 94 Ga. 732, 22 S. E. 579, this act was declared unconstitutional. By the provision now in force (Code of 1895, § 1875), it is enacted that any employer, after having discharged any employee, shall, upon written demand by such employee, furnish to him, within ten days from the application, a full statement in writing of the cause of his discharge, and that, if any employer shall refuse within ten days after demand to furnish such statement, it shall be ever after unlawful for him to furnish any statement of the cause of such discharge to any person or corporation, or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere.

The penalty of treble damages, to be recovered in a civil action, is imposed for a breach of this provision (§ 1874.)

Indiana.—The enactment in Horner's Anno. Stat. (1901) § 5206 r 3 is in part similar to that in the second of the Georgia statutes. But it is also provided that the written cause of discharge, when furnished at the request of the discharged employee, shall never be used as the cause for an action for slander or libel, either civil or criminal, against the employer.

Kansas.—By Gen. Stat. (Dassler) 1901, §§ 2422, 2423, employers of labor are required, upon the demand of a discharged employee, to furnish in writing the true cause or reason for the discharge. Any employer who violates the provisions of the act is declared to be guilty of a misdemeanor, and also liable to the party injured for treble damages.

Montana.—The provisions in the Political Code (1895) § 3392, are essen-

tially the same as those in the second Georgia statute.

Ohio.—The same description is applicable to the statute in this state regarding railway companies (87 Ohio Laws 1890, chap. 125, § 1.) The penal clause of the section of which this provision forms a part has been declared to be applicable only to the preceding provision, by which it is declared unlawful to discharge an employee because he refuses or neglects to become a member of any society or organization. *Crall v. Toledo & O. C. R. Co.* (1893) 7 Ohio C. C. 132, 6 Ohio C. D. 696.

By § 128 (1) of the English merchant shipping act 1894 (57 & 58 Vict. chap. 60), it is provided, under penalty, that the master shall sign and give to a seaman discharged from his ship, either on his discharge or on payment of his wages, a certificate of his discharge in a form approved by the board of trade, specifying the period of his service and the time and place of his discharge. The same section (cl. 2) also prescribes that the master shall, upon the discharge of every certificated officer whose certificate of competency has been delivered to and retained by him, return the certificate to the officer.

§ 129 (1) provides that where a seaman is discharged before a superintendent, the master shall make and sign, in a form approved by the board of trade, a report of the conduct, character, and qualifications of the seaman discharged, or may state in the said form that he declines to give any opinion upon such particulars or upon any of them, and the superintendent before whom the discharge is made shall, if the seaman desires, give to him or indorse on his certificate of discharge a copy of such report (in this act referred to as the report of character).

The first of the above paragraphs is substantially the same as § 172 of the merchant shipping act 1854 (17 & 18 Vict. chap. 104.)

By U. S. Rev. Stat. it is provided: § 4551, U. S. Comp. Stat. 1901, p. 880. That, upon the discharge of any seaman, the master of the ship shall sign and

B. DEFAMATION OF A SERVANT'S CHARACTER BY HIS MASTER.

2015. Right of servant to leave a master who defames his character.—

A master who makes false defamatory statements regarding his servant's character is manifestly guilty of a breach of duty which entitles the servant to leave the employment.¹

2016. Right of servant to maintain an action for damages against his master for defamation of character. Generally.—In the following sections general principles will be referred to only in so far as it may be necessary to do so for the purpose of elucidating the cases cited. For a detailed review of those principles, the reader will consult the various standard treatises on the law of slander and libel.

The different elements to be considered in an action brought by a servant to recover damages from a person who has defamed his character are indicated by the following passage in a well-known judgment delivered by Parke, B.: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."¹

2017. What defamatory statements concerning a servant are actionable.—*a. Written or printed statements.*—The circumstances under which a servant is entitled to maintain an action against the publisher of a written or printed statement are defined by the general rule

give him a certificate of discharge, specifying the period of his service and the time and place of his discharge, in a prescribed form.

§ 4453. That, upon every discharge effected before a shipping commissioner, the master shall make and sign, in a prescribed form, a report of the conduct, character, and qualifications of the person discharged.

¹ No English or American decisions directly affirming this doctrine have been found. But it is sufficiently sustained by analogy, and is enunciated in a Scotch treatise of high authority. See Fraser, *Mast. & S.* p. 128.

¹ *Toogood v. Spyring* (1834) 1 *Crompt. M. & R.* 181, 193, 4 *Tyrw.* 582, 3 *L. J. Exch. N. S.* 347, 9 *Eng. Rul. Cas.* 55.

that any such statement is *prima facie* libelous which is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred, or contempt, or ridicule.¹ Accordingly, a presumptive right to recover damages is es-

¹ Pollock, Torts, *206. See also, Odgers, Libel & Slander, 4th ed. p. 16.

Libelous statements.—A letter to a servant's employer, using language such as must have been understood by the employer as charging the servant with having obtained goods from the writer by fraudulent means, is libelous. *Over v. Schiffeling* (1885) 102 Ind. 191, 26 N. E. 91.

A statement which is fairly susceptible of the meaning that a manager of a newspaper was unfaithful to his employers in attempting to start a fresh newspaper while still in their employment is libelous. *Butcher v. Payton* (1890) 9 New Zealand, L. R. 240. In this case a verdict for the defendant was allowed to stand, for the reason that the words were merely to the effect that the plaintiff was "about to start" a new paper, and that these did not necessarily imply that he intended to do this while still in defendant's employment.

A claim made by an employer against the employee's surety for an alleged shortage in the employee's accounts on the termination of the employment imputes dishonesty and unfaithfulness, and is libelous *per se*. *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A. (N.S.) 91, 109 N. W. 463.

Where a newspaper article involves a charge that plaintiff refused to perform the obligations assumed by her as janitress, disregarded her employer's interest, and used his property, and the plaintiff alleges that her occupation was that of janitress, she is *prima facie* entitled to recover, without allegation of special damages. *Flaherty v. New York Times Co.* (1905) 109 App. Div. 489, 96 N. Y. Supp. 381.

In *Walker v. Best* (1905) 107 App. Div. 304, 95 N. Y. Supp. 151, the principal of the plaintiff, a schoolteacher, made an official report to the school superintendent, stating that plaintiff was "careless" in blackboard work, and thereafter the superintendent, in replying to a letter written to him by W., at plaintiff's request and in her interest,

calling attention to an alleged conflict between this report and one made shortly before by the same principal, stated that he never had any doubt that the principal's estimate of plaintiff was "pretty nearly correct." Held, that such reports were not libelous *per se*.

In *Pattison v. Gulf Bag Co.* (1906) 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224, a statement which the master had caused to be published in a newspaper, to the effect that the plaintiff, a female employee in his factory, had been discharged, not for violation of his rules, but for a reason which his manager did not care to disclose, but which was such that she could not be retained in his factory, was held to be libelous.

On the ground that the statute of limitations is an honorable defense, it has been held that it is not libelous *per se* to write to a servant's employer a letter in which it is stated that the servant, having no other defense to a claim for medical services, has "cowardly slunk behind that of the statute of limitations;" and that such a course is not in accordance with the writer's idea of strict integrity. *Hollenbeck v. Hall* (1897) 103 Iowa, 214, 39 L.R.A. 734, 64 Am. St. Rep. 170, 72 N. W. 518 (action against president of employing company for publishing letter).

But it was held in another action against the writer of this letter that special damages might be recovered on the ground that the writing of the letter had induced the plaintiff's employer to discharge him. *Hollenbeck v. Ristine* (1898) 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355. See also (1901) 114 Iowa, 358, 86 N. W. 377.

A statement in a recommendation of a former employee, that, "like many others, he left our service during the strike," is not libelous or actionable *per se*, so as to constitute a cause of action without special damages. *Kansas City, M. & B. R. Co. v. Delaney* (1899) 102 Tenn. 289, 45 L.R.A. 600, 52 S. W. 151, distinguishing the unreported case of *St. Louis & I. M. R. Co. v. Johnson*

tablished as soon as the servant has shown that the words in question were published by the defendant, and that they were untrue.²

(decided by the same court at its April term, 1897), in which the libel charged was "that plaintiff had been discharged for insubordination, as well as being at the head of a disreputable mob, not hesitating to do anything to the injury of the company's property," etc. The court held this language libelous *per se*, and that it was unnecessary to allege or prove special damages, since the charge was necessarily hurtful, and that, if false, plaintiff might recover general damages. In that case this court affirmed a judgment in favor of the plaintiff for \$1,500.

A clearance paper given to a discharged railroad employee at his request, reciting, "Cause for leaving service, unsatisfactory service, conduct good,"—is not libelous on its face. In order to show that it is so in fact, the employee has the burden of proving that it is untrue, known to be false, and published from malicious motives. *Illinois C. R. Co. v. Ely* (1903) 83 Miss. 519, 35 So. 873.

A publication stating that defendant has dispensed with the service of plaintiff as advertising manager of a newspaper for his "general careless manner of attending to business," and that his place will be filled by a competent man, who will attend to the affairs in a more businesslike manner, has been held not to be libelous, as charging the plaintiff with unfitness or incompetency, and cannot be made so by innuendo. *Ratzel v. New York News Pub. Co.* (1902) 67 App. Div. 598, 73 N. Y. Supp. 849, reversing (1901) 35 Misc. 487, 71 N. Y. Supp. 1074. The court relied on the theory that the imputation of carelessness did not warrant the inference that incompetency was imputed, and that nothing was shown to have been published by which the plaintiff could be injured in his business. This seems to be a rather strong case, to say the least of it. What impression would the words have produced upon the "average man?"

In an action for words in a letter, imputing dishonesty and bad conduct to a servant, by which she has lost a place, evidence of antecedent good conduct is admissible. *R. v. Waring* (1803) 5 Esp. 13, per Lord Alvanley.

In an action for defamation in false-

ly representing that the plaintiff was the defendant's indentured apprentice in the printing art, it was held that recovery might be had, upon proof of the allegations in a complaint which averred that the representations were made "to H. B. & Co., the proprietors of the Tribune office, which plaintiff was employed as a printer, warning them not to employ him, or continue him in their employment; by means whereof plaintiff was discharged from said employment, and has lost the emoluments and upport therefrom ever since;" and that, "by reason of said false and malicious representations to said Tribune office and other printing offices in Mobile, plaintiff has been deprived and prevented from obtaining any employment in his business as a printer ever since." *Clark v. Goddard* (1863) 39 Ala. 164, 84 Am. Dec. 777.

For a case involving similar circumstances, in which a statement of this kind was held not to be libelous, but to furnish ground for an action on the case, see *Blumenthal v. Shaw* (1897) 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, § 2029, note 5, *post*.

By Missouri Rev. Stat. 1899, § 2165, it is declared a misdemeanor for any person to report falsely to a railroad company that a conductor or other employee has received money for the transportation of persons or property, or failed to collect charges for such transportation. (Laws 1891, p. 127.)

² For a general collection of the cases relating to publication, see Odgers, *Libel & Slander*, 4th ed. chap. VI; Townshend, *Slander & Libel*, chap. VI.

It may be mentioned that a disclosure of a libel on a domestic servant to the wife of the defendant has been held not to be evidence of publication. *Wennhak v. Morgan* (1888) L. R. 20 Q. B. Div. 635, 57 L. J. Q. B. N. S. 241, 59 L. T. N. S. 28, 36 Week. Rep. 697, 52 J. P. 470.

In Scotland no publication to a third person is necessary to render a defamatory statement actionable. Odgers, *Libel & Slander*, 4th ed. p. 151. note. For a case illustrating this rule, see *Cunningham v. Petherbridge* (1894) 32 Scot. L. R. 1.

Where the defendant's voluntary act

b. Oral statements.—No action can be maintained for the publication of an oral statement, even though it is defamatory and false, unless the servant either proves that he has suffered special damage, as a result of the publication,³ or brings his claim within one of the

in parting with possession of a defamatory letter was so done, though merely by accident, as to have a tendency to injure the plaintiff's reputation, he cannot rely, as an element rebutting malice, on the absence of intention. *Fox v. Broderick* (1864) 14 Ir. C. L. Rep. 453. There the defendant pleaded that the letter containing the libel was intended to come into the hands of the plaintiff himself, but, by mistake, was directed by the defendant, and delivered through the postoffice, to the plaintiff's employer, instead of to the plaintiff. Held, on demurrer, that this plea was bad, as the letter was not a privileged communication, and the legal inference of malice would have arisen, even though the letter had been addressed and delivered to the plaintiff. The case of *Rex v. Paine* (1695) 5 Mod. 163, in which the delivery of a defamatory paper by the writer, to an individual, in mistake for another paper, was held not to be a publication, was distinguished on the ground that the uttering or parting with the possession of the defamatory writing was not voluntary or intentional on the part of the writer.

A servant's character is not privileged from production under an order for discovery. *Webb v. East* (1879) L. R. 5 Exch. Div. 23, 49 L. J. Exch. N. S. 250, 41 L. T. N. S. 715, 28 Week. Rep. 336, (order for an inspection made).

³ "Where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognize." *Foulger v. Newcomb* (1867) L. R. 2 Exch. 327, 330.

In an action for slanderous words, by reason of which the plaintiff was turned out of her lodging and employment, it appeared that the defendant complained to E., the mistress of the house, who was his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows; and he added that no moral person would like

to have such people in his house. It was held that the action was maintainable, the special damage being the consequence of the words used. *Knight v. Gibbs* (1834) 1 Ad. & El. 43, 3 Nev. & M. 467, 3 L. J. K. B. N. S. 135.

In *Kelly v. Partington* (1833) 5 Barn. & Ad. 645, the second count of the declaration stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her, as such, the following words: "She" meaning the plaintiff, "secreted 1s. 6d. under the till;" stating, "these are not times to be robbed." The declaration alleged as special damage, that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held that the words in the second count, if actionable at all, were so only by reason of the special damage. "I have always understood," said Patteson, J., "that the special damage must be the natural result of the thing done. . . . There is no innuendo stating whose money it was that she secreted; it might be her own. Then it is said that the words are actionable because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory."

If a wife be living apart from her husband as a servant in the family of A., and so maintained herself, and she be dismissed from the service of A. in consequence of a letter written by B., reflecting on her character, her husband may maintain an action for special damage. But if A. dismissed her colourably, intending to take her back again, the action will not lie. *Coward v. Wellington* (1836) 7 Car. & P. 531.

In an action for slander, the servant, to show special damage, may give in evidence the contents of a letter written by the person to whom the slander was

exceptions to the rule which makes his recovery dependent on proof of such damage. Under the common law those exceptions are three in number, *viz.*:

(1) Where the words charge the plaintiff with commission of a crime.⁴

(2) Where they impute to him a contagious disease tending to exclude him from society.

(3) Where they are spoken of him in the way of his office, profession, or trade.⁵

The only one of these exceptions which can be said to have any special relevance to a discussion of the remedial rights of a servant, in his capacity as a servant, is the third. The rule which it embodies may be stated briefly in this form: "From spoken words which impute misconduct in an office, trade, profession, or business, the law implies actionable damage."⁶ The mere imputation of want of abil-

uttered, to his partner, advising him to discharge the servant from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunks. *Fowles v. Bowen* (1864) 30 N. Y. 20.

In an action for slander, the words complained of were alleged to have been spoken to plaintiff's employers, and were as follows: "You have a barman in your employ (meaning the plaintiff) who has removed from his landlord's house, leaving £2 owing for a month's rent, and I cannot get the money from him." The plaintiff alleged, as special damage, that in consequence of the slander he was dismissed from his employment. Held, that the words were not actionable, in the absence of special damage resulting from them, and that the special damage alleged was too remote. *Speake v. Hughes* (1904) 1 K. B. (C. A.) 138, Mathew, L. J., remarked that the defendant might reasonably be supposed to have contemplated when he spoke the words, that the plaintiff's employers would remonstrate with him on the subject, but not that they would dismiss him from their employment.

⁴ A statement charging the plaintiff, a subordinate of the defendant, with having sent through the postoffice to the defendant's wife a printed paper, advertising and recommending certain articles for the prevention of conception

and for the procuring of abortions, was held to be slanderous *per se*, as imputing an indictable offense, involving moral turpitude. *Halstead v. Nelson* (1885) 36 Hun, 149.

To say of one's former clerk that he "has robbed me of all the profits, which amounted to several hundred dollars,"—charges a fraudulent conversion of the property of another, within a statute making such conversion a crime, and is actionable *per se*. *Allen v. Brady* (1904) 26 Ky. L. Rep. 1173, 83 S. W. 565.

⁵ Odgers, Libel & Slander, 4th ed. p. 37; Starkie, Slander & Libel, p. 98; Pollock, Torts, *206; Cooley, Torts, *196.

In the absence of a statute, words imputing unchastity to a woman are not actionable in themselves. See Odgers, Libel & Slander, p. 67; Starkie, Slander & Libel, 105; Townshend, Slander & Libel, § 172.

In England it is now provided by the slander of women act 1891, that "words spoken and published, which impute unchastity to any woman or girl, shall not require special damage to render them actionable." Statutes of a similar tenor are in force in Alabama, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, South Carolina, and probably others of the American states.

⁶ *Foulger v. Newcomb* (1867) L. R. 2 Exch. 327, 36 L. J. Exch. N. S. 169

ity to discharge the duties of an office of profit is sufficient to support an action. It is not necessary that there should be imputation of

16 L. T. N. S. 595, 15 Week. Rep. 1181, per Channell, B., in a judgment delivered for the whole court.

The phraseology adopted by the New York court of appeals is, that the words must impute "some matter in relation to the servant's particular trade or vocation, which, if true, would render him unworthy of employment." *Kinney v. Nash* (1849) 3 N. Y. 177.

The reason of the rule is that the law presumes such a probability of pecuniary loss from such imputation, in that office or employment or profession, that it will not require special damage to be shown. *Alexander v. Jenkins* [1892] 1 Q. B. (C. A.) 797, per Lord Herschell (p. 801).

In *Wright v. Moorhouse* (1594) Cro. Eliz. pt. 1, p. 358, an action was brought for these words: "Before the plaintiff came to the service of the Merchant Taylors, he dwelt in Shrewsbury, and set the town together by the ears; and so long as he was there, they were never in quiet; but afterwards they lived quietly; and he being clerk to the Merchant Taylors, was of consent and counsel with W. Goodlaw to deliver the books of the corporation which he had in his keeping, to the intent that thereby some of the lands of the same corporation might be found concealed." On demurrer, it was held that these words were *prima facie* actionable, as they touched the plaintiff in his office and credit.

In *Seaman v. Bigg* (1638) Cro. Car. 480, it was held that, although generally an action will not lie for calling one "cozening knave," yet where the words are spoken of one who is a servant and accompant, and whose credit and maintenance depend upon his faithful dealing, and he, by such disgraceful words, is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he might have recompense for loss of his credit and means.

To accuse a servant, who is employed in an office of trust, of having "cozened his master," is actionable; for it shall be intended in his office. *Reignald's Case* (1640) Cro. Car. 563.

In *Langmuir v. Thompson* (1833) 11 Sc. Sess. Cas. 1st series, 571, damages

were awarded for falsely accusing a servant of theft.

Words spoken of the plaintiff, while in the employ of the defendant's firm as a clerk, and addressed to a subsequent employer, to the effect that the plaintiff had become such a notorious liar that they could place little or no confidence in him; that they were so strongly impressed with his dishonesty that they had written to a person named to employ a police force to watch him, etc., must be understood as relating to him in his capacity as clerk; and being spoken of him in connection with his business, they are actionable *per se*. *Fowles v. Bowen* (1864) 30 N. Y. 20.

Words imputing to a certificated master mariner drunkenness whilst in command of a vessel at sea are actionable without special damage. *Irwin v. Brandwood* (1864) 2 Hurlst. & C. 960, 33 L. J. Exch. N. S. 257, 10 Jur. N. S. 370, 9 L. T. N. S. 772, 12 Week. Rep. 438.

It is actionable to say of a servant girl: "You are not aware, Mrs. C., what kind of girl you have in your service, for I can assure you, she . . . is often out with our married man." *Rumsey v. Webb* (1842) 11 L. J. C. P. N. S. 129.

In an action for oral slander it was alleged that the defendant spoke and published of the plaintiff, whose employment was that of a female domestic servant, the following words, in relation to her employment: "I was so incensed with that girl for coming to hire with me after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge!" No special damage was alleged. Held (on demurrer), that the words were actionable *per se*, as relating to the plaintiff's employment. *Connors v. Justice* (1862) 13 Ir. C. L. Rep. 451. "Can anyone," said Monahan, Ch. J., "doubt that chastity is an essential requisite in a female domestic servant? And can anyone doubt that the master or mistress of a family would be justified in dismissing, without the usual month's notice, a female domestic servant for unchaste conduct? In the present case,

immoral or disgraceful conduct.⁷ But in order that the rule may be applicable "it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business." It must also appear that they "tend to prejudice him in that business." This result, as well as the question whether the words are capable of having reference to the business, depends upon the nature of the business.⁸ It follows, therefore, that no legal liability is incurred by the speaker of defamatory words, unless they charge the servant with the want of some general requisite, as honesty, capacity, fidelity, etc., or else connect the imputation with the

the slander is, that the plaintiff's mistress (Mrs. Berry) dismissed her, in consequence of her having discovered the unchaste conduct of the plaintiff. Coupling this with the allegation that chastity is a necessary qualification, can there be any doubt entertained that the imputation was one of misconduct rendering her unfit for her situation?" The case was therefore held not to be within the principle laid down in *Lumby v. Allday*, note 13, *infra*. The doctrine applied by the Irish court finds a singularly apt support in the words which, more than a century before the case was decided, an eminent novelist had put in the mouth of a maid servant: "To be sure, ma'am, one's virtue is a dear thing, especially to us poor servants; for it is our livelihood, as a body might say." Fielding, *Tom Jones*, Bk. VII., chap. 7. Fielding was a lawyer, as well as a novelist; but it may be presumed that he is here speaking simply as a social philosopher.

Where the charge is not necessarily connected with the plaintiff's office or business, the declaration is essentially defective unless it shows how the words were connected by the speaker with that office or business. *James v. Brook* (1846) 9 Q. B. 7. There a judgment in favor of a superintendent of police was arrested after verdict, there being merely an allegation of the speaking of the words: "I" (meaning defendant) "saw a letter, two or three day since, regarding an officer of the L. police force" (meaning plaintiff), "who" (meaning plaintiff) "had been guilty of conduct unfit for publication." The case was declared to be indistinguishable from *Ayre v. Craven* (1834) 2 Ad. & El. 2, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35,

where a physician was accused of adultery, and although the words there used were very likely to injure, the court held that they were not actionable, as they did not necessarily import that the plaintiff had been guilty of adultery in the course of exercising his profession.

An averment in an answer to the suit of a clerk for the *quantum meruit* value of his services, that he is so notoriously unreliable and unworthy of trust that he could not obtain employment where he was known, filed in the court, and read in the presence of many witnesses, is libelous and slanderous, if untrue. *Weil v. Israel* (1890) 42 La. Ann. 955, 8 So. 826.

Where a cook got into a squabble with her master in the kitchen of a hotel, and they both lost their temper, and in order to browbeat her, he called out several times in the hearing of several of the guests "You are drunk," it was held that there was no such defamatory language used as would support an action for damages, the *animus injuriandi* being absent under such circumstances. *MacDonald v. Rapprecht* (1894) 21 Sc. Sess. Cas. 4th series, 389. But *quære* as to the correctness of this decision. The animus, it is submitted, is immaterial.

See also the following sections, where the numerous cases are cited in which the slanderous character of the words spoken was taken for granted, and the only question discussed was whether the occasion was privileged.

⁷ *Alexander v. Jenkins* [1892] 1 Q. B. 797, per Lord Herschell (p. 800).

⁸ *Foulger v. Newcomb* (1867) L. R. 2 Exch. 327, 330, 36 L. J. Exch. N. S. 169, 16 L. T. N. S. 595, 15 Week. Rep. 1181.

office which he holds or the trade or business in which he is engaged.⁹ That is to say, in order to support an action, the statement complained of "must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office."¹⁰ No recovery can be had where the imputation conveyed does not imply the want of any of those qualities which a servant occupying such a position as the plaintiff ought to possess, and has no reference to his conduct as a servant.¹¹

The general effect of most of the decisions seems to be, that any words must be regarded as actionable *per se* which falsely impute to a servant such conduct or qualities as would, if the words were true, justify his master in discharging him, or render it appreciably more difficult for him to obtain employment.¹² But in a few cases the facts of which might seem to have been not inappropriate for the application of this doctrine, the right to recover has been denied. The principle relied upon was, that if the words complained of, although they are false and malicious, are not in themselves slanderous, the mere fact that the servant may probably suffer damage in consequence of their having been spoken will not render them actionable, even though damage has actually resulted.¹³

⁹ *Lumby v. Allday* (1831) 1 Crompt. & J. 301 (see further as to this case in note 13, *infra*).

¹⁰ *Alexander v. Jenkins* [1892] 1 Q. B. (C. A.) 797, per Lord Herschell (p. 801).

¹¹ *Lumby v. Allday* (1831) 1 Crompt. & J. 302. See further as to this case in note 13, *infra*.

¹² The criterion is distinctly recognized in *Alexander v. Jenkins* [1892] 1 Q. B. (C. A.) 797, 61 L. J. Q. B. N. S. 634, 66 L. T. N. S. 391, 40 Week. Rep. 546, 56 J. P. 452 (see note 10, *supra*); and *Connors v. Justice* (1862) 13 Ir. C. L. Rep. 451 (see note 6, *supra*).

¹³ In one case the court proceeded on the assumption that the want of chastity and frequenting the company of dissolute women does not constitute any objection to a man for the position of clerk to a gas company. *Lumby v. Allday* (1831) 1 Crompt. & J. 301. There the defendant said to the plaintiff, "You are a fellow; a disgrace to the town; unfit to hold your situation, for your conduct with whores." Plain-

tiff alleged that the words were spoken of him in his business or office as clerk. The court held the words not actionable.

In *Connors v. Justice*, note 6, *supra*, the court criticized the decision with good reason as a strong one, as the defendant himself had declared that the plaintiff was unfit for his situation, and, as a matter of fact, he had actually been discharged in consequence of the speaking of the defamatory words.

In *Miller v. David* (1874) L. R. 9 C. P. 118, the declaration alleged that the defendant falsely and maliciously spoke of the plaintiff, a working stone mason, "He was the ringleader of the nine-hour system," and "He has ruined the town by bringing about the nine-hour system," and "He has stopped several good jobs from being carried out, by being the ringleader of the system at L.," whereby the plaintiff was prevented from obtaining employment in his trade at L. Held, that the words not being in themselves defamatory, nor connected by averment or by implica-

"The rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation . . . is, that it does not apply to illegal callings."¹⁴

2018. Acts that may affect the servant's reputation.—*a. Suspension of servant not actionable as being injurious to his character.*—A servant who has been suspended, together with other employees, while certain alleged irregularities in the office where he has been working are being investigated, cannot maintain an action against his employer, if it is apparent that no aspersion has been cast upon his character, except such as may be inferred from his suspension.¹

b. Ordering an investigation into the servant's accounts.—The act of an employer in ordering an investigation of a servant's accounts does not constitute a cause of action on the ground of an actionable wrong in the nature of slander.²

2019. Absolute privilege as a defense.—In England defamatory words with regard to an employee of the government are absolutely

tion with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained. The court expressed its approval of the general rule laid down by Bayley, B., in *Lumby v. Allday*, *supra*.

In *Cowles v. Potts* (1865) 34 L. J. Q. B. N. S. 247, 11 Jur. N. S. 946, 13 Week. Rep. 858, a statement that a person then occupying the position of farm bailiff had left the parish under discreditable circumstances, and without settling with his creditors, was declared to be "plainly" not actionable without special damage, although he lost his situation in consequence of the statements having been made.

In all the above-cited cases the injury suffered by the plaintiff was certainly one which might well be expected to follow from the statements, and is difficult to see any satisfactory ground upon which it can be maintained that the statements were not prejudicial to the plaintiff in his calling. But the cases are consistent with two others which, although they do not relate to servants in the strict sense of the word, are sufficiently in point to refer to.

In one of these it was held not to be actionable, without special damage, to say of a woman who taught young

women to dance: "She is as much a man as I am; she got J. S. with child; she is an hermaphrodite." *Wetherhead v. Armitage* (1679) 2 Lev. 233. In the other it was laid down that words imputing adultery to a physician were not actionable. *Ayer v. Craven* (1834) 2 Ad. & El. 2, 4 Nev. & M. 220, 4 L. J. K. B. N. S. 35.

But the latter case was referred to by Alderson B., in *Gallwey v. Marshall* (1853) 9 Exch. 294, 2 C. L. R. 399, 23 L. J. Exch. N. S. 78, 2 Week. Rep. 106. in terms which show that he was not altogether satisfied with the doctrine applied.

¹⁴ The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes; that he was employed on the terms of his not doing so; and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes. Special damage was alleged. Held, on demurrer, a good declaration, even without the allegation of special damage. *Foulger v. Newcomb* (1867) L. R. 2 Exch. 327.

¹ *Henry v. Pittsburgh & L. E. R. Co.* (1891) 139 Pa. 289, 21 Atl. 157.

² *Draysdale v. Rosebery* [1909] S. C. 1121, 46 Scot. L. R. 795.

privileged when they are used in a communication sent, in the course of official duty, by one Minister of State to another.¹ This immunity is also accorded to statements made by a military man, in the course of a military inquiry regarding the conduct of another military man, even though it should be proved that the defendant had acted *mala fide*, and without any reasonable or probable cause.² It may be that the doctrine of absolute privilege is also a protection to a subordinate government official in the civil service, who, in the course of an investigation into the alleged misconduct of a subordinate employee, communicates the fact of that misconduct to the immediate superior of the supposed delinquent.³ But statements made to their superiors

¹ *Chatterton v. Secretary of State* [1895] 2 Q. B. 189, 64 L. J. Q. B. N. S. 676, 14 Reports, 504, 72 L. T. N. S. 858, 59 J. P. 596 (statements in a despatch recommending the removal of the plaintiff to the half-pay list of the army), reviewing the earlier cases. For the decisions as to absolute privilege, see Odgers, *Libel & Slander*, 4th ed. chap. IX; Townsend, *Slander & Libel*, 4th ed. §§ 217 *et seq.*

² *Dawkins v. Rokeby* (1875) L. R. 7 H. L. 744, 45 L. J. Q. B. N. S. 8, 33 L. T. N. S. 196, 23 Week. Rep. 391.

In *Dawkins v. Paulet* (1869) L. R. 5 Q. B. 94, 9 Best. & S. 768, 39 L. J. Q. B. N. S. 53, 21 L. T. N. S. 584, 18 Week. Rep. 336, where the defamatory matter had been inserted in the report of the superior officer to the Adjutant General, the plaintiff was held not to be entitled to recover. But Cockburn, Ch. J., delivered a very weighty dissenting judgment, maintaining that it was merely a case of qualified privilege. In an earlier case, *Dickson v. Combermere* (1863) 3 Fost. & F. 527 (action for causing the removal of a colonel of militia by false charges), the learned Chief Justice had left to the jury the question of malice; and in *Dickson v. Wilton* (1859) 1 Fost. & F. 419 (action for libel, arising out of same facts), Lord Campbell had left it to the jury to say whether the words had been used from a sense of duty. Mr. Odgers (*Libel & Slander* p. 220) suggests that the actual effect of these two cases is, that *private* letters written by the commanding officer of a regiment to his immediate superior, on military matters, as distinct from his official reports, are not absolutely privileged, and that,

if they cannot be distinguished from the *Dawkins Case* on this ground, they must be regarded as overruled by it.

The supreme court of Maryland has declined to follow the *Dawkins Case* in one which involved similar facts. M., a Professor at the United States Naval Academy, placed his resignation in the hands of W., then superintendent of the academy, to be forwarded to the Secretary of the Navy for his decision. W. was required by law to indorse his opinion thereon. The resignation was forwarded by W. with his indorsement thereon of reasons why it should be accepted. It was held that the indorsement was merely privileged to the extent that the occasion of making it rebutted the presumption of malice. *Maurice v. Warden* (1880) 54 Md. 233, 39 Am. Rep. 384.

³ In *Waterbury v. Dewe* (1876) 16 N. B. 670, the defendant, a postoffice inspector, had been sent to examine into certain alleged thefts of registered letters in the city of A., and, after suspending the plaintiff, a clerk, had reported the circumstances to the postmaster. It was held by the judges that, if his plea had sufficiently disclosed his authority to make the investigation, his words would have been absolutely privileged, under the doctrine applied in the case last cited. But when the case finally reached the Supreme Court of Canada, the action was held not to be maintainable, on the ground that the doctrine as to qualified privilege protected the defendant. See § 2023, par. (12), *post*. The court expressed an opinion as to the higher degree of immunity.

concerning public, or quasi public, servants, are the subject of a merely qualified privilege.⁴

Words charging a servant with theft are not actionable, where they are spoken by his master merely for the purpose of sustaining in a court of justice a defense to the servant's claim for wages. But it is otherwise where they are spoken in a calumnious manner, while the master is waiting about the court room, and not for the purpose of defense.⁵

Statements made in reply to a threat of legal proceedings, which are a relevant defense to such proceedings, fall within the decree of protection accorded to judicial slanders made upon record, and are therefore only actionable on an averment of facts and circumstances sufficient to infer malice.⁶

For a general discussion of the defense of absolute privilege, see *Odgers, Libel & Slander*, 4th ed. chap. IX; *Townshend, Slander & Libel*, 4th ed. §§ 217 *et seq.*

2020. Qualified privilege. Generally.—Although the statement complained of may be defamatory in the sense explained in § 2017, *ante*, the servant's action will fail if the statement is what is commonly described as a "privileged communication." The proper meaning of the phrase is merely this: that "the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact,—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."¹ A com-

⁴ *Proctor v. Webster* (1885) L. R. 16 Q. B. Div. 112, 57 L. J. Q. B. N. S. 150, 53 L. T. N. S. 765 (sanitary inspector accused of taking bribes); *Blake v. Pilford* (1832) 1 Moody & R. 198 (defendant complained to the Secretary of the Postoffice that a guard on a mail coach had been guilty of misbehavior to the defendant's wife); *Vallery v. State* (1894) 42 Neb. 123, 60 N. W. 347 (charges against a teacher in a state school).

⁵ *Trotman v. Dunn* (1815) 4 Campb. 211.

⁶ *Campbell v. Cochrane* (1906) 8 Sc. Sess. Cas. 5th series, 205.

¹ Parke, B., in *Wright v. Woodgate* (1835) 2 Crompt. M. & R. 573, Tyrw. & G. 12, 1 Gale, 329.

This definition was approved in *Taylor v. Hawkins* (1851) 16 Q. B. 308, 20

L. J. Q. B. N. S. 313, 15 Jur. 746; *Jackson v. Hopperton* (1864) 16 C. B. N. S. 829, 10 L. T. N. S. 529, 12 Week. Rep. 913; *Jenoure v. Delmege* [1891] A. C. 73, 60 L. J. P. C. N. S. 11, 63 L. T. N. S. 814, 39 Week. Rep. 388, 55 J. P. 500.

For similar definitions see *Toogood v. Spyring* (1834) 1 Crompt. M. R. 193, 4 Tyrw. 582, 3 L. J. Exch. N. S. 347, 9 Eng. Rul. Cas. 55; *Somerville v. Hawkins* (1851) 10 C. B. 583, 589, 20 L. J. C. P. N. S. 131, 15 Jur. 450; *Gassett v. Gilbert* (1856) 6 Gray, 94.

In *Gilpin v. Fowler* (1854) 9 Exch. 615, Erle, J., remarked that a more correct expression than "privileged communication" would be "a communication made on an occasion which rebutted the presumption of malice."

"A privileged communication is one

munication is deemed to be of this nature, "where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts."² The situation thus predicated exists wherever a communication is "made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty."³ An analysis of this statement shows

made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held, in point of law, to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language." Per Lindley, L. J., in *Stuart v. Bell* [1891] 2 Q. B. 341, 345.

² Blackburn, J., in *Davies v. Sneed* (1870) L. R. 5 Q. B. 608, 611, 39 L. J. Q. B. N. S. 202, 23 L. T. N. S. 126, statement adopted by Jessel, M. R., and Brett, L. J., in *Waller v. Loch* (1881) L. R. 7 Q. B. Div. C. A. 619, 51 L. J. Q. B. N. S. 274, 45 L. T. N. S. 242, 30 Week. Rep. 18, 46 J. P. 484.

The cases constituting an exception to the general rule that the publication of all defamatory matter which is false in fact, as malicious, are those in which "the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability. . . . A party cannot be held responsible for a statement of publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest or that of another, provided it is made in good faith, and without a wilful design to defame." *Gassett v. Gilbert* (1856) 6 Gray, 94.

"In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man, upon the subject of character, should be privileged, if made bona fide, and without malice." Lord Ellenborough, *arguendo*, *Hodgson v. Scarlett* (1818) 1 Barn. & Ald. 232, 240.

The law does not allow a privilege merely for the benefit of the giver of the character. "It is of importance to the

public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that the communications are protected." *Gardner v. Slade* (1849) 13 Q. B. 796, 17 Eng. Rul. Cas. 246, per Wightman, J. (p. 801).

³ *Harrison v. Bush* (1855) 5 El. & Bl. 344, per Lord Campbell, Ch. J. (p. 362).

Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party has an interest and a duty to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is only of a moral or social character. *Bacon v. Michigan C. R. Co.* (1887) 66 Mich. 166, 33 N. W. 181.

Similar phraseology is used in *Hebner v. Great Northern R. Co.* (1899) 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128.

In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should actually have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. *Hebditch v. MacIlwaine* [1894] 2 Q. B. 54, 63 L. J. Q. B. N. S. 587, 9 Reports, 452, 70 L. T. N. S. 826, 42 Week. Rep. 422, 58 J. P. 620.

In *Coules v. Potts* (1865) 34 L. J. Q. B. N. S. 247, Blackburn, J., observed that "the tendency [in the more recent decisions] has been to extend the limits of the moral duty or reasonable exigency which authorizes the publication of defamatory matter."

that there are two relative situations in which a communication may be the subject of a qualified privilege, *viz.*:

(1) Where it is made by the defendant in the exercise of a duty, to a person having an interest in the matter communicated.⁴

(2) Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest.⁵

In most instances the qualified privilege accorded to a master in respect to communications affecting the character of his servant may be considered as falling more naturally under the first than under the second of these heads.⁶ But in some states of the evidence the conception of a mutuality of interest will more readily suggest itself as the rationale of the exemption from liability; and as a matter of fact all the cases which have been cited as authorities for both points of view relate to the characters of servants.

It is the province of the judge to determine whether the occasion on which the communication was made was privileged,⁷ and also whether there was excess in the exercise of the privilege.⁸

⁴ *Pullman v. Hill* [1891] 1 Q. B. (C. A.) 524, per Lopes, L. J.

See also *Somerville v. Hawkins* (1851) 10 C. B. 583, 589; and *Lindsey v. St. Louis, I. M. & S. R. Co.* (1910) 95 Ark. 534, 129 S. W. 807.

In *Connoll v. Gisborne Times Co.* (1909) 28 New Zeal. L. R. 299, the directors of a newspaper company drew up and published in the newspaper a statement to the effect that, upon inquiry, they were convinced that certain defamatory language used concerning a certain person in an article inserted by the editor had no foundation in fact, and that they had written to the editor a letter in which they expressed their regret that he had published such an article. Held, that the words of the statement were not *per se* defamatory as regards the editor; that, if they were defamatory, they were privileged; and that, as the directors had not gone beyond what was necessary in the discharge of their duty, and had acted without malice, the privilege had not been exceeded.

⁵ *Hunt v. Great Northern R. Co.* [1891] 2 Q. B. (C. A.) 189, 60 L. J. Q. B. N. S. 498, 55 J. P. 648, per Lopes, L. J., adopting the language of Mr. Odgers in his treatise on Libel & Slander, 2d ed. p. 238.

A similar form of statement was used by the same judge in *Pullman v. Hill* [1891] 1 Q. B. (C. A.) 524, 530, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263.

⁶ This aspect of the matter is illustrated by such statements as these: "It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged because the one person has a duty and the other has an interest." *Pullman v. Hill* [1891] 1 Q. B. 524, per Lord Esher, M. R. (p. 528).

"Communications of this sort are privileged on the ground of duty towards the servant, or of interest on the part of the master." Jervis, Ch. J., in *Manby v. Wilt* (1856) 18 C. B. 544, 546.

⁷ *Stuart v. Bell* [1891] 2 Q. B. (C. A.) 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612; *Pullman v. Hill* [1891] 1 Q. B. (C. A.) 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263; *Clark v. Molyneux* (1877) L. R. 3 Q. B. Div. (C. A.) 237, 246, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10; *Hebditch v. MacIlwaine*

2021. Privilege in cases where the statement was made in compliance with a statutory duty.—A statement regarding a servant, made to the proper authority in compliance with a specific statutory duty, is prima facie privileged.¹

2022. —in cases where the statement was made in response to inquiries by third persons.—The reports furnish numerous illustrations of the doctrine that a statement affecting a servant's character is prima facie privileged, if made in response to an inquiry from some person who has a legitimate interest in obtaining information on the subject. The decisions embodying this doctrine have reference to the following situations:

(1) Inquiry addressed to a former master of the servant by a person who contemplates hiring him, or has already hired him.¹

(2) Communication made, at the request of the servant's master, by a third person, who did not contemplate hiring him.²

(3) Request made for a character by the servant himself, when he is leaving the employment.³

(4) Request made by a discharged servant that his employer state the reason for his discharge.⁴

[1894] 2 Q. B. 54, 63 L. J. Q. B. N. S. 587, 9 Reports, 452, 70 L. T. N. S. 826, 42 Week. Rep. 422, 58 J. P. 620; *Dewe v. Waterbury* (1881) 6 Can. S. C. 143; *Tench v. Great Western R. Co.* (1874) 33 U. C. Q. B. 8; *Gassett v. Gilbert* (1856) 6 Gray, 94; *Dale v. Harris* (1872) 109 Mass. 193; *Fresh v. Cutter* (1890) 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774.

¹ *Tench v. Great Western R. Co.* (1874) 33 U. C. Q. B. 8, 37.

² *Hill v. Thompson* (1892) 19 Sc. Sess. Cas. 4th series, 377 (entry in ship's log, made by captain, as required by the merchant shipping act of 1854, stated that an officer "wilfully and intentionally disobeyed" a certain order).

³ *Hargrave v. Le Breton* (1769) 4 Burr. 2424, 9 Eng. Rul. Cas. 169, per Lord Mansfield, *arguendo*; *Lowry v. Aikenhead* (1768; K. B.) an unreported case cited by *Chambre, J.*, in *Rogers v. Clifton* (1803) 3 Bos. & P. 587; *Edmondson v. Stevenson* (1766; K. B.) an unreported case cited in *Bull. N. P.*, p. 8 (impertinence charged and immorality suggested); *Dale v. Harris* (1872) 109 Mass. 193 (theft charged); *Weatherston v. Hawkins* (1786) 1 T.

R. 110; *Child v. Affleck* (1829) 9 Barn. & C. 403, 4 Moody & R. 338, 7 L. J. K. B. 272 (charge of sexual immorality); *Sims v. Kinder* (1824) 1 Car. & P. 279 (charge of theft); *Blackburn v. Blackburn* (1827) 4 Bing. 395, 1 Moore & P. 33, 3 Car. & P. 146, 6 L. J. C. P. 13, 29 Revised Rep. 583.

² *Cockayne v. Hodgkisson* (1833) 5 Car. & P. 543, per Parke, B. (letter written to B by A, his tenant, stating that B's gamekeeper had sold game); *Kine v. Sewell* (1838) 3 Mees. & W. 297, 7 L. J. Exch. N. S. 92 (surveyor employed to measure a contractor's work voluntarily told contractor's employer that one of the contractor's servants had stolen some of the materials, and repeated the charge in answer to an inquiry by the contractor).

³ *Hebner v. Great Northern R. Co.* (1899) 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128 ("service card" handed to dismissed railway servant in presence of clerks in superintendent's office).

⁴ *Rosenbaum v. Roche* (1907) 46 Tex. Civ. App. 237, 101 S. W. 1164 (no action for slander maintainable).

(5) Inquiry made by a relative, or a friend of the servant, or by any other third person, whose position with relation to the servant gives him an interest in obtaining correct information about the servants' character.⁵

It has been held that where a letter is written ostensibly to inquire into a servant's character, but in reality to entrap the master into a libelous answer, no action lies.⁶

2023. —in cases where the statement was made voluntarily.—There is some authority for the view that where a master voluntarily, and without being applied to, makes a statement prejudicial to the character of a servant, it will be incumbent on him to plead and prove the truth of the words.¹ Such a theory implies that all voluntary statements are to be excluded from the class of those which are the subject of a prima facie privilege, and that the authors of such

⁵ *Taylor v. Hawkins* (1851) 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. N. S. 313 (brother of servant told that he had been robbing his master).

See also *Watson v. Burnet* (1862) 13 Sc. Sess. Cas. 2d series, 333, where the statement was made to the father and mother of the servant.

The action was held not to be maintainable, where the defendant, upon being pressed by a friend of the plaintiff to give his reason for refusing to sign a protest against removing the plaintiff from his position as trustee of a local charity, said that he would not keep a big rogue like the plaintiff in the trust, and, being further pressed, explained reasons for this opinion, *viz.*, that the plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. *Cowles v. Potts* (1865) 34 L. J. Q. B. N. S. 247, 11 Jur. N. S. 946, 13 Week. Rep. 858.

Where the chairman of a society, at a meeting of its members, was asked questions as to the conduct of the manager of a local branch, and stated in reply what he had himself observed, the statement was held to be privileged. *Stott v. Evans* (1887) 3 Times L. R. 693.

⁶ In *Weatherston v. Hawkins* (1786) 1 T. R. 110, A., the plaintiff's brother-in-law, repeatedly called on the employer to inquire why he had dismissed the plaintiff, and at last the defendant wrote to A., stating his reasons specifically. The plaintiff issued a writ the

same day the letter was written. Held by Mansfield, Ch. J., and Buller, J., that no action lay on the letter, as the defendant was evidently entrapped into writing it.

See also *Rex v. Waring* (1803) 5 Esp. 13, which is to the same effect.

¹ Buller, *Nisi Prius*, p. 8, note b, referring to *Lowry v. Akenhead* (1768; K. B.), an unreported case, in which Lord Mansfield said it was so settled, and that he had frequently ruled it so at nisi prius.

This case was cited as good law by Chambre, J., in *Rogers v. Clifton* (1803) 3 Bos. & P. 587, 594. But the other judges distinctly recognize the doctrine which, in the cases cited in the following notes, is sustained by the weight of authority. The actual point upon which the action turned was the existence of malice. See § 2027, note 5, *post*.

In *Fraser on Master & Servant*, p. 130, the rule of Scotch law is stated to be, that a master is not, in general, entitled, though what he says be true, to publish his servant's infamy voluntarily, and without a request from an interested party. The decision cited is *Christian v. Kennedy* (1818; Sc. Ct. of Sess.) 1 Murray, 427.

In *Rosenbaum v. Roche* (1907) 46 Tex. Civ. App. 237, 101 S. W. 1164, the rule laid down by the court with a view to a new trial was that, where an employer is requested by the father of a discharged employee, who, though of age, is living with her father as a member of his family and under his

statements, not being entitled to rely on the presumption which is predicated in cases of privilege, occupy a less favorable position, in an evidential point of view, than those who make statements in response to inquiries. But, having regard to the general current of authority, it seems clear that the rule in this connection cannot be formulated more strongly against the master than this: that "if the master wantonly and capriciously volunteers to make a statement injurious to the servant, or makes such a statement out of malice, the statement is not privileged."² The decisions cited in this and the following sections show that the doctrine upon which the courts have customarily proceeded is that the question whether a communication is *prima facie* privileged or not depends simply upon the consideration whether it was made for the purpose of discharging a duty or protecting an interest, in the sense explained in § 2020, *ante*, and not upon the consideration whether it was made voluntarily, or in answer to an inquiry.³ This doctrine is exemplified by numerous cases in which the actual employer of the plaintiff, or his agent, or some person having a direct financial or official interest in the fitness of the plaintiff to discharge the duties of his position, was the defendant. The authorities may be conveniently classified under the following heads, indicative of the relation between the defendant and the recipient of the information. Unless the contrary is stated, it is to be understood that the effect of the decisions referred to was that the communications in question were *prima facie* privileged.

(1) Statements made by the plaintiff's former master to a person who contemplates hiring, or had already hired, the plaintiff.⁴ The reasons for extending protection to such statements are especially

care and protection, to state the reason why his daughter was discharged, the reply of the employer would be privileged; but that, if the employer voluntarily states to the father the reason why the discharge was made, the statement would not be privileged.

² This is the language used by Wightman, J., in defining the circumstances under which voluntary statements are actionable. See *Gardner v. Slade* (1849) 13 Q. B. 796, 18 L. J. Q. B. N. S. 334, 13 Jur. 826, 17 Eng. Rul. Cas. 246.

³ In *Pattison v. Jones* (1828) 8 Barn. & C. 578, Bayley, J., remarked: "I do not mean to say that in order to make libelous matter written by a master privileged, it is essential that the party

who makes the communication should be put into action in consequence of a third party's putting questions to him. I am of opinion he may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion, and do some act to induce that other to seek information from and put questions to him."

⁴ *Rogers v. Clifton* (1803) 3 Bos. & P. 587, it was laid down by Lord Alvanley, Ch. J., and Rooke, J., that a former master of a servant, whether asked to do so or not, is always warranted in communicating to a person who is about to hire the servant anything of a criminal nature which has

strong where a servant obtains a place upon the strength of a character, given by his master in response to an inquiry, and the master afterwards discovers facts which induce him to believe that the character was undeserved. Under such circumstances, the former master is morally bound to inform the new master of those facts, and the privilege "lasts as long as anything is discovered, before unknown to the master."⁵

(2) Statements made by the plaintiff's master to other employees.⁶ Some of the decisions under this head illustrate the incidents and consequences of one variety of "blacklisting." See § 2030, *post*.

come to his knowledge since the servant left his employment.

Statements made by a friend to the vicar of a parish with respect to the character of a curate who had been advertised as about to preach one of a course of sermons in the latter parish were held to be *prima facie* privileged. *Clark v. Molyneux* (1877) L. R. 3 Q. B. Div. 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10.

The general rule formulated by the supreme court of Maryland is, that a communication made by a man to his neighbor, who is about to employ a servant formerly in the employ of the speaker, to the effect that the servant stole from the speaker, is privileged, if made in good faith, without malice, in the honest belief of its truth, and under the conviction that the speaker was in duty bound to make it to his neighbor, although it was made voluntarily, and not in response to any inquiry. *Fresh v. Cutter* (1890) 73 Md. 87, 10 L.R.A. 67, 25 Am. St. Rep. 575, 20 Atl. 774. An instruction not referring to the defense of privilege was held to be erroneous.

⁵ See *Gardner v. Slade* (1849) 13 Q. B. 796, 13 Jur. 826, 18 L. J. Q. B. N. S. 334, 17 Eng. Rul. Cas. 246 (former master intimated in a letter that servant had been dishonest, and thus induced further inquiry); *Fowles v. Bowen* (1864) 30 N. Y. 20 (mercantile firm had given a general recommendation to a clerk).

⁶ *Somerville v. Hawkins* (1851) 10 C. B. 583, 20 L. J. C. P. N. S. 131, 15 Jur. 450 (servant charged with theft in presence of two coservants); *Manby v. Witt* (1856) 18 C. B. 544, 2 Jur. N.

S. 1004, 25 L. J. C. P. N. S. 294 (master told each of two servants that the other had been robbing him); *Innes v. Adamson* (1889) 17 Sc. Sess. Cas. 4th series, 11 (servant charged with neglect of duty, two other coservants being present); *Newell v. Bennett* (1896) 3 Scot. L. T. 414 (immorality charged against three servants in presence of others).

In *Sheftall v. Central R. Co.* (1905) 123 Ga. 589, 51 S. E. 646 (first appeal [1903] 118 Ga. 867, 45 S. E. 687), it was laid down that, where a railroad company discharges a conductor, and it comes to its knowledge that there are in his possession company tickets which, while in its employment, he had a right to sell, and which he refused to surrender, the company can, to protect its own interest, take such precautions as are reasonably necessary to prevent the use of the tickets; and consequently that a publication of the circumstances to persons whose knowledge is necessary to protect it against the use of the tickets is privileged. On the other hand, a publication to persons not concerned with the matter of outstanding tickets, whether they are employees of the company or not, is not privileged.

In *Denver Public Warehouse Co. v. Holloway* (1905) 34 Colo. 432, 3 L.R.A. (N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840, it was held that the privilege accorded to a communication of one officer of a corporation to another, with respect to the conduct of one of its servants, is not lost by reason of the fact that the recipient disclosed its contents to another servant, for the purpose of showing why the servant to which it related had been dismissed.

(3) Statement made by the plaintiff's master to a person on whose recommendation the plaintiff had been hired.⁷

(4) Statements made by the plaintiff's master to a relative of the plaintiff.⁸

(5) Statements made by the plaintiff's master to a person employed by him to investigate the plaintiff's conduct.⁹

(6) Statements made by the plaintiff's former master to persons having commercial or financial dealings with the master.¹⁰

⁷ *Child v. Affleck* (1829) 9 Barn. & C. 403, 4 Moody & R. 338, 7 L. J. K. B. 272 (female servant alleged to have been guilty of sexual immorality after leaving the defendant's employment); *Dixon v. Parsons* (1858) 1 Fost. & F. 24 (letter to the effect that the servant's conduct had not justified the character given of him, that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty); *Farquhar v. Neish* (1890) 17 Sc. Sess. Cas. 4th series, 716 (mistress, immediately after dismissing a domestic servant for alleged drunkenness, wrote to the registry office through which she had been engaged, stating the reason for the dismissal, and declining to give anyone her character without mentioning her failing); *Tremaine v. Parker* (1848) 12 L. T. 312 (captain of ship alleged to be a hard drinker).

⁸ *James v. Jolly* (1879) an unreported case, cited in *Odgers on Libel & Slander*, 4th ed. p. 256 (parents of servant told that he was a thief); *Cox v. Mathews* (1861) 2 Fost. & F. 397 (per Byles, J., with reference to the same facts); *Sharp v. Bowlar* (1898) 103 Ky. 282, 45 S. W. 90 (same facts); *Aberdeen v. Macleay* (1893) 9 Times L. R. 539 (aunt of servant informed of various faults); *Gorst v. Barr* (1887) 13 Ont. Rep. 644 (father of servant told that he was a thief); *Livingston v. Bradford* (1897) 115 Mich. 140, 73 N. W. 135 (similar facts); *Wells v. Lindop* (1888) 15 Ont. App. Rep. 695, affirming (1887) 14 Ont. Rep. 275 (wife of servant told that he was a thief; see also [1887] 13 Ont. Rep. 434).

In *Moore v. Butler* (1868) 48 N. H. 161, words charging a servant with theft were held to be prima facie privileged (1) when spoken to the servant herself, no other person being present; (2) when spoken to her mother, alone;

(3) when spoken in the presence of the speaker's husband, and the mother and aunt of the servant.

⁹ Instructions given to the employer's counsel to investigate certain questioned entries in the employer's books, and make protest to the bookkeeper against them, cannot serve as the foundation of a charge of defamation against the employer. *Levy v. McCan* (1892) 44 La. Ann. 528, 10 So. 794.

When a charge of theft is being laid against a servant, the statements made to a police officer are privileged. *Dale v. Harris* (1872) 109 Mass. 193.

¹⁰ The communication was held to be privileged where it consisted of a statement published by a baker in a newspaper, for the purpose of informing his customers that one of his drivers had left his employ, and had taken upon himself the privilege of collecting bills. *Hatch v. Lane* (1870) 105 Mass. 394.

So, also, where a circular, stating that an employee had been discharged, and giving the reasons therefor, is distributed by a newspaper company among persons from whom advertisements have been obtained in the past, or from whom they may be expected in the future, the communication is privileged. *Ratzel v. New York News Pub. Co.* (1902) 67 App. Div. 598, 73 N. Y. Supp. 849, reversing (1901) 71 N. Y. Supp. 1074.

In *Gassett v. Gilbert* (1856) 6 Gray, 94, 99, it was held to be the duty of the defendants, as directors of a society for promoting the medical education of women, to take all proper measures to see that the money raised by subscription, in aid of the institution, was collected and appropriated according to the intention of those from whom it was obtained, and that, if they believed that the plaintiff, after her authority as a collecting agent had ceased, was falsely representing herself as still authorized to collect subscriptions in behalf of the

(7) Statements made by the plaintiff's master to a guarantor of the plaintiff's honesty.¹¹

(8) Statements made by a director of the company of which the plaintiff is employee, to the directors of another company by which he is also employed.¹²

(9) Statements made by the governing body of a corporation to its shareholders with regard to the plaintiff, an employee of the corporation.¹³

(10) Statements made by the shareholders of a company with regard to the conduct of a servant of the company.¹⁴

(11) Statements made by one officer of a corporation by which the plaintiff is employed, to another officer of that corporation.¹⁵

(12) Statements made to the plaintiff's official superior by a per-

corporation, and was thereby wrongfully obtaining money from the public, they were justified in publishing a notice, couched in such language as was necessary and proper, to put persons on their guard against her unauthorized representations, and to prevent her from receiving money under the false pretense that it was collected for the use and benefit of the corporation.

¹¹ *Dundas v. Livingston* (1900) 3 Sc. Sess. Cas. 5th series, 37 (charge of embezzlement); *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A. (N.S.) 91, 109 N. W. 463 (statement made with reference to an alleged defalcation).

¹² *Harris v. Thompson* (1853) 13 C. B. 333 (charge of obtaining the money of one company under false pretenses, and using it to pay his own debts).

¹³ Where the president and directors of a company sent out to the shareholders a report stating the result of their investigations into the conduct of a mechanic employed as bridge builder, the communication was held to be privileged. *Philadelphia, W. & B. R. Co. v. Quigley* (1858) 21 How. 202, 16 L. ed. 73.

This decision was approved in *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. Div. 262, where the plaintiff was employed as manager of the factories of a joint-stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following

statement: "The shareholders will observe that there is a charge of £1306 for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." It was resolved at the ordinary general meeting of the shareholders that this report should be printed with that of the directors, and sent to the shareholders. It was held that an action for libel could not be maintained by the manager. After referring to the above-mentioned American case, Mellor, J., said: "Independently of any authority, I am quite prepared to hold that a company having a great number of shareholders, all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders, whether present or absent, if the communication be made without malice, and bona fide."

¹⁴ *Broughton v. McGrew* (1889) 5 L.R.A. 406, 39 Fed. 672 (statements made at a stockholders' meeting); *Haney v. Trost* (1882) 34 La. Ann. 1146, 44 Am. Rep. 1161 (wife of shareholder told him that a servant of a street car company was dishonest, and shareholder communicated the information to the foreman).

¹⁵ *Denver Public Warehouse Co. v. Holloxy* (1905) 34 Colo. 432, 3 L.R.A. (N.S.) 696, 114 Am. St. Rep. 171, 83 Pac. 131, 7 Ann. Cas. 840.

son appointed by a higher authority to examine into the alleged misconduct of the plaintiff.¹⁶

(13) Statements made by an official superior of the plaintiff to the governing body of an institution in which both were employed.¹⁷

(14) Statements made at a meeting of a public or quasi public corporation with regard to the plaintiff, an employee of the corporation.¹⁸

(15) Statements made by one of the contractors engaged in a

¹⁶ *Dewe v. Waterbury* (1880) 6 Can. S. C. 143, reversing (1879) 19 N. B. 225 (chief postoffice inspector for Canada, while making inquiries into certain irregularities which had been discovered at a certain postoffice, told the assistant postmaster that he had charged one of his clerks with abstracting money from letters). On the previous hearings of the case before the supreme court of New Brunswick (1876) 16 N. B. 670 (1878) 18 N. B. 6, the decision had turned upon the question whether the inspector had authority to make the inquiry.

¹⁷ The communication was held to be privileged, where the principal of an institution for deaf mutes complained to the executive committee of the board of trustees of the institution, that the plaintiff, a teacher therein, had mailed to the defendant's wife a printed paper, recommending and advertising articles for the prevention of conception and for procuring abortions, and stating where the articles could be purchased. *Hemmens v. Nelson* (1893) 138 N. Y. 517, 20 L.R.A. 440, 53 N. Y. S. R. 94, 34 N. E. 342, affirming (1891) 36 N. Y. S. R. 905, 13 N. Y. Supp. 175. Verdicts for the plaintiff, rendered on three previous trials of this case, had been set aside by the supreme court. See (1881) 24 Hun, 395 (1885) 36 Hun, 149 (1888) 13 N. Y. S. R. 211.

¹⁸ Privilege was held to be a good defense under the following circumstances:

Where statements were made by a member of a board of poor law guardians, at a meeting of the board, with regard to a former employee of the board. *Pittard v. Oliver* [1891] 1 Q. B. 474, 60 L. J. Q. B. N. S. 219, 64 L. T. N. S. 758, 39 Week. Rep. 311, 55 J. P. 1.

Where a ratepayer in a borough made

an oral statement to a member of the watch committee of the borough, respecting the plaintiff in his capacity of superintendent of police. *Bannister v. Kelly* (1895) 59 J. P. 793.

Where a ratepayer who was unable to attend a parish meeting called to investigate the parish constable's accounts wrote a letter with regard to those accounts, and requested that it should be read to the meeting. *Spencer v. Amerton* (1835) 1 Moody & R. 470, Parke, B.

Where a parish officer was seeking re-election, and charges as to his previous conduct in the office were made against him at the parish meeting held for the purpose of nominating officers. *George v. Goddard* (1861) 2 Fost. & F. 689.

Where the justices were about to swear in the plaintiff as a paid constable, and a parishioner came forward and stated that the plaintiff was not a proper person to be a constable. *Kershaw v. Bailey* (1848) 1 Exch. 743, 17 L. J. Exch. N. S. 129. The fact that several other persons besides the justices were present was held not to destroy the privilege.

In one case the privilege of the occasion was held to be a good defense to an indictment for libel, laid against the wife of the servant's master, who had, at her husband's request, written to the servant a letter charging him with theft. *Reg. v. Perry* (1883) 15 Cox, C. C. 169. The court laid it down, that the terms of a letter written under such circumstances ought not to be too nicely criticized. But it is manifest that in this instance, the fact that there was no publication to a third person could have been an effectual bar to a civil action in respect to the letter in question.

certain kind of work, with regard to a servant of another of the contractors.¹⁹

2024. —in cases where the statement was made to the present or prospective employer.—Other illustrations of the doctrine that the voluntary character of a communication concerning a servant's character does not take it out of the privileged class are to be found in the cases where the defamatory statement was made to the master, present or prospective, of the plaintiff, by a third person who, for one reason or another, had a duty or interest in respect to subject-matter of the communication.¹

¹⁹ In *McLaren v. Yealick* (1903) 22 New Zealand L. R. 546, it was ruled in a nisi prius case that the statement of a contractor who was operating one part of a mine, to the effect that he had been informed that a miner in the employ of another contractor had been seen taking pieces of quartz, was privileged when made to the manager of the mine, but not when made to the contractor for the trucking of the ore.

¹ Privilege has been successfully pleaded under the following circumstances:

Where a letter was written to the Privy Council, charging a sanitary inspector with corruption and misconduct in his office. *Proctor v. Webster* (1885) L. R. 16 Q. B. Div. 112, 55 L. J. Q. B. N. S. 112, 53 L. T. N. S. 765.

Where a petition addressed by a creditor of an officer in the army to the secretary at war, bona fide, and with a view of obtaining, through his interference, the payment of a debt due, contained a statement of facts which, though derogatory to the officer's character, the creditor believed to be true. *Fairman v. Ives* (1822) 5 Barn. & Ald. 642, 1 Dowl. & R. 252, 1 Chitty, 85, 24 Revised Rep. 514.

Where a letter to the postmaster general, or to the secretary to the General Postoffice, complaining of misconduct in a postmaster, was written as a bona fide complaint, to obtain redress for a grievance which the party really believed he had suffered. *Woodward v. Lander* (1834) 6 Car. & P. 548, per Alderson, B.

Where the managing agent of an insurance society told the proprietor of a certain ship that, if the plaintiff was appointed to command her, the society would refuse to continue to insure her.

Hamon v. Falle (1879) L. R. 4 App. Cas. (P. C.) 247 (decided on demurrer).

Where a letter charging the manager of a quartz-crushing company with dishonesty in abstracting gold was written to a shareholder of that company by a person having an interest in a company which owned the mine which supplied the ore to the former company. *Horne v. Milne* (1881) 7 Vict. L. R. (L). 296 (the "interest" which in this case was deemed sufficient to justify the communication consisted in the fact that the two concerns were virtually parts of the same undertaking).

Where a letter was written to a board of guardians by their clerk, complaining that one of the under clerks in the office neglected his duty, and behaved in an offensive and insubordinate manner. *Keight v. Hill* (1879) 43 J. P. 176.

Where a subscriber to a charity wrote to the managing committee a letter concerning the conduct of their secretary in the management of the funds of the charity, and a second letter in answer to an answer from the committee proposing an inquiry, and also made oral statements before the committee during the inquiry. *Maitland v. Bramwell* (1861) 2 Fost. & F. 623.

Where a manual prepared by inhabitants of a school district, and sent to the local superintendent of schools, charged a teacher with immorality. *McIntyre v. McBean* (1856) 13 U. C. Q. B. 534.

Where a communication representing that A. was immoral and unfit to have the care of a district school was made to a township superintendent by persons interested in a certain school within his jurisdiction, for the purpose of preventing the issue of a license to A.

Wieman v. Mabee (1881) 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71.

Where a confidential letter was written to a friend in the same city as plaintiff's employer (he being unknown to the writer), in which he mentioned that certain facts had created a suspicion in the neighborhood that the plaintiff had been guilty of dishonesty, and suggested that an investigation into the matter should be made. *Hart v. Reed* (1840) 1 B. Mon. 166, 35 Am. Dec. 179.

Where a creditor wrote to the servant's employer, stating that the servant had slunk behind the statute of limitations to escape paying his debt. *Hollenbeck v. Ristine* (1898) 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

Where B., a tradesman, after having been dismissed from serving A., a customer, who stated as his reason that B. charged for goods never delivered, and B. afterwards wrote a letter to A., vindicating himself, and imputing the dishonesty to a servant of A. *Coward v. Wellington* (1836) 7 Car. & P. 531, per Littledale, J.

Where the defendant, a tradesman, having reason to suspect that A., a servant of M., who was a customer of the defendant's, had, when sent to the defendant's premises by M., abstracted property belonging to the defendant, communicated to M. the reasons he had for believing that the plaintiff had taken such property. *Amann v. Damm* (1860) 29 L. J. C. P. N. S. 313, 8 C. B. N. S. 597, 7 Jur. N. S. 47, 2 L. T. N. S. 322, 8 Week. Rep. 470.

Where the defendant, the host of the plaintiff's employer, told him privately that the plaintiff was suspected of having committed a theft at a hotel where the employer had been staying a few days before. *Stuart v. Bell* [1891] 2 Q. B. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612 (Lopes, L. J., dissented, holding that the communication was not privileged).

Where a druggist who had a right under a special contract to fill the prescriptions of a physician made statements concerning the moral character of a female attendant in his office. *Trimble v. Morrish* (1908) 152 Mich. 624, 16 L.R.A.(N.S.) 1017, 116 N. W. 451. The *ratio decidendi* was that the druggist, having an interest in the business, was under a duty of imparting any information which affected it.

Where the defendant wrote a confidential letter to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the defendant was likewise interested. *M'Dowgall v. Claridge* (1808) 1 Campb. 267, 10 Revised Rep. 679.

Where the defendant had spoken words to the plaintiff's employer which imputed that the plaintiff had made overtures to the defendant's clerk to commit a fraud upon the plaintiff's employer, and divide the proceeds between them. *Caulfield v. Whitworth* (1868) 18 L. T. N. S. 527, 16 Week. Rep. 936.

In *Cowhead v. Richards* (1846) 2 C. B. 569, 15 L. J. C. P. N. S. 278, 10 Jur. 978. C., the mate of a ship, sent to B., a stranger, a letter charging A., the captain, with gross misconduct (constant drunkenness). B. showed this letter to D., the owner, who dismissed A. Held, by Tindal, Ch. J., and Erle, J., that the showing of the letter by B. to D. was a privileged communication. Held, by Coltman and Cresswell, J., that it was not privileged. It was conceded by all the judges that the letter would have been privileged if it had been sent by the mate direct to the owner. In *Amann v. Damm* (1860) 29 L. J. C. P. N. S. 314, 8 C. B. N. S. 597, 7 Jur. N. S. 47, Willes, J., said that he concurred in the opinion of Tindal, Ch. J., and Erle, J. Their conclusion was also approved by Lindley, L. J., in *Stuart v. Bell* [1891] 2 Q. B. 341, 60 L. J. Q. B. N. S. 577, 64 L. T. N. S. 633, 39 Week. Rep. 612.

In an action for libel, consisting of a publication in a newspaper of a report of an inspector of charities under the charitable trusts act, containing a letter, written some years before, reflecting on the plaintiff in his management of a college, it was held that, as the matter was one of public interest, the defendant was not liable, provided he published it fairly, from an honest desire to afford the public information. *Cox v. Feeney* (1863) 4 Fost. & F. 13.

In *Over v. Schiffing* (1885) 102 Ind. 191, 26 N. E. 91, the decision proceeded upon the ground that libelous matter communicated to the employer solely for the benefit of the writer, and not intended to benefit the employer by giving him in good faith and for a just purpose, information for his protection.

2025. Circumstances under which statements are not privileged.—

a. Making of statement to improper person.—The language in which the doctrine as to privileged communications is enunciated by the courts necessarily implies that it does not afford any protection in any case where, as between the publisher and the recipient of the information in question, there was no correspondence of duty or interest in respect to the subject-matter.¹ But a communication made to an official superior of an employee may sometimes be privi-

against the employee, is not privileged. The misconduct charged in this case was that the plaintiff had, by corrupt and dishonest means, obtained personal property from the defendant, without paying for labor performed on it.

¹ Privilege was held not to be a defense, where a rector sent to his own parishioners and those of an adjoining parish a circular letter, warning them not to send their children to a national school which the plaintiff had opened in the parish, against the rector's wishes, and in opposition to the rector's parish school. *Gilpin v. Fowler* (1854) 9 Exch. (Exch. Ch.) 615, 23 L. J. Exch. N. S. 152, 18 Jur. 292, 2 Week. Rep. 272.

Where a lieutenant in the Navy, who had been appointed by the government its agent on board a transport ship, wrote a letter to the secretary of Lloyd's Coffee House, imputing misconduct and incapacity to the master of the transport, the communication was held not to be privileged, as such a complaint should have been made to the government. *Harwood v. Green* (1827) 3 Car. & P. 141, per Best, Ch. J., who held that the fact that others were in the habit of making similar complaints was neither a complete defense nor admissible in mitigation of damages.

A circular letter sent out by a firm of merchants to everyone whose name was on its address book, and stating that the plaintiff was no longer in their employ, and advising their "friends and customers" to give him no recognition on their account, is not privileged. *Warner v. Clark* (1893) 45 La. Ann. 863, 21 L.R.A. 502, 13 So. 203.

Words spoken by a subscriber to a charity, in answer to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circum-

stances, a privileged communication. *Martin v. Strong* (1836) 5 Ad. & El. 535, 1 Nev. & P. 29, 2 Harr. & W. 336, 6 L. J. K. B. N. S. 48. The decision was put upon the ground that the claim of privilege was too large, the subscriber to a charity not being entitled, as such, to enter into the discussion.

A was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A afterwards became a candidate for another situation. B wrote to C, introducing D as a candidate, and C, having written to B, informing him that another person had succeeded in obtaining the appointment, B wrote an answer to C, reflecting on the conduct of A whilst in the situation of engineer to the railway company. There was a subsequent election, at which A was unsuccessful, in consequence of this letter having been shown. It appeared that B and C were both shareholders in the railway company, and that B managed C's affairs in the railway. B had not been applied to for his opinion, and the letter, containing the libel, was written after the termination of one election, and before the other was in contemplation. Held, in an action by A against B for the libel, that the letter was not a privileged communication. *Brooks v. Blanshard* (1833) 1 Crompt. & M. 779. Lord Lyndhurst said: "The defendant was not applied to for any opinion, and the election was over. A communication is not privileged merely because it is confidential." Bayley, B., said: "The letter was written after one election was over and before the other was in contemplation." These brief statements might seem to indicate that the court treated the voluntary quality of the communication as the differentiating factor. But the true

leged, although it ought more properly to have been made to some other official.² Nor is it deemed essential to the protection of a communication "that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made

ratio decidendi, as explained by Parke, B., in the subsequent case of *Kine v. Sewell* (1838) 3 Mees. & W. 297, 302, was that, "if the election was over, there could be no interest." The remark of Alderson, B., was to the same effect: "The question about which the subscribers had met had been determined one way or other before the words were spoken by the defendant, and the judge was of opinion that the defendant had no right to say anything about the matter."

In *Jackson v. Mayne* (1868) 19 L. T. N. S. 399, the evidence adduced at the trial was that, in the police sheets issued and read to all the members of the metropolitan police force, the plaintiff, an inspector of hackney carriages, was stated to have been dismissed for having made out accounts for sums claimed to be due from him, etc., founded on a misrepresentation of duties alleged to have been performed, etc. Keating, J., said he would hold for the present that it was not privileged. The jury could not agree, and the point was not further discussed.

In a Canadian case, it was considered that the course thus taken was proper. *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. 8, 28, per Hagarty, Ch. J.

In *Pullman v. Hill* [1891] 1 Q. B. (C. A.) 524, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263, an employer had ordered his typewriter, a person having no interest in seeing or hearing the communication, to copy a letter containing libelous words, and then directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. Held, that there had been two publications of the letter, neither of them privileged.

On the authority of this case, it has been held in Ontario that, where the manager of the defendant company handed to his stenographer, to be typewritten, a draft letter written in the interest of the company, but unconnected with its ordinary business, the publication to the stenographer took away the privilege as regards defamatory

statements made in the letter. *Puterbaugh v. Gold Medal Furniture Mfg. Co.* (1904; C. A.) 7 Ont. L. Rep. 582, 1 Ann. Cas. 100, reversing (1903) 5 Ont. L. Rep. 680.

But where a solicitor, writing to his client on a privileged occasion, gives the letter to his clerk to copy in the ordinary course of a solicitor's business, the publication is privileged. *Boasius v. Freres* [1894] 1 Q. B. 842, 63 L. J. Q. B. N. S. 401, 9 Reports, 224, 70 L. T. N. S. 368, 42 Week. Rep. 392, 58 J. P. 670.

The transmission of libelous matter unnecessarily by a postoffice telegram of libelous matter which would have been privileged if sent in a sealed letter avoids the privilege. *Williamson v. Freer* (1874) L. R. 9 C. P. 393, 43 L. J. C. P. N. S. 161, 30 L. T. N. S. 332, 22 Week. Rep. 878.

For other cases in which defense of privilege has been discussed with reference to the justifiability of making the statement to the person in question, see §§ 2029, 2030, *post*.

² As where a timekeeper, employed on behalf of a public department, wrote to the secretary of the department a letter charging the contractor with fraud in the measurement of the work. *Scarll v. Dixon* (1864) 4 Fost. & F. 250.

And where defendant wrote to the inspector of constabulary, saying that he had been informed that the plaintiff, a government medical officer, had refused to attend a poor woman, who had died in consequence. *Jenoure v. Delmege* [1891] A. C. (P. C.) 73, 60 L. J. P. C. N. S. 11, 63 L. T. N. S. 814, 39 Week. Rep. 388, 55 J. P. 500 (letter should have been addressed to the superintending military officer).

And where a letter written to the Provincial Secretary, and not, as in strictness it should have been, to the Commissioner of Crown Lands, complained of the conduct of a government land surveyor. *Kerr v. Davison* (1873) 9 N. S. 354.

These three cases, however, are apparently in conflict with *Blagg v. Sturt* (1846) 10 Q. B. 899, where it was held that a letter written to the Home Secre-

with honesty of purpose to a party who has any interest in the inquiry . . . the simply fact that there has been some casual bystander cannot alter the nature of the transaction.”³

tary, complaining of the conduct of the plaintiff, in his capacity as clerk to the borough magistrate of A., was not privileged “because the Secretary of State had no direct authority in respect to the matter complained of, and was not a competent tribunal to receive the application.” But in *Harrison v. Bush* (1855) 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 99, 2 Jur. N. S. 90, 4 Week. Rep. 199, Lord Campbell expressed the opinion that this was not a proper criterion to determine whether the complaint is made to a competent tribunal, and remarked that it would certainly be strange, if what might well be an excusable error on the part of the complainant should deprive him of the benefit of his privilege.

³ *Toogood v. Spyring* (1834) 1 Crompt. M. & R. 181, 4 Tyrw. 582, per Parke, B.

In that case, A, the tenant of a farm, required some repairs to be done to the farmhouse, and B, a master carpenter in the employ of the landlord, directed C, one of his assistants, to do the work. C did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred which induced A to believe that C had broken open his cellar door, and obtained access to his cider. A, two days afterwards, met C in the presence of D, a man working on the landlord's estate, and charged him with having broken his cellar door, and with having got drunk and spoiled the work. A afterwards told D, in the absence of C, that he was confident C had broken open the door. On the same day A complained to B that C had been negligent in his work, had got drunk, and he thought he had broken open his cellar. Held, that the complaint to B was a privileged communication, if made bona fide, and without any malicious intention to injure C, but that the reiteration of the statement to D, in the absence of C, was unauthorized and officious, and therefore not protected.

Words by which an employer accused an employee of dishonesty, in the course of an inquiry started by the employee for the purpose of clearing his character, were held to be privileged, although

they were spoken in the hearing of a person to whom the employer had just sold his business. *Ryan v. Newman* (1882) 3 New South Wales L. R. 309.

At a meeting of a board of guardians, of which the plaintiff had been the clerk, the defendant, a member of the board, in the course of a discussion concerning the plaintiff's accounts, made certain defamatory statements concerning the plaintiff, without malice, and bona fide believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting. Held, that the privilege which would have attached to the statements, if made in the presence of guardians only, was not taken away by the presence at the meeting of reporters or persons other than guardians. *Pittard v. Oliver* [1891] 1 Q. B. 474, 60 L. J. Q. B. N. S. 219, 64 L. T. N. S. 758, 39 Week. Rep. 311, 55 J. P. 100. It was conceded that, if the defendant had himself called in the reporters,—persons having no interest in the inquiry,—the privilege would have been destroyed. But, as he, as an individual, had had nothing to do with their introduction to the meeting, their presence at the time when he was called upon to do his duty made no difference.

This case may be contrasted with another in which it was held, in an action against the proprietor of a newspaper, that the administration of the poor laws, both by the government department and by the local authorities, including the conduct of the medical officers, is a matter of public interest; but that the publication of a report of proceedings at a meeting of poor-law guardians, at which *ex parte* charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. *Purcell v. Sowler* (1877) L. R. 2 C. P. Div. 215, 46 L. J. C. P. N. S. 308, 36 L. T. N. S. 416, 25 Week. Rep. 362. The court proceeded on the ground that the guardians were a body of limited jurisdiction whose proceedings it was not usual or essentially necessary to publish. There was no duty to report such *ex parte* proceedings.

“If a libel is uttered on a privileged

A libelous statement written by an employer is not privileged merely because it is written to the employee's mother.^{3a}

b. Language going beyond the reasonable requirements of the occasion.—A communication which would have been privileged if it had been nothing more than a simple statement of facts may sometimes be actionable if it is couched in language of excessive violence.⁴ This circumstance is also competent evidence of malice. See § 2027, *post*.

c. Statements made without a reasonable belief in their truth.—If the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, al-

occasion to a husband, when his wife is present, her presence does not take away the privilege." *Huddleston, B., arguendo, in Wennhak v. Morgan* (1888) L. R. 20 Q. B. Div. 635.

The mere fact that when a servant was accused by his master of theft, certain casual bystanders, or some of his fellow servants, were present, will not deprive the words spoken of their privileged quality. *Gildner v. Busse* (1902) 3 Ont. L. Rep. 561.

The mere fact that the attorney of a company is present at a shareholder's meeting by the request of the president does not deprive of its privileged quality a statement made by one of the shareholders with regard to the incompetency of an employee of the company. *Broughton v. McGrew* (1889) 5 L.R.A. 406, 39 Fed. 672 (per Wood, J.):

"A master who is about to dismiss a servant may call in a witness to hear what is said, without losing the privilege which his words would otherwise have on such an occasion." *Taylor v. Hawkins* (1851) 16 Q. B. 308, per Lord Campbell, Ch. J., (p. 319) (servant was charged with embezzlement in the presence of a neighbor and friend of the employer's).

The occasion was held to be *prima facie* privileged, when a master turned away a maidservant whom, upon his returning unexpectedly to his house, he finds under circumstances which create a strong suspicion that she has been guilty of immoral conduct with another employee of, and declared his reasons for the dismissal in the presence of two friends who happened to enter the house at the same time with him. *Watson v.*

Burnet (1862) 13 Sc. Sess. Cas. 2d series, 333.

Where a maidservant in a hotel was accused by a guest, in the presence of her mistress and fellow servant, of stealing an article belonging to him while she was cleaning his room, there was held to be no privilege. *Reid v. Moore* (1893) 20 Sc. Sess. Cas. 4th series, 712. But, *quære* as to this decision.

^{3a} *Rose v. Imperial Engine Co.* (1906) 110 App. Div. 437, 96 N. Y. Supp. 808, second appeal in (1908) 127 App. Div. 885, 112 N. Y. Supp. 8.

⁴ In *Fryer v. Kinnersley* (1863) 15 C. B. N. S. 422, the defendant, on the recommendation of one E., hired F. in the capacity of a gardener. Being dissatisfied with him after some months, he gave him notice to leave his service, and called upon E. to recommend him another gardener in his place. Shortly afterwards the defendant wrote to E. a letter, complaining of F.'s conduct; in which letter, amongst other things, he said,—“On Saturday I had another scene with Fryer in my garden. He was extremely violent, came toward me several times with an open clasp-knife in his hand, and eyes staring from the sockets with rage, a perfect raving madman. I was, fortunately, accompanied by my upper servant. He accused me of having opened a letter of his, etc. I think it right that you should be informed of Fryer's violent conduct, as you might unwittingly recommend him, without being aware of his temper and faults.” In consequence of this letter, E. refused to employ F. in the society's gardens, as he

though he had no reasonable ground for his belief.⁵ "The privileges would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed."⁶

d. Repetition of statement.—In some instances a statement which was privileged when first made becomes actionable if it is made a second time.⁸

e. Information imparted for the benefit solely of the maker of the statement.—In one case a letter was held not to be a privileged com-

before had done, and but for the letter would have done again. Held, that, assuming that the relation between the defendant and E. was such as to warrant a communication on the subject of F.'s conduct, the above letter was excluded from the privilege, by reason of excess. It should be observed that on the trial the judge had left it to the jury to say whether the defendant was actuated by malicious motives, and malice had been negatived by the verdict. The decision of the court of review was rendered in dealing with a motion for a nonsuit, made on the ground that the letter was privileged. As the element of express malice had been excluded from the case by the finding of the jury, it is clear that the conclusion that the defendant was liable necessarily implies that the doctrine applied was that which is stated in the text. But the case is sometimes referred to as one which embodies the doctrine that violent language is evidence of malice.

Plaintiff's daughter had been in defendant's service for some time, and after she left, defendant's wife went to where she was staying, at her sister's, and claimed some things as her property, as being taken by the girl. The girl and her sister went and told this to their father, the plaintiff; and the plaintiff, his wife, and the girl, the sister, and the sister's husband, went together to defendant. Plaintiff said he came to inquire about the charge against his daughter. Defendant said she had been stealing all the time she had been at his house. Plaintiff then said, that if so, defendant should not have kept her in his service. Defendant then said that the plaintiff was a

thief, and that his family were all thieves, and that they were all tarred with the same stick. Held, that this was not a privileged communication, and that proof of express malice was not required to enable the plaintiff to recover. *Miller v. Johnston* (1874) 23 U. C. C. P. 580. In the judgment of the court it was remarked: "It would be, we think, going beyond all authorities to hold the defendant protected on legal principles. He is represented as reiterating his charge against the plaintiff in a needlessly vehement and offensive manner, not calmly nor fairly stating an express charge in which he considered the plaintiff to be implicated or mixed up, but rather as making the charge against the daughter a ground for a general attack on the family."

⁵ *Clark v. Molyneux* (1877) L. R. 3 Q. B. Div. (C. A.) 237, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox, C. C. 10.

⁶ *Jenoure v. Delmege* [1891] A. C. 73, 79.

⁸ In *Blackburn v. Blackburn* (1827) 1 Moore & P. 33, 4 Bing. 395, Park, J., said: "Although the first communication might be privileged, yet the defendant had no right to reiterate the slander, or to continue vilifying the character or reputation of the plaintiff. If a person give a character of a servant, it is at first privileged; but if he afterwards say he will ruin such servant, it is not so." A verdict for the plaintiff was allowed to stand, although the jury had found that the defendant was not actuated by express malice.

See also *Missouri P. R. Co. v. Behee*, (1893) 2 Tex. Civ. App. 107, 21 S. W. 384, § 2030, note 2, *post*.

munication, for the reason that the statements contained in it were made voluntarily and solely for the advantage of the writer himself, and that it was "not intended to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant."⁹

2026. Privilege avoided by proof of express malice.—Where the defamatory statement in question was one which did not belong to the class of those which are prima facie privileged, it is obviously immaterial whether express malice is proved or not. Accordingly the mere fact that the jury have found that the defendant was not actuated by such malice in making a nonprivileged statement does not constitute a sufficient reason for setting aside a verdict in favor of the plaintiff.¹ But a servant cannot maintain an action for the damage caused by a privileged statement, unless he is able to prove affirmatively that it was maliciously made.² "It is certainly not

⁹ *Over v. Schiffing* (1885) 102 Ind. 191, 26 N. E. 91 (letter charging the plaintiff with having obtained goods by fraudulent means, and requesting the employer to retain the price out of money which he owed to the plaintiff).

¹ *Blackburn v. Blackburn* (1827) 4 Bing. 395, 1 Moore & P. 33, 3 Car. & P. 146, 6 L. J. C. P. 13, 29 Revised Rep. 583.

² In *Edmonson v. Stevenson* (1766) cited in Bull. N. P. 8, Lord Mansfield laid down the rule which has been followed ever since, viz., that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved."

"I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an action to prove the truth of any aspersions thrown out by him against the latter, but that it lies upon the servant to prove the falsehood of the aspersions thrown out against him. In such case the master is justified, unless the servant prove express malice in the act of the former." Chambre, J., in *Rogers v. Clifton* (1803) 3 Bos. & P. 587, 594.

That the onus of proving express malice lies in the servant is also laid down in the following cases: *Fountain v. Boodle* (1842) 3 Q. B. 5, 2 Gale. & D. 455, per Lord Denman, Ch. J.; *Child v. Affleck* (1829) 9 Barn. & C.

403, 4 Moody & R. 338, 7 L. J. K. B. 272; *Pattison v. Jones* (1828) 8 Barn. & C. 578, 3 Moody & R. 101, 8 L. J. K. B. 26; *Taylor v. Hawkins* (1851) 16 Q. B. 308, 20 L. J. Q. B. N. S. 313, 15 Jur. 746; *Harris v. Thompson* (1853) 13 C. B. 333; *Jackson v. Hopperton* (1864) 16 C. B. N. S. 829, 10 L. T. N. S. 529, 12 Week. Rep. 913; *Pullman v. Hill* [1891] 1 Q. B. (C. A.) 524, 530, 60 L. J. Q. B. N. S. 299, 64 L. T. N. S. 691, 39 Week. Rep. 263; *Innes v. Adamson* (1889) 17 Sc. Sess. Cas. 4th series 11; *Wells v. Lindop* (1888) 15 Ont. App. Rep. 695; *Dewe v. Waterbury* (1880) 6 Can. S. C. 143; *Brown v. Norfolk & W. R. Co.* (1902) 100 Va. 619, 60 L.R.A. 470, 42 S. E. 664.

The reason why a master who, when applied to, gives the character of a servant, is not bound to substantiate by proof what he says, has been thus stated by Lord Alvanley, Ch. J., "If it were to be understood that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of such his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master so understanding the law (at least, with any regard to his own safety) to give any character but the most favorable to a servant, and consequently impossible for a servant not entitled to the most favorable character, to obtain any new place." *Rogers v. Clifton* (1803) 3 Bos. & P. 587, 591.

necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the nonexistence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its nonexistence.”³ In the absence of such evidence, “it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit or a verdict for the defendant. Otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and, if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff on the ground, merely, of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice.”⁴ If such evidence is forthcoming, “the question is to be left to the jury whether the defendant spoke the words with an honest belief that the imputation conveyed by them was true, or from motives of malice or ill-will.”⁵

The doctrine of the Scotch courts is that, where a servant seeks to recover damages for a statement imputing misconduct to him, which has been made by his master, in discharge of a duty, to the proper authority, he must put in issue, not only that the statement was made maliciously, but also that it was made without probable cause. *Hill v. Thompson* (1892) 19 Sess. Cas. 4th series, p. 377 (entry by captain in ship's log, in compliance with a provision in the merchant shipping act of 1854, charged an officer with wilful disobedience; *Croucher v. Inglis* (1889) 16 Sc. Sess. Cas. 4th series, 774 (minister of parish in which the pursuer resided had, by letters written by him to the inspector of poor of another parish and to the board of supervision, represented the plaintiff as grossly unfit to have charge of pauper children boarded with him by the parochial board of the second parish).

³ *Somerville v. Hawkins* (1851) 10 C. B. 583; *Taylor v. Hawkins* (1851) 16 Q. B. 308, per Erle, J.; *Harris v. Thompson* (1853) 13 C. B. 333.

The defendant cannot object to a charge which is substantially to the effect that, unless the jury are satisfied that the defendant availed himself of the occasion to make the statement ma-

liciously, they should find for defendant. *Wells v. Lintop* (1888) 15 Ont. App. Rep. 695, referring to rule laid down by Bramwell, L. J., in *Clark v. Molyneux* (1877) L. R. 3 Q. B. Div. 237, 243, 47 L. J. Q. B. N. S. 230, 37 L. T. N. S. 694, 26 Week. Rep. 104, 14 Cox. C. C. 10.

Slight evidence of malice may be left to the jury. *Fowles v. Bowen* (1864) 30 N. Y. 20.

⁴ *Taylor v. Hawkins* (1851) 16 Q. B. 208, per Lord Campbell, Ch. J. The same doctrine is laid down in *Kelly v. Partington* (1833) 4 Barn. & Ad. 700, 2 Nev. & M. 460; *Caulfield v. Whitworth* (1868) 18 L. T. N. S. 527, 16 Week. Rep. 936; *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. (C. A.) 8, 18.

⁵ *Jackson v. Hopperton* (1864) 16 C. B. N. S. 829, per Erle, Ch. J., p. 837; *Kelly v. Partington* (1833) 4 Barn. & Ad. 700, 2 Nev. & M. 460; *Jackson v. Hopperton* (1864) 16 C. B. N. S. 829, 12 Week. Rep. 913, 10 L. T. N. S. 529; *Dickson v. Parsons* (1858) 1 Fost. & F. 24; *Keight v. Hill* (1879) 43 J. P. 176; *Hammens v. Nelson* (1893) 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342; *Galssett v. Gilbert* (1856) 6 Gray, 94; *Dale v. Harris* (1872) 109 Mass. 193; *Hollenbeck v. Ristine* (1898) 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

Whether the injury alleged to have been sustained by reason of the defamation was a juridical consequence of its utterance is a question of fact, to be determined with reference to the ordinary criteria of proximity and remoteness of damage. All that need be said in this connection is that, under any conceivable state of facts, a jury would be warranted in finding for the plaintiff if the evidence shows that a person to whom the defamatory matter was communicated had been so influenced by it that he had either refused to take the plaintiff into his employment, or had dismissed him.⁶

2027. Circumstances from which malice may be inferred.—The existence of malice may be inferred either from the language of the communication itself, or by such extrinsic evidence as may be afforded by the relation of the parties, the circumstances attending the publication, or the conduct and expressions of the defendant.¹ The grounds upon which it has been sought to avoid the effect of privilege are as follows:

(1) That the statement made by the defendant was untrue. The accepted doctrine under this head is that evidence which goes no further than to prove that the defamatory words were untrue is not sufficient to warrant the inference of malice.² Such an inference, however, may be drawn where it is shown that the defendant knew that the words were untrue.³ When the statement is shown to have been

⁶ As the great majority of the cases cited in this subtitle take this doctrine for granted, it would be superfluous to cite authorities. For a case in which the loss of a position was explicitly held to be an immediate result of a libel, see *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A.(N.S.) 91, 109 N. W. 463.

¹ *Wright v. Woodgate* (1835) 2 Crompt. M. & R. 573, Tyrw. & G. 12, 1 Gale, 329, per Parke, B.; *Gassett v. Gilbert* (1856) 6 Gray, 94; *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A.(N.S.) 91, 109 N. W. 463, and the case next cited.

The contention that malice can be inferred from language alone, where there is nothing on the face of the communication to indicate it, was rejected in *Trimble v. Morrish* (1908) 152 Mich. 624, 16 L.R.A.(N.S.) 1017, 116 N. W. 451.

In Indiana it is provided that the document which an employer is required by statute to furnish, showing the cause of the discharge of a servant, shall

"never be used as the cause of action for slander or libel" against the employer. Horner's Anno. Stat. § 5206 r 3 (see § 2014, note 2, ante).

² *Fountain v. Boodle* (1842) 3 Q. B. 5, 2 Gale, & D. 455; *Fowles v. Bowen* (1864) 30 N. Y. 20; *Trimble v. Morrish* (1908) 152 Mich. 1017, 16 L.R.A.(N.S.) 1017, 116 N. W. 451.

³ *Fountain v. Boodle* (1842) 3 Q. B. 5, 2 Gale & D. 455, per Lord Denman. There a letter to an inquirer stating that the writer had dismissed the plaintiff, a governess, on account of her incompetency, and of her not being lady-like or good tempered, was held to be, when taken in connection with the fact that the writer had previously recommended the plaintiff for the position of governess, some evidence of express malice.

In *Sunley v. Metropolitan L. Ins. Co.* (1906) 132 Iowa, 123, 12 L.R.A.(N.S.) 91, 109 N. W. 463, the jury were held to be warranted in finding malice where it was shown that the plaintiff had, upon the demand of the assistant su-

a false one, it is incumbent on the defendant to prove that it was made with an honest belief that it was true, and if he fails to do so, a verdict in favor of the plaintiff is justifiable.⁴

(2) That the statement was made voluntarily, and not in response to an application from an interested party. It has already been pointed out that, according to the great preponderance of authority, this fact does not take a communication out of the prima facie privileged class. (§ 2023, *ante*.) But its competency as evidence of malice is recognized.⁵

perintendent of the defendant company, made a proper accounting, before the company had stated to his surety that he was a defaulter, that the amount of the alleged defalcation specified on the statement was larger than that which had been originally reported by the superintendent, and that, at the time the charge was made, it had received a remittance of \$8.45 from the plaintiff and had in its hands more than enough of his salary to satisfy its demand. The superintendent's knowledge of the real facts was held to be imputable to the defendant.

That malice is implied where the character given is false, to the knowledge of the defendant, is also the doctrine accepted in Scotland. *Anderson v. Wishart* (1818) 1 Murrey, 429.

⁴ *Fountain v. Boodle* (1842) 3 Q. B. 5, 2 Gale & D. 455, per Patteson, J.; *Wells v. Lindop* (1887) 14 Ont. Rep. 275.

It is primarily a question for the jury whether the defendant honestly believed that what he stated was true, and whether he had acted in what he considered the discharge of his duty. *Scarll v. Dixon* (1864) 4 Fost. & F. 250.

In *Gassett v. Gilbert* (1856) 6 Gray, 94, the court thus laid down the law: "The question of good faith on the part of the defendants, and their honest belief in the truth of the statements put forth by them, are matters of fact which are to be determined exclusively by the jury. Although it is not necessary for the defendants to prove the truth of the statements contained in the notice, in order to justify the publication, yet proof of their falsity is admissible on the part of the plaintiff to show that the defendants did not act on an honest belief in their truth."

Malice may be inferred where, in an

action of damages for slander by a person who had been employed as box-keeper by the owner of a circus, against her employer, the pursuer averred that the defender, in presence of two other employees, had accused the pursuer of defrauding him by selling old tickets and not accounting for the money so obtained. *Dinnie v. Hengler* (1909-10) Sc. Sess. Cas. 4.

⁵ In *Rogers v. Clifton* (1803) 3 Bos. & P. 587, where the defendant had sought out a former employer of the plaintiff's and told him that the plaintiff, after being dismissed, had refused to quit the house until he had received a month's wages, to which he conceived himself to be entitled, the court held that this single act of impertinence on the servant's part did not justify his officious interference. "I think," said Chambre, J., "the inducement to Sir. Gervas Clifton to do all this was the quarrel which had taken place between himself and the plaintiff at parting. Considering, therefore, as I do, the quarrel as the real cause of the charge made against the plaintiff, and seeing so much officious interference on the part of the defendant, I am quite clear we ought not to grant a new trial."

A, having discharged his servant, and hearing that he was about to be engaged by B, wrote a letter to B, and informed him that he had discharged him for misconduct. B, in answer, desired further information. A then wrote a second letter to B, stating the grounds on which he had discharged the servant. In an action by the servant against A for a libel contained in this letter, it was held that, assuming the letter to be a privileged communication, it was properly left to the jury to consider whether the second letter was written by A bona fide, or with an intention to injure the servant. *Patti-*

(3) That the defendant imparted to a third person information as to misconduct of which he believed the plaintiff to have been guilty after he had left his service. Such a communication was denied to be an "officious interference," betokening malice, where it had been made in response to an inquirer, and also voluntarily conveyed to parties from whom the defendant had received the servant with a good character.⁶

(4) That the prejudicial statement made by the defendant was inconsistent with a favorable one previously made by him.⁷

(5) That the communication was made to an improper person.⁸

son v. Jones (1828) 8 Barn. & C. 578. Littledale, J., said: "Upon the question whether a master who has written a libel in giving the character of a servant has acted bona fide or not, it may make a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted bona fide than in the case where he has given the character after being required so to do."

The fact that the servant's former employer when writing a letter about other matters to a person who had hired the servant on the strength of a recommendation given by the writer, alluded to the servant, and induced inquiries about him, is not evidence of malice. *Gardner v. Slade* (1849) 13 Q. B. 796. Wightman, J., said: "It seems to me precisely the same thing as if the questions then put had been put to Mrs. Slade [the defendant's wife] when the first inquiry as to character was made. The answers would then have been privileged, unless malice had been shown; and I think that, spoken as they were, they afford no evidence of malice."

For a case in which malice was held not to be inferable, although the communication was voluntary, see *Child v. Affleck* (1829) 9 Barn. & C. 403, 4 Moody & R. 338, 7 L. J. K. B. 272, (note 6, *infra*).

⁶*Child v. Affleck* (1829) 9 Barn. & C. 403: "It has been contended," said Bayley, J., "that the letter should not have contained the statement of the alleged misconduct after the plaintiff left the defendant's service. But I think that Mrs. Affleck would have stopped short of her duty in withholding that information, and that she was

not bound to disclose the names of the persons from whom she received it." With respect to the writing of the letter to the person from whom the servant had brought a character, the learned judge remarked that it was not a malicious act to make a communication which might have the effect of preventing the former character from being set up again as the true one.

⁷*Fountain v. Boodle* (1842) 3 Q. B. 5, 2 Gale & D. 455 (see note 2, *supra*); *Macdonald v. McColl* (1901) 3 Sc. Sess. Cas. 5th series, 1082.

⁸That a master had told each of two servants, in the absence of the other, that he is discharging them because both had been robbing him, was denied to be evidence of malice. *Manby v. Witt* (1856) 18 C. B. 544, 25 L. J. C. P. N. S. 294, 2 Jur. N. S. 1004, 4 Week. Rep. 613. Jervis, C. J., remarked that the defendant was not only right in pursuing the course he did, but that he was bound, when he accused one of the plaintiffs of robbing him, to tell her with whom she was charged with having acted, and that when he charged the other plaintiff with robbing him, he was bound to name his accomplice.

In *Sharp v. Bowler* (1898) 103 Ky. 282, 45 S. W. 90, where the defendant was alleged to have charged the plaintiff with being a thief, and with having stolen certain articles while employed as a servant at his house, testimony that he had said that his family had missed some things, and that plaintiff had the only chance of taking them, although it did not show the speaking of the exact slanderous words charged in the complaint, was held to have been properly admitted as bearing on the question of malice.

In *Moore v. Butler* (1868) 48 N. H.

"The mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge, or been influenced by malicious motives."⁹

(6) That a communication admitted to be privileged as regards the persons to whom it was addressed was transmitted in such a manner that other persons might read it,¹⁰ or to an unnecessarily large number of persons.¹¹ In most instances, however, the question whether the publication was improper *quoad personam* has been treated as having a direct bearing upon the question whether the occasion was prima facie privileged. See § 2025, *a*, ante.

(7) That the defendant included in the document complained of statements or language not warranted by the occasion which led to its being published. Malice may be inferred where the terms of the document went beyond the limits of what was necessary and proper to accomplish the legitimate purpose of protecting the defendant and parties for whose information the document was published.¹² This

161, the question of malice was held to be for the jury, where words imputing theft were spoken in the presence of the speaker's husband, and the mother and aunt of the servant.

⁹ *Toogood v. Spyring* (1834) 1 Crompt. M. & R. 181, per Parke, B. (p. 194).

¹⁰ In *Sadgrove v. Hole* [1901] 2 K. B. 1, 70 L. J. K. B. N. S. 455, 49 Week. Rep. 473, 84 L. T. N. S. 647, 17 Times L. R. 332, it was held that, though the mere fact that a communication had been sent by postcard instead of by a closed letter would generally be evidence of malice, yet, in the present case, inasmuch as the communication would not be understood by the persons through whose hands it passed as referring to the plaintiff, there was no evidence of express malice to avoid the privilege.

See also *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. (C. A.) 8, reversing (1872) 32 U. C. Q. B. 452 (for facts, see § 2030, note 2, *post*).

¹¹ A baker published in a newspaper a statement to the effect that the plaintiff, one of his drivers, had "left my employ and taken upon himself the privilege of collecting my bills," etc. Held, that no exception lay to a ruling that the publication was privileged, if M. & S. Vol. V.—394.

made in good faith, and if found by the jury to be a reasonable mode of giving the notice. *Hatch v. Lane* (1870) 105 Mass. 394. The jury found this to be a reasonable mode of giving notice, thus negating express malice.

But to give a similar publicity to the discharge of a cook or butler would be without justification. *King v. Patterson* (1887) 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705.

¹² *Gassett v. Gilbert* (1856) 6 Gray, 94 (for fact, see § 2023, note 10, *ante*).

In *Taylor v. Hawkins* (1851) 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. N. S. 313, it was held that the defendant did not "go beyond what might be said by a person honestly wishing to tell the whole truth," where, in reply to the plaintiff's brother, who had inquired of the defendant why he had treated the plaintiff so, and was keeping him out of a situation, he said: "He has robbed me; and I believe for years past," and added that he concluded so from the circumstances under which he had discharged the plaintiff.

See also *Brown v. Norfolk & W. R. Co.* (1902) 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664, § 2030, note 2, *post*.

element has also been treated as one which takes a statement altogether out of the privileged class. See § 2025, *b*, *ante*.

(8) That the defendant made a permanent record of the defamatory matter in such a manner as to render it constantly accessible to a large number of persons.¹³

(9) That the circumstance which constituted the subject-matter of the statement complained of had occurred a long time before it was made.¹⁴

(10) That the defendant reiterated the defamatory statement, after he had admitted it to be untrue.¹⁵ This circumstance has also been viewed as one which takes a statement altogether out of the privileged class. See § 2025, *d*, *ante*.

(11) That the defendant refused to tell fully the reasons for which he dismissed the plaintiff. Such a refusal may or may not be evidence of malice, according to circumstances.¹⁶

¹³ In *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498, it was intimated, *arguendo*, that there would have been independent evidence of malice for the consideration of the jury if the statements complained of (which had been inserted in a report made by the directors to the shareholders of the defendant company) had been entered in the books of the company to stand for an indefinite period as a record that an accusation injurious to the character of the plaintiff as an employee had been brought against him.

¹⁴ In a case where a letter reflecting on the conduct of plaintiff in his management of a college had been published in a newspaper, as part of the contents of a report of an inspector of charities, it was held that comments upon it were only material as evidence of malice. Cockburn, Ch. J., laid it down that the mere fact that the information was old did not show malice, in point of law, the jury being entitled to consider whether the bad system condemned in the letter had been perpetuated. *Cow v. Feeney* (1863) 4 Fost. & F. 13.

¹⁵ See *Missouri P. R. Co. v. Behee* (1893) 2 Tex. Civ. App. 107, 21 S. W. 384, the facts of which are given in § 2030, note 2, *post*.

¹⁶ In *Manby v. Witt* (1856) 18 C. B. 544, where it was held that a master

was justified in telling each of two servants whom he accused of theft, that the other was regarded as his accomplice, it was remarked by Jervis, Ch. J., during the argument of counsel, that, if he had not done this, "he would have very imperfectly performed his duty, inasmuch as he would be suppressing the party's means of answering the charge; and so he might have laid himself open to an imputation of malice."

On the other hand, where the plaintiff had been dismissed for misconduct by the directors of one company, and the communication in question had been made by one of those directors to the board of another company of which he was also a director, it was held that the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney was consistent with bona fides, and therefore not evidence of malice which could properly be submitted to the jury. *Harris v. Thompson* (1853) 13 C. B. 333. Jervis, Ch. J., said: "He might fairly say that it was enough for him, as a director, to make a general charge, and that it was no part of his duty to furnish evidence." He had a right and a duty to put his codirectors in possession of the facts known to him; but he was not bound to produce strict proof of the charges on which the other company was acting in dismissing the plaintiff.

(12) That the defendant refused to grant reasonable facilities for investigating the truth of his assertion.¹⁷

(13) That the defendant refused to comply with the servant's request to name the person from whom he received the information communicated to the employer. Such a refusal, it has been held, does not warrant the inference of malice.¹⁸

(14) That the defamatory statement was couched in more violent and intemperate language than the occasion called for.¹⁹ As to the effect of the same circumstance in avoiding the privilege altogether, see § 1711, note 4, *ante*.

(15) That the statement was overcharged or exaggerated, or the facts distorted.²⁰

¹⁷ As where he refused to point out an entry in a book, when that became the means of proving or disproving a charge which the defendant had made. *Kelly v. Partington* (1833) 4 Barn. & Ad. 700, 702, 2 Nev. & M. 460.

¹⁸ *Trimble v. Morrish* (1908) 152 Mich. 624, 16 L.R.A.(N.S.) 1017, 116 N. W. 451. There the defendant was told that, if he would name his informant, he would not be troubled. He declined to do this, saying: "The story was told to me in confidence, and I do not desire to implicate any other person in it." Commenting on this action, the court observed: "This is the precise course that a high-minded person would have taken. He would have taken that course, not because he was actuated by a desire to save a wanton wrongdoer, but from considerations of true manliness. Only a despicable character would have availed himself of the privilege of escaping responsibility by exposing another to the danger which threatened him. Surely, because one does just what he ought to do, it should not be said that his conduct furnishes evidence of malice." It may be doubted whether the theory of social conduct upon which the court based its conclusion will command universal approbation. For the purpose of testing the propriety of his action in the premises, it is to be assumed that the defamatory statement in question was false, though not to his knowledge. If it was false, and the plaintiff assured him that it was false, he certainly was under some obligation to assist her in clearing her character. By refusing to do so he was virtually extending to his informant

the protection of the privilege which, under the circumstances, the law accorded to his own communication of the defamatory matter. The situation was undoubtedly one which created a painful conflict of duties, and for the reason that there was such a conflict, the course followed by him could not be regarded as blameworthy. Any higher praise than the negative commendation he does not appear to have merited. But the considerations thus relied upon by the court were, it is submitted, irrelevant. The notion to which the decision should have been referred was that the legal quality of the defendant's actions was properly to be estimated with respect to the conditions existing at the time when he repeated the defamatory words to the plaintiff's employer. The communication having been made without malice in the first instance, he was entitled to have his liability determined with relation to that fact, unless there was a subsequent utterance of the words under circumstances which imparted to them a different color.

¹⁹ In *Cowles v. Potts* (1865) 34 L. J. Q. B. N. S. 247, 11 Jur. N. S. 946, 13 Week. Rep. 858, the jury negatived malice in a case where the defendant had declared that he would not keep a big rogue like the plaintiff in a certain trust, and that the plaintiff's roguery was so great that he was not fit to be near his employer's young son.

²⁰ *Blake v. Pilford* (1832) 1 Moody & R. 198 (in charge to jury by Taunton, J.)

Where a master of a discharged servant, in answering a letter from her attorney, demanding the balance of her

(16) That a calumnious charge was made recklessly and without adequate investigation.²¹

(17) That the defendant, on an occasion subsequent to that upon which the statement complained of was made, used language which evinced an unfeeling recklessness as to the effect of that statement upon the ability of the plaintiff to earn an honest livelihood.²²

(18) That the defendant employed an improper expedient for the detection of the crime with which he afterwards charged the plaintiff.²³

(19) That the defendant, having pleaded justification, introduced no evidence in support of the plea. The only cases in which a jury is entitled to consider this circumstance as evidence of malice, in aggravation of damages, are those in which the communication was not privileged.²⁴

C. BLACKLISTING OF SERVANTS.

2028. Blacklisting. Generally.—In several of the reported cases the remedial rights of servants who have suffered damage from the publication of their names in those circulars or notices which are now commonly known as “blacklists” have been determined with reference to the principles of the law of libel. But as the subject has been dealt with from other standpoints also, and a peculiar interest attaches to it, as one of the characteristic incidents of the conditions created by the industrial developments of modern times, it has been deemed

wages, stated that he had no doubt she had taken certain articles which had been missed from the house, the question of malice was held to be for the jury to decide. *Laidlaw v. Gunn* (1890) 17 Sc. Sess. Cas. 4th series, 394.

²¹ In *Brown v. Ritchie* (1904) 6 Sc. Sess. Cas. 5th series, 642a, a prima facie right of action was held to be shown by averments to the effect that the plaintiff had been dismissed by her employer's manager; that, upon her asking for an explanation, he said, “Clear out at once, or I will fling you out of the door, as the theft is quite clear against you;” that he had made no inquiries to ascertain whether this statement was well or ill founded, and that it was false, and utterly maliciously and without probable cause. For references to the effect of recklessness in uttering defamatory words, see *Odgers, Libel & Slander*, 4th ed. pp. 333, 338.

²² As, where the master, when requested to afford reasonable facilities for investigating the truth of his statement, remarked, “What is that to me?” when it was suggested that a female servant might have been driven to prostitution. *Kelly v. Partington* (1833) 4 Barn. & Ad. 700, 2 Nev. & M. 460.

²³ The mere fact that the cashier of a bank had marked coins for the purpose of detecting an unknown employee who was committing thefts is not evidence which is competent to prove that he was actuated by malice in subsequently accusing a boy of theft, in the presence of his father and a bookkeeper. *Livingston v. Bradford* (1897) 115 Mich. 140, 73 N. W. 135.

²⁴ *Wilson v. Robinson* (1845) 7 Q. B. 68, 14 L. J. Q. B. N. S. 196, 9 Jur. 726.

advisable to collect in this subtitle all the decisions in which the various juridical aspects of the rights and liabilities of employer and employed have been discussed.

In its broadest sense the expression "blacklist" may be said to denote a document by means of which A, either voluntarily, or, as is most frequently the case, in pursuance of a previous arrangement, communicates to B certain information about C, which is likely to prevent B from entering into business relations with C. This description is comprehensive enough to cover the posting of workmen by labor organizations. But this aspect of "blacklisting" is more appropriately treated under the head of Trade Unions. The only species of "blacklist" with which we shall deal in this article is that which is issued by an employer of labor, with the object of rendering it more difficult for the persons mentioned in it to procure work. The cases relating to each of the two forms in which such a "blacklist" is published are reviewed in the following sections.

2029. Notices exchanged between different employers in the same line of business.—It is to documents of this kind that the term "blacklists" is most commonly applied.¹

The cases in which their legal effect has been discussed may be most conveniently arranged under four distinct heads, which have reference to the nature of the remedy sought by the servant.

a. Actions for libel.—Under the general principles of the law of libel, it is clear that, where a notice showing the unfitness of a discharged servant for the position he held is sent by his former employer to other employers in the same line of business, without malice, and for the sole purpose of enabling them to avoid the employment of unsuitable persons, the publication must be deemed to be privileged, as being made bona fide, upon a subject-matter in which the party communicating the information has an interest, or in reference to which he has a duty, to persons having a corresponding interest or duty.² On the other hand, the privilege of the occasion will not

¹ In *State ex rel. Scheffer v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759, the court observed: "Conceding that the word 'blacklist' . . . has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is, that it has reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees."

² In *Wabash R. Co. v. Young* (1904) 162 Ind. 102, 4 L.R.A. (N.S.) 1091, 69 N. E. 1003, a declaration which alleged that the appellant railway company "blacklisted" the appellee, by informing another railway company that he was a "labor agitator," was held not to describe such a malicious interference with the appellee's business as would create a liability at common law. An analysis of the judgment of the court discloses the following grounds for its decision: (1) That there was no aver-

protect an employer who inserts in a notice of this description a defamatory statement which he knows, or should know, to be false.³

ment that a charge of this nature was calculated to injure the appellee, or that any odium attached to members of such orders or to labor agitators; (2) that the charge was not libelous *per se*, as implying the use of unlawful or improper means to promote the interests of laboring men; (3) that no connection was shown between the alleged statement and the failure of the appellee to obtain employment, or his loss of any position; (4) that for aught that appeared in the declaration, the statement made concerning the appellee was true, and, if it was true, it could not render the appellant liable; (5) that the information given to the second railway company was not volunteered by the appellant, but was given in answer to an inquiry.

A member of an association of owners of steam fishing vessels, who had resolved that a "register of defaulting crews" should be kept, and that if one of the crew of a vessel belonging to a member should, when engaged to go to sea, refuse to do so, or should come on board drunk, the member should report his name to the secretary for insertion in the register, was not liable for reporting an engineer to the secretary as having been drunk and having refused to proceed to sea, since in making the report the defendant was privileged, and, as it was not proved that he had acted maliciously, he was not liable in damages for slander. *Keith v. Lauder* (1906) 8 Sc. Sess. Cas. 5th series, 356.

In *Willner v. Silverman* (1909) 109 Md. 341, 24 L.R.A.(N.S.) 895, 71 Atl. 962, it was held that the blacklisting of discharged employees by a combination of employers is not actionable without proof of damage.

Employers may combine to circulate among themselves lists of names of strikers and other persons whose employment would for any cause be undesirable, so long as such combinations are entered into and used for promoting the legitimate business purposes of those concerned. *Rhodes v. Granby Cotton Mills* (1910) 87 S. C. 18, 68 S. E. 824.

The general phraseology used in the text to express the quality of a privileged communication is taken from the judgment of Lord Campbell in *Harrison*

v. Bush (1855) 5 El. & Bl. 344, 25 L. J. Q. B. N. S. 99, 2 Jur. N. S. 90, 4 Week. Rep. 199.

³ An action was held to be maintainable for sending the following printed circular to a number of employers following the same business as the plaintiff's master: "John Lally, an apprentice in my shop, not out of his time, quit work without cause on August 1. If he is working for you now, or applies for work, you will understand the situation. Article eleven of the by-laws covers the case." *Lally v. Cantwell* (1890) 40 Mo. App. 44, 45 (former appeal (1888) 30 Mo. App. 524, where it was held that the petition stated a good cause of action). The court said that the word "quit" implied "wrongfully quit,"—a false statement, as the plaintiff had not been legally bound as an apprentice, and could quit at any time.

Where an employer, after knowledge that plaintiff was not a striker, willfully persists in representing him to be one, by means of a blacklist circulated among employers, with the resulting injury that he is unable to obtain employment, he becomes liable therefor. *Rhodes v. Granby Cotton Mills* (1910) 87 S. C. 18, 68 S. E. 824.

In *Freit v. Belmont* (1909) 132 App. Div. 723, 117 N. Y. Supp. 656, a judgment for the defendant was reversed where he had published in a racing paper a statement that the plaintiff, who had been indentured to serve in the former's racing stable, had left his employ without his consent or a written discharge, and that owners and trainers were warned against harboring or employing him, where, as a matter of fact, the defendant had discharged him in accordance with the contract. The court said: "He had already discharged the boy and the latter was freed from the obligations of the indenture agreement, and entitled to any employment he could obtain. The defendant, therefore, was not justified in depriving the plaintiff of employment by publishing to those who were bound under the racing rules to refuse employment in such circumstances, that the plaintiff left his employ without his consent and without being discharged."

In *Willner v. Silverman* (1909) 109

b. Actions for conspiracy.—In the absence of proof that the agreement in pursuance of which the "blacklist" in question was sent out by his employer was entered into for a malicious purpose, the inclusion in it of a true statement, to the effect that a certain servant participated in a strike, does not furnish any ground for an action for conspiracy, although, as a result of the "blacklisting," he was unable to procure or retain work under other employers.⁴

Md. 341, 24 L.R.A.(N.S.) 895, 71 Atl. 962, it was held that the circulation of a letter by an employer who has discharged an employee, through the instrumentality of an organization of employers of which the employer is a member, which does not state the cause of the discharge with strict accuracy, but which requests the association to refuse employment to the discharged employee, "as we would like to make an example of him," is actionable if damage results therefrom.

⁴*Jenkinson v. Nield* (1892; Q. B. Div.) 8 Times L. R. 540. The court held that the action came within the principle of *Mogul S. S. Co. v. McGregor* [1892] A. C. 51, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. There was no evidence, it was said, that the defendants were actuated by any other motive than self-interest. If that were so, and they were not desirous of injuring the plaintiff, their conduct was not actionable.

In *Atkins v. W. & A. Fletcher Co.* (1903) 65 N. J. Eq. 658, 55 Atl. 1074, the members of a striking labor union attempted to procure an injunction for the purpose of preventing interference by the defendant with "picketing" by the members of the union. The bill alleged that the members of a certain trades association, including the defendant, had conspired together to prevent the employees discharged by defendant for striking from receiving employment by any of the members of the association. This allegation was declared to be based upon the erroneous idea that employers have not the right to combine freely to refuse employment to any kind or class of workmen, precisely as employees have a right to combine freely to refuse to be employed by any employer who sees fit to employ workmen of whom they disapprove, or in any respect to conduct his business contrary to their views.

In *Worthington v. Waring* (1892) 157 Mass. 421, 20 L.R.A. 342, 34 Am. St. Rep. 294, 32 N. E. 744, the petitioners, who had been employed as weavers in a mill owned by a corporation of which the defendants were the treasurer and superintendent, left their work after their demand for higher wages had been refused. The defendants then sent their names on a "blacklist" to the officers of other mills in the vicinity, informing them that petitioners had left on a strike. The petition alleged that the defendants and the officers of the other mills had thereupon conspired together not to employ the petitioners, with intent to compel them either to go without work in the vicinity or to go back to work at their former place at such wages as that corporation should see fit to pay them. It was held: (1) That striking employees whose names are put by their employers on a "blacklist" which is sent to other employers in the same city, with whom a combination has been made by an agreement not to employ "blacklisted" employees of other employers, cannot unite in an action against the employers, but if any right of action exists, it is in favor of each one separately; and (2) that equity will not sustain the "blacklisting" of striking employees in order to prevent their employment by other members of an employers' association, nor will it compel the former employers to reinstate them or procure for them employment with other persons; but their remedy, if any, is in an action at law.

In *Bradley v. Pierson* (1892) 148 Pa. 502, 24 Atl. 65, an action was brought by striking employees for damages resulting from their failure to obtain employment, in consequence of the distribution of "blacklist" circulars by their former employer. But as it appeared that an association of which the employees were members approved of their action in quitting, and paid them wages

c. *Actions on the case.*—The effect of several decisions seems to be that, even if a statement inserted in a certain "blacklist" was not libelous, and the agreement in pursuance of which it was circulated was not an unlawful conspiracy, a servant who has suffered injury from its publication is entitled to recover damages in a special action on the case, if it was false, and its falsehood was known, either actually or constructively, to the employer who procured its insertion.⁵

while they were out of work, the court said that the plaintiffs could not recover on the facts, and that it was therefore useless to discuss the law of the case.

Compare the cases cited in § 2013, note 5, *ante*, as to the liability of employers who agree not to hire servants who have not received "clearance cards."

The general principle embodied in *Buffalo Lubricating Oil Co. v. Standard Oil Co.* (1887) 106 N. Y. 669, 12 N. E. 825, affirming (1886) 42 Hun, 153, that a libel published in pursuance of a conspiracy to ruin the business of a rival is actionable may also be referred to in this connection.

⁵ In *Blumenthal v. Shaw* (1897) 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954, the facts were as follows: Prior to the transfer of a business by M. to B., the defendant, a firm resident in another state, S., the plaintiff, a minor, and S's father, entered into an agreement with M. whereby S. entered into the service of M. as an apprentice for a term of years. The parties regarded the agreement as though it were a valid statutory indenture of apprenticeship, although in fact it was not. When B. took over the business, S. remained with them under the agreement. Subsequently S. was summarily discharged by P., the general foreman of the defendant. P. then sent out notices to other manufacturers in the trade in W., stating that S., an apprentice, had left without cause, and requesting that S. should not be employed. These notices were sent out in pursuance of an understanding among the manufacturers in the city that none of them should employ an apprentice belonging to another concern. It was shown that S. had thereafter been dismissed from two factories where he had been employed, because of these notices. It also appeared that S. had applied to P. for "discharge papers" and had been refused. S. brought a special action on the case against F. B. & Co. to recover damages

for the injury which he had sustained from being prevented from obtaining employment, and from being dismissed from places where he had procured work. Held, (1) That P., as the representative of absent principals who had invested him with a general agency, had implied authority to do those things in the course of the business which were appropriate and demanded by the occasion; (2) that the acts of P., resulting from his mistake in assuming that S. was bound as an apprentice during the remainder of his minority, were binding upon the defendant; (3) that the theory of the defendant that S's alleged grievance was the publication of a libel, or the utterance of slander by the defendant's agent, was untenable; and (4) that, as S. had been emancipated by his father, he was entitled, after he became of age, to maintain an action against the defendant to recover damages for their tortious act.

In *Willis v. Muscogee Mfg. Co.* (1904) 120 Ga. 597, 48 S. E. 177, it was laid down that, where several employers in a city make a rule that employees who leave without cause must give notice, and continue working during the period covered by the notice, and agree to report to each other all employees who leave without compliance therewith, and, except in special cases, not to employ men so reported, such agreement, although voluntary, and not enforceable, is not, in the absence of malice, an unlawful combination or conspiracy which would make such companies liable to men properly reported for a violation of the rule; but that an employer who wrongfully reports an employee, and thus damages him by preventing his getting work, is liable. The court took the position that "an employer has a right to select his employees according to what standard he may choose, though such standard be arbitrary or unreasonable. An employer certainly has a right to refuse to employ anyone whom he

Such a reason, however, seems to indicate a certain confusion of thought.

d. Suits for an injunction.—One of the Federal courts of the United States has refused to grant an injunction to restrain a company from discharging its employees on the ground that they were members of a certain union, from placing their names on a "black-

knows to have left another employer in violation of a reasonable rule which both employers are seeking to enforce." Accordingly, "an agreement among a number of employers to report such violations, and thus assist each other in the selection of their employees, is not unlawful, though coupled with an agreement to employ no one so reported." (See headnote written by the court.) In the opinion we find the following remarks: "While the corporations which entered into the agreement above described had a right to do so, they owed a duty to their employees not to abuse that right. When one of them falsely reported an employee, to his injury, such employee may recover for the tort. The combination of the employers was a powerful machine for the accomplishment of lawful results, but it was capable of misuse to the injury of innocent employees. When a company so misuses it, such company must take the consequences. . . . If the employer who promulgated the regulation made a mistake in its construction, and applied it to a state of facts which did not come within it, the employee injured by such mistake has a right to recover. The employer cannot arbitrarily place an employee upon the blacklist, as having violated the regulation, when in point of fact the employee's conduct did not come within the terms of such regulation, and he therefore had not violated it." As the plaintiff had introduced evidence from which the jury might properly find that the plaintiff had been discharged, or had left the service of the defendant, because the latter had insisted on a change in his contract of employment, and that the rule, therefore, did not apply to him, it was held to be error to grant a nonsuit.

In *Hundley v. Louisville & N. R. Co.* (1898) 105 Ky. 162, 63 L.R.A. 289, 88 Am. St. Rep. 298, 48 S. W. 429 (see § 2013, note 6, *ante*), it was laid down that, where several railway companies

have made an agreement that no person discharged for good cause by any of the parties to the agreement shall be employed by any of the others, it is an actionable wrong for one of those companies to enter upon its records a false statement as to its reasons for discharging an employee. It was held, however, that the declaration in this case was defective, as not containing any averment that the servant had sought, and been refused, employment in consequence of the wrongful act, the reason assigned being that an agreement of this character is not legally injurious to the servant unless it has actually been carried out to his damage.

But the court seems to have viewed the agreement as being one which, in respect to any of the parties who might happen to perform in an improper manner one of the acts contemplated by it, assumed the complexion of a conspiracy *ab initio*. There is apparently no authority for this doctrine of conspiracy by relation.

In *Mattison v. Lake Shore & M. S. R. Co.* (1895) 2 Ohio N. P. 276, 3 Ohio S. & C. P. Dec. 526, the principle relied upon by one of the lower courts of Ohio was that, as employees may not combine so as to all quit the employment of a person at one time, and thus make it impossible for the employer to carry on his business, so, on the same principle, all the companies operating trunk lines in the United States cannot lawfully combine so as to make it impossible for an employee to obtain other work from other companies. It was declared to be for the public interest and the public good that the right of a man to seek his own employment in any honest work which he may seek should not be interfered with or violated. In its charge to the jury on the second trial of this case ((1896) 3 Ohio N. P. 190), the court charged the jury that, if the defendant company adopted the "blacklist" rules in question, not for the purpose of enabling it to conduct its own

list," from maintaining that "blacklist," and from permitting other employers to inspect it.⁶

2030. Notices circulated amongst the coemployees of the persons to whom they relate.—Another kind of "blacklist" is that which employers who hire large numbers of servants circulate either among all their servants indiscriminately, or among such superior employees as are invested with authority to engage and discharge subordinate servants. The right to publish such a document has so far been tested only in actions for libel, and it has uniformly been held that the privilege of the occasion is *prima facie* an effectual bar to a claim for damages based on this ground.¹ Whether the servant can recover in

business, but with the intention of preventing its discharged employees from obtaining other employment, and if their enforcement would have that effect,—then, that their adoption would be unjustifiable and in law malicious. This statement, imposes on the employer a much less sweeping liability than that to which he would be subjected under the doctrine originally enunciated.

⁶ *Boyer v. Western U. Teleg. Co.* (1903) 124 Fed. 246, after expressing its opinion that it was not unlawful to discharge the employees because they belonged to the union specified, the court proceeded thus: "Suppose a man should file a bill alleging that he belonged to the Honorable and Ancient Order of Freemasons, or to the Presbyterian church, or to the Grand Army of the Republic; that his employer had discharged him solely on that account; that he had discharged others of his employees, and intended to discharge all of them for the same reason; that he kept a book which contained all the names of such discharged persons, and set opposite the name of each discharged person the fact that he had been discharged solely on the ground that he belonged to such organization; and that he had given such information to others, who refused to employ such persons on that account. Is it possible a court of equity could grant relief? If so, pray on what ground? And yet that is a perfectly parallel case to this as made by the bill." The court accordingly refused to interfere, although the employers who had seen the entries in the book had refused to hire the discharged servants.

¹ In *Hunt v. Great Northern R. Co.* [1891] 2 Q. B. (C. A.) 189, it appeared

that, after the plaintiff had been dismissed from the defendant railway company's service on a charge of gross neglect of duty, the railway company published his name in a printed monthly circular addressed to all its servants, stating the fact that plaintiff had been dismissed and the reason therefor. The communication was unanimously held to be a privileged one. "Can anyone," said Lord Esher, M. R., "doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that, if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service? I cannot imagine a case in which the reciprocal interest could be more clear." It was argued that the plaintiff's name need not have been mentioned by the defendants, and that the privilege of the occasion was lost because his name was mentioned. This contention was rejected. "It might possibly be," said Lopes, L. J., "that the mentioning of his name could be suggested as evidence of malice on the part of the defendants,—not that I think the suggestion could be maintained for one moment. But, at any rate, it could only be used as evidence to show that the defendants had abused the occasion, not that the occasion did not exist."

In *Hebner v. Great Northern R. Co.* (1899) 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128, the record of the

any given instance on the ground of express malice is a question to be determined with reference to considerations similar to those which are controlling in all actions for defamation.²

reasons for a railway servant's discharge was made in one of the books of the corporation, kept for its own information, and the only publication complained of occurred when the record was communicated by one of the clerks employed by defendant in the office of the telegraph superintendent to another clerk; both of these persons being interested, and both acting strictly within the line of duty, as being engaged in procuring the information necessary to enable them to fill out the card which was to be delivered to him the plaintiff. It was held that there was no undue public dissemination of the contents of the book; and that there was nothing in the evidence which indicated that care was not taken to confine the information to persons who were directly interested, and whose duty it was to know the reason for plaintiff's dismissal from defendant's service.

Where a notice to the effect that a railway servant has been discharged for insubordination is posted in various rooms set apart for his fellow servants, but sometimes visited without authority by members of the public, the communication is privileged. *McDonald v. Board of Works* (1874) 5 Austr. J. Rep. 34.

In *Missouri P. R. Co. v. Richmond* (1889) 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555, it was held that, in the absence of actual malice, an action for libel would not lie against a railway company for the circulation of a "blacklist" among the superior officials who employed men upon its own line. The court said: "Looking to the public interests involved in the safe operation of railways as well as the interests of their owners, it seems to us that one having reasonable ground to believe that a person seeking important position in that service was incompetent, careless, or otherwise unfit would be under such obligation to communicate his knowledge or belief to all persons likely to employ such unsuitable person in that business as would make the publication privileged if made in good faith."

See also the next note.

²In *Tench v. Great Western R. Co.* (1873) 33 U. C. Q. B. (C. A.) 8, re-

versing (1872) 32 U. C. Q. B. 452, it was held by six out of nine judges that the evidence showed a reasonable mode of publication, and no excess such as to take away the privilege or show malice. Draper, C. J., one of those who took this view, argued thus: "The station master's offices or the booking offices in the cases pointed out, appear to me proper places for the notice to reach those to whom it was addressed, and the caution which McGrath was directed to give the employees in regard to these placards, shows a careful intent to do no more than was necessary to convey the information to those who ought to receive it. McGrath swears he did what he was ordered and no more. I think there was no evidence of express malice to be submitted to the jury." Spragge, C., one of the dissenting judges, expressed the opinion that, in the circulation of the paper in question, much more was done than was sufficient to answer all the legitimate purposes of the occasion: "It was posted up, and kept posted up in some places for weeks, and in others for months, in offices of the company called private, but to which others than servants of the company obtained access, and there saw and read it, and in some of those offices in a conspicuous place, where it could be seen and read from the wicket at which the public purchased their tickets." Richards, C. J., also considered that "the putting up of this notice in the offices of the company in such places as they could be seen by others than employees, without its being shown there was any paramount necessity therefor, and for the pasting it in the books of certain officers of the company, this was . . . independent evidence of malice, to go to the jury."

In *Bacon v. Michigan C. R. Co.* (1887) 66 Mich. 166, 33 N. W. 181, the plaintiff, a carpenter employed by the defendant company, when he was leaving a train in a hurry, upon its arrival at the place where he lived, picked up by mistake a coat which was not his, leaving his own behind, and carried it with his tools to the company's shop, where he threw it across a bench. A few days later he was discharged for no

2031. Statutes with regard to blacklisting.—The present writer has no hesitation in expressing the opinion that the broader considerations of public policy point very decidedly to the conclusion that "blacklisting" should be greatly restricted, if not entirely prohibited, by legislation, in so far as the practice takes the form of an exchange of circulars or notices between different employers. There is no doubt considerable difficulty in framing provisions which will afford ade-

assigned cause. In a subsequent issue of a "discharge list," sent out at intervals to all the agents of the company who were authorized to hire employees, his name was inserted with a memorandum to the effect that he had been discharged for stealing. Held, that there was evidence which would have justified the jury in finding that defendant was actuated by malice in fact, and that it was error to take the case from them.

In a certain issue of a "discharge list," circulated among all the agents of a railway company who had charge of the employment of its servants, it was stated that the plaintiff had been discharged for incompetency. In spite of his having drawn attention of the defendant's train master to the mistake, and obtained a written statement that he had not been discharged on this ground, the list was again issued without any correction, the result being that he was discharged several times upon different lines of railway operated by the company. Held, that the reissuance of the list (compare § 2025, *d*, ante) after the train master had notice of the falsity of the statement with regard to the plaintiff was a circumstance which justified the inference of malice. *Missouri P. R. Co. v. Behee* (1893) 2 Tex. Civ. App. 107, 21 S. W. 384. On a previous appeal of this case (1888) 71 Tex. 424, 9 S. W. 449, the ground upon which the judgment of the lower court had been set aside was that certain evidence had been improperly excluded.

Where an order discharging an employee of a railway company was circulated among his fellow employees, with the statement that he had been dismissed for intimating that an officer of the company had used insulting language in speaking of another officer, and that such intimation was untrue, it was held that the language used was not so violent or disproportioned to the occasion (see § 2027, *ante*) as to raise

an inference of malice. *Brown v. Norfolk & W. R. Co.* (1902) 100 Va. 619, 60 L.R.A. 472, 42 S. E. 664.

In *Missouri P. R. Co. v. Richmond* (1889) 73 Tex. 568, 4 L.R.A. 280, 15 Am. St. Rep. 794, 11 S. W. 555, a railway company was held to be liable for the circulation of a "blacklist" by an employee, in which it was stated that the plaintiff, a conductor, had been dismissed for carelessness.

In *Bulcock v. St. Anne's Master Builders' Federation* (1902) 19 Times L. R. 27, it appeared that plaintiff, who had been locked out by a former employer in consequence of a wage reduction, and who had subsequently found employment elsewhere, was paid off and discharged without any breach of contract on the part of his employers, as a consequence of the action of the defendants, a federation of master builders who had participated in the lockout, in asking a society with which both the defendant society and the local association to which plaintiff's employers belonged were affiliated, to intervene for the purpose of inducing them to discharge him. One of the rules of the federation was that in every case of dispute no member should employ any workman who was on strike or locked out from the workshop of another member. Another rule was that members should not supply material or labor to any person who by his action was rendering himself obnoxious to the federation. Upon this state of fact it was held that, as it had been found by the trial judge that there was no evidence of any act done with an intention to injure the plaintiff, and that there was no evidence of anything except acts by the defendants to further their own purposes, and as the plaintiff's employers had not been induced to do any illegal act, the trial judge correctly held that there was no evidence of any actionable wrong.

quate protection to employees, and at the same time not trench unduly upon the privilege of communicating information regarding their character to persons who are interested in ascertaining the truth. (See §§ 2021 *et seq.*, *ante.*) But it is apprehended that any harm which may result from a moderate limitation of the rights of employers in this respect will be slight in comparison with the evil consequences which are certain to follow if a practice so essentially repugnant to the free institutions of Anglo-Saxon civilization as that of systematic "blacklisting" is allowed to remain unregulated. The inevitable effect of such a practice must be the subjection of a constantly increasing number of employees to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete,¹ and to which they are still in some measure subjected by the laws of a portion of the countries of Continental Europe. A passport system of this kind has always been found to be productive of serious evils, even when it is worked by public officials;² and it must be much more dangerous to leave in the hands of private parties so formidable an instrument of potential tyranny, capable of being used, and, as human nature is constituted, certain to be used, in many instances, as a means of gratifying personal animosity or class hatred.

These considerations go far to justify the drastic action already taken by those American legislatures who have enacted statutes, of

¹ In 5 Eliz. chap. 4, § 10, it was enacted that a servant in any of the various occupations specified should be liable to imprisonment if he departed from the city or parish in which he had been employed, without obtaining an official testimonial stating that he was licensed to depart from his master, and at liberty to serve elsewhere. It is manifest that, if the practice of "blacklisting" is left unchecked, the employers of our own times will be able, by private compacts, to place large bodies of employees in a position analogous to that which would result from the operation of such a statute.

² In France the "livrets" which workmen were obliged to carry were, in practice, found to occasion very grave abuses, their effect, in times of combination and industrial troubles, being to brand certain individuals in such a manner that they could not find work anywhere. In the *Dictionnaire Universel* of Larousse the opinion is expressed that the

"livret" was nothing but a vexatious measure, gratuitously inflicted upon honest and laborious workmen, since they alone conscientiously fulfilled the prescribed formalities. The writer of the article states that the operation of the laws on the subject had virtually been suspended when an ordinance suggesting their abolition into operation was proposed in 1869.

The "Arbeitsbücher" in Germany were books prepared by the police authorities, by means of which the identity of the workmen subjected to control is established, and which contained entries by employers, showing the nature of the holder's occupations, and the duty at which each of the engagements began and ended. But the only regulation of the kind which now exists relates to minors, its object being to prevent breaches of contract by apprentices and young workpeople. Brockhaus, *Conversations—Lexicon*.

which the general purport is, that any corporation or individual who "blacklists" an employee, with the intent of preventing him from obtaining employment from any other person, is guilty of a penal offense.³ One of these enactments, *viz.*, that of Minnesota, has been pronounced constitutional.⁴

Two others, *viz.*, those of Georgia and Indiana, have been declared invalid.⁵

Some of these statutes not only forbid "blacklisting," but declare it to be unlawful for two or more employers to combine or confer together for the purpose of preventing any person from procuring employment. In Minnesota it has been held that a person who is prejudiced by a breach of such a provision may recover damages against the employer who violated it. He does not, however, establish a right to recover on the ground of such violation by merely proving that the defendant's interference resulted in his loss of employment. "Conditions might exist between two employers that an interference to prevent the employment of a particular person would be perfectly justifi-

³ Alabama Laws 1895, chap. 321.

Colorado.—1 Mills's Anno. Stat. p. 487, chap. 15 (Laws 1897, chap. 31).

Connecticut.—Laws 1897, chap. 184.

Florida.—Laws 1893, chap. 93.

Georgia.—Code of 1895, § 1873; Laws 1891, p. 183.

Indiana.—Horner's Anno. Stat. (1901) § 5206p; § 5206q, 2.

Iowa.—Code of 1897, §§ 5027, 5028 (Laws 1888, chap. 57).

Kansas.—Dassler's Gen. Stat. (1901) (Laws 1897, §§ 2421-2423).

Minnesota.—Laws 1895, chap. 174, re-enacted in virtually the same form, Rev. Laws 1905, § 5097.

Missouri.—Rev. Stat. 1899, § 2166 (Laws 1891, p. 122).

Montana.—Political Code (1895) §§ 3390, 3391; Penal Code (1895) § 656; Code 1907, § 1756 (Laws 1891, p. 257).

Nevada.—Laws 1895, chap. 75.

North Dakota.—Rev. Code 1899, § 7042.

Oklahoma.—Laws 1897, chap. 13, art. 4.

Texas.—Laws 1907, p. 142.

Utah.—Laws 1896, chap. 6.

Virginia.—Hurst's Code 1898, § 3845b; Code 1904, § 3657d; (Acts 1891-92, chap. 622).

Washington.—Laws 1899, chap. 23.

Wisconsin.—Rev. Stat. 1898, § 4466b (Acts 1895, chap. 240).

By the statutes of Georgia, Indiana, Montana, Virginia, Wisconsin, and Iowa, it is expressly provided that they shall not be construed as prohibiting the employer from furnishing, when requested by a discharged employee to do so, a truthful statement of the causes for his discharge.

A similar proviso has been introduced into the most recent Colorado enactment, Laws 1905, chap. 79.

By Kentucky Stat. 1903, § 2739a, 2, employers are forbidden to blacklist employees for failing to purchase food, etc., at a particular place designated by the employers.

⁴ *State v. Justus* (1902) 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; *Joyce v. Great Northern R. Co.* (1907) 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975. See the concluding chapter of this treatise.

⁵ *Wallace v. Georgia, C. & N. R. Co.* (1893) 94 Ga. 732, 22 S. E. 579; *Wabash R. Co. v. Young* (1904) 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003, 1004.

The *ratio decidendi* in the latter case was merely the technical point that the enactment was made applicable to a class of employees not embraced in the title. For a full discussion of the constitutionality of these statutes see the concluding chapter of this treatise.

able. To constitute an actionable wrong under the statute, therefore, it should appear that the interfering employer was actuated by malice or an evil intent toward the person interfered with . . . not express malice, but such as the law implies in such cases from the fact that the act complained of was unlawful." ⁶

⁶*Joyce v. Great Northern R. Co.* (1907) 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975. There plaintiff had been in the employ of the Union Depot Company at St. Paul, as a track repairer. He was injured while engaged in the discharge of his duties, by being struck by a switch engine of defendant, then being operated in the depot company's yards. On recovering from his injury he sought re-employment of the depot company. Defendant interfered, and by its act induced the depot company to refuse him further employment, except upon the condition that he release defendant from all claim for damages on account of his injury. He declined to release his claim, and the depot company, in consequence of the interference of defendant and plaintiff's refusal to release, refused to re-employ him. Held, that the act of defendant, on the evidence disclosed, was a violation of the statute, and constituted, unexplained by matters in justification, an actionable tort, and that the question whether there were any such matters should have been submitted to the jury. The court observed: "The trial court, as already noted, held that defendant had such an interest in the conduct of the affairs of the depot company as to justify it legally in requesting that company to refuse plaintiff re-employment, unless he would release his right to damages for the injury referred to. It may be conceded that the railway company is vitally interested in the management of the depot and depot yards, and that it may properly interfere and insist that no incompetent or unworthy persons be employed therein; and, if such was the foundation of its conduct here in question, no liability exists. But we are unable to concur in the view that, upon the facts now before the court, its conduct was justified as a matter of law. To justify an act of interference of this sort, it must be founded upon some lawful object. *Walker v. Cronin* (1871) 107 Mass. 555. This does not appear. There is no suggestion in the record that plaintiff was incompetent for the duties

assigned him, nor that his employment would be detrimental to the railway company in the operation of its trains in the depot yards. The only reason, so far as the evidence discloses, for the interference of the company in preventing his employment, was to induce or coerce him into releasing his right to damages. He had made no claim for damages at this time. The company assumed, probably rightfully, that one would be made, and it sought in this manner to relieve itself therefrom. This, standing alone, was a wrongful object, within the contemplation of law, and insufficient as a justification. But it is further contended that plaintiff's injuries were the result of his own negligence, that his claim against the railway company was without merit, and its assertion justified the company in objecting to his further retention by the depot company. In considering this feature of the justification, too much stress should not be laid upon the fact that plaintiff had, at the time of the interference complained of, made no claim for damages. It may fairly be said that the company was justified in assuming that a claim would be made, and plaintiff's refusal to release it shows that he intended to demand redress for his injury. If defendant's position in this respect be sustained by a fair view of the evidence,—a question for the jury,—and it be found that plaintiff's claim for damages was wholly without merit, or, if the circumstances surrounding the accident be such as to justify the belief on the part of the company that it was without merit, and was about to be wrongfully asserted against it, such facts would fully justify it in interfering to prevent plaintiff's further retention as an employee of the depot company. Its relations with that company are of such a nature as to justify it in opposing the employment of persons who, when injured by their own fault, assert meritless claims for damages and involve the company in litigation."

Statutes of this kind are intended to prevent the wilful and malicious attempts by one person to prevent another from obtaining employment of any kind, and have no reference to the right of a person to object to the employment of another where the other is required to use the objector's property.⁷

Under the Texas statute providing that where a corporation discharges an employee it must, under penalty, furnish the employee upon his written demand a true statement of the cause of the discharge, the corporation need not enter into a full history of all the circumstances attending the discharge.⁸

D. LIABILITY IN OTHER CASES.

2032. Defacement of written characters or licenses.—Where a certificate of character given to a servant by a former employer is couched in terms which show that it is intended to be used as a general testimonial on any future occasions when such a voucher may be required, the servant is entitled to recover substantial damages against a subsequent employer who maliciously defaces the document by writing on it a disparaging statement, although, by reason of its not having been published, that statement may not serve as the basis of an action for libel.¹

⁷ *O'Brien v. Western U. Teleg. Co.* (1911) 62 Wash. 598, 114 Pac. 441, which was an action against a telegraph company for causing the discharge of one who was employed as a telegraph operator in a newspaper office to operate a wire leased from the company under a contract providing that operators should be satisfactory to the telegraph company.

⁸ In *St. Louis Southwestern R. Co. v. Hixon* (1911) — Tex. —, 137 S. W. 343, it was held that a railroad company, in giving out a statement that an employee had been discharged for insubordination, was not bound to give a complete history of the case, even though others might feel that the brakeman was justified in disobeying the orders, where it was delivered only to the employee himself. The court said: "It is not a case where one falsely publishes of another a charge which is untrue or injurious. The statement was made to the employee alone, and thus made, under penalty for refusal, in response to a written demand. In such

case, where there is no claim of wilful bad faith, or fraudulent and covinous purpose to deliberately state an untrue reason for the discharge, but where the reason given was, from the standpoint of the railway company, wholly true, we cannot consent to a judgment against such employer, acting in good faith." To the same effect, *St. Louis, S. F. & T. R. Co. v. Inman* (1911) — Tex. Civ. App. —, 137 S. W. 1153.

¹ *Wennhak v. Morgan* (1888) L. R. 20 Q. B. Div. 635, Huddleston, B., said: "There is a material distinction between the letters ordinarily written in answer to an inquiry as to a servant's character—which would probably be the property of the master proposing to engage the servant—and a general testimonial of good character, which is, I should think, intended to be used as a voucher on future occasions. . . . There might well have been a question for the jury whether, under the circumstances, the handing over of the testimonial was a deposit, or a parting with the property so as to vest it in the defendants. If

In cases where a statute by which it is enacted that a person engaged as an employee in a particular business shall take out a license provides that certain entries regarding him shall be indorsed upon his license when he leaves his employment, he is entitled to maintain an action if such an entry is made by an improper person or in an improper manner.²

the jury found that it was merely a deposit, the illustration given in argument of handing over a diploma on an application for a situation would apply." It was also held that the trial judge had wrongly taken upon himself to decide the amount of damages.

This decision seems to be essentially inconsistent with the language used by Lord Abinger in *Taylor v. Rowan* (1835) 1 Moody & R. 490, 7 Car. & P. 70. There A., before he entered the police force, sent a certificate of his good character, signed by the Colonel of his regiment, to the commissioners of police. On his dismissal from that force, the certificate was returned to the plaintiff, inclosed in a letter signed by the defendant, the certificate being stamped with the words, "Dismissed the police service." Held, that for stamping these words, trespass was not the proper form of action, the injury having been done to a chattel not in the possession of the plaintiff, and also that this was not evidence to go to the jury that it was done by the defendant, or by his order. In his charge to the jury, Lord Abinger said: "I should say that the only value of this certificate is to give prima facie evidence of the character of the plaintiff. And suppose a fact to occur afterwards which affected his character, I should say that any honest man who knew it, and made a remark of it on the certificate, would be doing no wrong. Suppose that a servant who brought a written character was taken into service, and afterwards behaved ill. Now, if the master returned the servant the character, could it be considered that he did wrong if he wrote upon it that the person to whose character it related had afterwards been in his service, and was dismissed for ill behaviour? I think the commissioners of police act meritoriously in stating that men are dismissed from the police force." When this passage was quoted by counsel in the subsequent case of *Rogers v. Macnamara* (1853) 14 C. B. 27 (see note M. & S. Vol. V.—395.

2, *infra*), Jervis, Ch. J., remarked (p. 37): "It would be morally right, perhaps, and yet actionable."

In *Glynn v. Dillon* (1859) 8 Ir. C. L. Rep. LXXI., appx., where the action was for the defacement of a written certificate of character by writing on it words which were susceptible of a construction injurious to the plaintiff, only a technical point of pleading was decided.

A declaration stated that the plaintiff had duly obtained a license to act as a conductor of metropolitan stage carriages, under 13 & 14 Vict. chap. 7; that the defendant, a proprietor of a metropolitan stage carriage, employed him to act as a conductor; that the plaintiff, on entering on such employment, delivered his license to the defendant, under the provisions of the act (6 & 7 Vict. chap. 86, § 8), to be retained by him whilst the plaintiff remained in his service; that the defendant wrongfully and maliciously wrote in ink on the license, before he redelivered the same to the plaintiff on his quitting such service, the words "discharged for being 1s. 4d. short. A. M.," to signify that the plaintiff had been dismissed as being dishonest; and that, by reason thereof, the license became defaced, damaged, and useless to the plaintiff, and he had been prevented from obtaining employment under it. Held, that the declaration disclosed a sufficient cause of action. *Rogers v. Macnamara* (1853) 14 C. B. 27.

The defendant pleaded that the plaintiff, whilst in his employ as such conductor, received on his account the sum of 12s. 3d.; and that, in breach of his duty, and intending to defraud the defendant, the plaintiff accounted to him for 10s. 11d. only, and thereby defrauded him of 1s. 4d.; and that the defendant wrote on the license the words complained of, to signify that the plaintiff had been dismissed for dishonesty, as it was lawful for him to do. Held, that the plea disclosed no justification for

2033. Liability for giving or procuring a false character.—*a. Civil liability.*—The effect of the authorities seems to be that, where A, by making statements or by suppressing facts regarding X, induces B to employ X as an agent, A is liable for such damages as B may sustain through the misconduct of X, although A had no intention of injuring B, or of benefiting himself.¹

the act complained of. "It is admitted," said Jervis, Ch. J., "that the plea can only be a good one if the declaration can be treated as containing a simple complaint of libel, to which the plea is pleaded as a justification. That, however, is not the essence of the plaintiff's complaint. The complaint is that, the plaintiff having an interest in the license, the defendant, whilst it remained in his possession, pursuant to the provisions of the statute, by writing thereon defaced it, and rendered it of no value to the plaintiff. Now, unless the act charged can be said to be justified by some moral duty in the defendant, —which can hardly be seriously contended,—the action is clearly maintainable. The 24th section of the 6 & 7 Vict. chap. 86, entitles the master to retain possession of the license for twenty-four hours after the driver or conductor has ceased to be in his service, in order to enable him to make any complaint he may have to make against him. Under no circumstances can the employer be justified in taking upon himself to adjudicate on his own complaint, by writing on the license that which the act of Parliament authorizes the justice alone to indorse. I think the declaration is good, and the plea affords no answer." Williams, J., however, was of the opinion that the circumstances stated in the plea might have some effect on the amount of the damages to be awarded.

By the 6 & 7 Vict. chap. 86, § 21, the proprietor of a hackney carriage is required to retain in his possession the license of every driver, etc., employed by him while such driver, etc., remains in his service. A declaration in case stated that the plaintiff obtained a driver's license under the act; that he was employed by the defendant, a proprietor of a hackney carriage, and, under the provisions of the act, delivered the license to him; and that, whilst the license remained in the defendant's possession, the latter "wrongfully and un-

justly wrote in ink upon the license certain words purporting, and then being intended by the defendant, to give a character of the plaintiff as an unfit and improper person to act as a driver of hackney carriages; that is to say, etc., etc.; by reason whereof the license became defaced and wholly useless to the plaintiff, and the plaintiff was thereby hindered and prevented from obtaining employment as a driver, etc. Held, on motion in arrest of judgment, that the action was maintainable; that case was the proper form; and that the declaration was sufficient," as it was not necessary to aver that the act was done maliciously. *Hurrell v. Ellis* (1845) 2 C. B. 295.

By § 8 of the same act, every proprietor of a hackney carriage employing the driver named in the license is to enter upon the license the days on which the driver entered and quitted his service, respectively. The foreman of a cab proprietor, in making the entries required by the above section, inserted in the license one date of entering the proprietor's service and two dates of quitting it, and signed his name at the end of the entry. The effect of these entries was found to be to prejudice the driver with other cab proprietors, to the knowledge of the foreman who made the entries. Held, that such a defacement was a "matter of complaint" between a proprietor and a driver, within § 22 of the act, which a magistrate had jurisdiction to hear and determine, and in respect to which he might award such compensation as might seem proper. *Norris v. Birch* [1895] 1 Q. B. 639, 64 L. J. Mag. Cas. N. S. 91, 15 Reports, 222, 72 L. T. N. S. 491, 43 Week. Rep. 271, 18 Cox, C. C. 123.

¹*Foster v. Charles* (1830) 6 Bing. 396, 7 Bing. 105. Tindal, Ch. J., said: "The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff."

b. Criminal liability.—A person who utters a forged testimonial as to his character, with intent to deceive, and thereby obtains a situation, is guilty of forgery at common law.² In England the giving or procuring of false characters has also been made the subject of an express statute.³

2034. Liability of recipient to giver of information regarding a servant.—Where a master informed a discharged servant that he had been discharged in consequence of the receipt of certain information communicated by a former master of his, and the former master was pronounced not liable in an action for defamation afterwards brought by the servant, it was held that he could not recover from the second master the extrajudicial expenses to which he claimed to have been put in connection with that action, although his letter in which the information regarding the servant had been imparted had been marked "private and confidential."¹

Bosanquet, J., said: "If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law."

In the later case of *Wilkin v. Reed* (1854) 15 C. B. 192, 2 C. L. R. 796, 23 L. J. C. P. N. S. 193, 18 Jur. 1081, 2 Week. Rep. 556, the declaration in an action for giving a false character of one P., a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he had dismissed P. from his employ was the decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty. The only points actually decided were that the plaintiff's evidence did not support the declaration, and that he was not entitled to amend it under the common law procedure act of 1852. But Crowder, J., expressed a doubt whether the fact that an employer, when giving a character to his employee, abstains from stating that he had been guilty of dishonesty, constitutes a cause of action in favor of a person who takes the employee into his service on the strength of the character so given, and loses a certain sum of money by his misappropriations. This *dictum* seems to be inconsistent with the decision just cited.

In an anonymous case cited by Mr. Christian in a note to Bl. Com. vol. I. p. 432, a person had knowingly given

a false character of a man to the plaintiff, who was thereby induced to take him into his service. The servant soon after robbed his master of property to a great amount, and was hung. It was held that the plaintiff was entitled to recover damages from the defendant to the extent of his loss.

In Fraser's Master & Servant, it is stated that it has not yet been decided in Scotland that a person who sustains injury in consequence of the granting of a false character to a servant has an action of damages against the grantor, but that in one case the point was taken for granted. *Anderson v. Wishart* (1818) 1 Murray, 429.

² *Reg. v. Sharman* (1854) 6 Cox, C. C. 312, 23 L. J. Mag. Cas. N. S. 51, Dears. C. C. 285, 18 Jur. 157, 2 Week. Rep. 227; *Reg. v. Moah* (1858) 27 L. J. Mag. Cas. N. S. 204, Dears. & B. C. C. 550, 4 Jur. N. S. 464, 6 Week. Rep. 470, 7 Cox, C. C. 503.

³ 32 Geo. III., chap. 56, amended in some unimportant particulars by 34 & 35 Vict. chap. 116, and 47 & 48 Vict. chap. 43.

¹ *Mushets v. Mackenzie* (1899) 1 Sc. Sess. Cas. 5th series, 756. The former master had used these words in his letter: "He went on strike, leaving us without giving sufficient notice. . . . It is unfair to us, if he is in your employment." Upon receiving this letter, B dismissed the workman, giving as a reason the breach of his contract with A, and ultimately communicated to him

the contents of the letter. In an action for defamation brought by the workman, A was found not to be liable, and was indemnified by the payment of the taxed costs. He then brought an action against B to recover the damages caused by the latter's breach of the contract of confidentiality, or, in the alternative, by the illegal violation of his proprietary rights in the letter, the sum claimed being the amount of the extrajudicial expenses to which he claimed to have been put, over and above the costs of the workman's action. All the judges held that A could not recover. Lord Macdonald put his decision on the ground that the claim was based upon the theory that extrajudicial expenses might be treated as damages owed to the plaintiff by a party who, by his action, had indirectly led to the action's being brought by a person who had no

case against A. If there was no ground for the action, it could not be said that the proceedings of B had caused it to be raised. Lord Young was of opinion that, irrespective altogether of the claims being one for extrajudicial expenses, there was no violation of any legal right, and that a person receiving the character of a servant from a former employer of the servant is under no legal obligation not to disclose it to the servant. Lord Moncreiff, without deciding the general question thus raised by Lord Young, held that the answer of A to B's letter amounted to a suggestion that the workman should be dismissed, and that as B could not be expected to do this without giving his reasons, the answer was deprived of any confidential quality which it might otherwise have possessed.

CHAPTER LXXXIX.

RIGHTS OF EMPLOYER IN RESPECT OF THE SERVICES OF THE EMPLOYEE AND THE THINGS PRODUCED THEREBY.

A. EARNINGS OF EMPLOYEES.

- 2035. Generally.
- 2036. Proprietary interest of a master in the earnings of his apprentice.
 - a. Wages.
 - b. Extraordinary gains.
 - c. Waiver of tort in actions for enticing or harboring apprentice.
- 2037. Proprietary interest of the master in the earnings of his servant. Rights as dependent upon the time when the work in question was performed.
- 2038. Same subject. Rights of master considered with reference to the fact that the work in question gave the servant an interest conflicting with his duty.
- 2039. Same subject further discussed.
 - a. Statutory provisions, effect of.
 - b. Master's right to wages earned by servant whose services have been temporarily transferred with the master's consent.
 - c. Master's rights, when forfeited by failure to assert them.
 - d. Profits incidentally acquired by a servant while engaged in his duties.
 - e. Rights of master where the servant enlists in the Army or Navy.
 - f. Right of master to the benefit of special knowledge possessed by the servant.
 - g. Rights of masters under special contracts.
 - h. Right of master to tips.
- 2040. Performance of extraneous work, viewed as a breach of duty justifying dismissal of, or an action against, the servant.
- 2041. Rights of the master in respect of unlawful profits obtained by the servant while engaged in the discharge of his duties.
 - a. General rule stated.
 - b. Remedies of the master against the servant in equity.
 - c. —at law.
 - d. Liability of the third person who participated in the wrongful transaction.
 - e. Breach of duty good cause for discharging the servant.

B. INVENTIONS OF EMPLOYEES.

2042. Rights of employers and employees considered without reference to the patent laws.
2043. —considered with reference to the patent laws. Generally.
- a. Employee entitled to inventions independently made by him.
 - b. Employee subjected to duress.
 - c. Patent taken out by employee in violation of his fiduciary obligations.
 - d. Acquiescence by employee in the taking out of a patent by his employer.
 - e. Assignment of patent rights by employee.
 - f. Employer licensed by employee to use his inventions.
2044. Engagement of employee for the purpose of making improvements in specific articles.
2045. Engagement of employee for the purpose of perfecting an original conception of the employer.
2046. Employment of workman for the express purpose of making inventions for the employer's benefit.
2047. Duty of employee to disclose the results of discoveries made by him.

C. LITERARY WORK OF EMPLOYEES.

2048. Right of an employer in respect to the results of literary or artistic work performed by the employee. Generally.
2049. Rights of parties in regard to books.
2050. —dramatic pieces.
2051. —musical compositions.
2052. —abstracts from official records.
2053. —encyclopædias and periodicals.
2054. —notes to new editions of books previously copyrighted by the employer.
2055. —literary work done in connection with official duties.
2056. Rights of parties as affected by the fiduciary obligations of the employee.

A. EARNINGS OF EMPLOYEES.

2035. Generally.—An examination of the cases reviewed in this chapter shows that the legal consequences which supervene when a servant, either on his own account, or on behalf of a third person, engages in extraneous business transactions, or performs work other than that covered by the contract of hiring, have been discussed by the courts from three different standpoints.

In one group of cases we find the master viewed as a party who has acquired by the contract of hiring a proprietary interest, more or less complete according to circumstances, in the services of the person hired. In other words, the assumed effect of the contract is to

vest in the master a right to control for his own benefit the whole or a part of the earning capacity of the servant, and to claim a proportionable amount of the products of that capacity. Historically, this conception would seem to be traceable to the maxim, *Quicquid acquiritur servo acquiritur domino*, which expressed the rule of the law of villeinage, that whatever was acquired by a villein, whether realty or personalty, became, under certain qualifications, the property of his master.¹

In another group of cases the question involved was whether the fact of the servant's having performed services for a third person constituted a breach of duty which rendered him liable to dismissal or to an action for damages. In this instance the right of the master to the earnings of the servant is not directly in issue, the point to be determined being merely the quality of the servant's conduct with relation to an obligation upon the existence of which the right is ultimately dependent. But as the circumstances considered in the cases which belong to this category are essentially similar to those presented in cases which are concerned with the extent of the master's right, it has been deemed advisable to deal with both descriptions of cases in the same chapter.

In a third group of cases, also, the action was founded upon an alleged breach of fiduciary obligations, and not upon the proprietary interest of a master in the time and labor of his servant. But the immediate object of the proceedings was, as in the first group, the recovery of the actual earnings or other benefits acquired by the servant as a result of his wrongful conduct.³

The circumstances presented by the cases which fall under each of these heads may furnish a foundation either for legal or for equitable remedies. As regards those which belong to the first two groups, it is sufficient to observe that, if a court of law cannot afford adequate pro-

¹ See Mr. Hargrave's note to Co. Litt. 117a.

The corresponding French maxim was, "*Qui a le vilain, il a sa proye.*" See 20 How. St. Tr. 36, note.

³ This aspect of the matter is illustrated by the cases cited in § 2041, *post*. In one of them Bowen, L. J., described the transaction in question as being a "breach of confidence and good faith towards the master," "a violation of the confidential relation, and a breach of faith towards the master;" and a "wrongful act inconsistent with his duty towards his master, and the continuance

of confidence between them." *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L. R. 39 Ch. Div. 339, 362, 363.

"An agent is bound to account for any profit made by him in the matter of his agency at the expense of his principal and without his knowledge, because he cannot retain for his own use money which it is his duty to earn on behalf of his principle, and which, when received, he is under obligation to pay over to his principle." Sterling, L. J., *arguendo*, *Powell v. Evan Jones & Co.* [1905] 1 K. B. 11.

tection to the proprietary or exclusive right of a master to the time and labor of his servant, the case becomes, on general principles, one in which the aid of a court of equity may be invoked. So far as the third group is concerned, it is not disputed that either a court of law or a court of equity is competent to give redress whenever the effect of a transaction is to put a servant in such a position that "he has a temptation not faithfully to perform his duty to his employer,"⁴ or, in other words, "has an interest against his duty."⁵ But it is manifest that the latter notion is more distinctly germane to the characteristic principles of the jurisprudence administered by courts of equity. In some instances of an attempt by a servant to secure a clandestine personal advantage at his master's expense, the rights of the master cannot be adjusted satisfactorily except by treating the transaction as one which is in the language of Lord Arden, an actual "breach of trust."⁶

2036. Proprietary interest of a master in the earnings of his apprentice.—a. Wages.—Speaking generally, the master acquires, by a contract of apprenticeship, the right to use for his own benefit the entire earning capacity of the apprentice, and is therefore entitled, in the absence of some special consideration, to the wages accruing to the apprentice for services rendered to a third person during the period covered by the indentures.¹ The money so earned may be claimed by the master, whether the apprentice had deserted him before the

⁴Cotton L. J., in *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L. R. 39 Ch. Div. 339, 357.

The general principle of equity jurisprudence is that "no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty." Lord Cranworth, in *Broughton v. Broughton* (1855) 5 De G. M. & G. 164.

"In matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves." Story, Agency, § 210. See also Evans, Principal & Agent, ** 304 *et seq.*, Mechem, Agency, § 455.

⁵Lord Ellenborough in *Thompson v. Havelock* (1808) 1 Campb. 527, and *Diplock v. Blackburn* (1811) 3 Campb. 43, 13 Revised Rep. 744.

⁶*Massey v. Daves* (1794) 2 Ves. Jr. 317, 2 Revised Rep. 218, 1 Mor. Min. Rep. 247.

¹In *Munsey v. Goodwin* (1825) 3

N. H. 272, it was laid down that one who knowingly employs the apprentice of another person may be sued in assumpsit for the value of the apprentice's services.

In *Foster v. Stewart* (1814) 3 Maule & S. 191, Le Blanc, J., remarked: "It is clearly established by all the cases that the master is entitled to the labor and earnings of his apprentice during the whole term of his apprenticeship."

On the ground that the master of an apprentice was entitled to the whole of his earnings, it was held that a part of the earnings reserved to him by the indenture was not a benefit reserved to him within the meaning of the English stamp act, requiring an additional duty to be paid for such benefit. *Rex v. Wantage* (1801) 1 East, 601; *Rex v. Bradford* (1813) 1 Maule & S. 151.

An apprentice "receives no compensation from the master, except his maintenance and education; and his whole labor and capacity belong completely to

second employment was entered upon;² or had temporarily quitted the master's service with the master's consent;³ or had been forcibly withdrawn from his master's control;⁴ or had been enticed away from the master.⁵

The preponderance of authority is decidedly in favor of the doctrine that in cases where the apprentice was actually under the control of his master at the time when he left or was taken out of the service, the liability of the second employer for the wages accruing to him is predicable, irrespective of whether that employer did or did not know of the contract of apprenticeship when he entered into the contract of hiring.⁶ But the knowledge or ignorance of the second master is obviously a wholly immaterial factor where the wages claimed were earned after the original master's right to the services

the master that any thing which he earns during his apprenticeship is due to the master directly, although the master is not privy or assenting to his earning it." *Easley v. Craddock* (1826) 4 Rand. (Va.) 423, 426.

See also the cases cited in note 1 to the next section, and in the following notes to the present section.

² "In general the master is entitled to all that the apprentice shall earn; consequently if he runs away and goes to a different business, the master is entitled at law to all his earnings." Lord Hardwicke in *Hill v. Allen* (1747) 1 Ves. Sr. 83.

In *Carsan v. Watts* (1784) 3 Dougl. K. B. 350, Lord Mansfield "thought it clear that whatever an apprentice who runs away gains in another service *eo nomine* belongs to the master, and is earned for him; and that if it is anything specific, the master may bring trover for it."

In *Bright v. Lucas* (1797) Peake, N. P. Add. Cas. 121, it was held that an apprentice who had deserted from his master's service could not maintain an action for wages against his new employer.

³ *Meriton v. Hornsby* (1747) 1 Ves. Sr. 48.

⁴ That a master might maintain an action of trover for a document entitling his apprentice to money earned on a warship to which he had been taken by a press-gang was laid down in *Barber v. Dennis* (1706) 1 Salk. 68; *Anonymous* (1701) 12 Mod. 415. But in the second case it was held

that trover would not lie against the executor of the apprentice for a ticket given out after the death of the apprentice, for the reason that the ticket had never been in the possession of the apprentice. It was conceded that, after the executor received the money, the master might maintain assumpsit for so much money received to his use.

See also *Eades v. Vandeput* (1785) 5 East, 39, note a, 4 Dougl. K. B., which, although it has been to some extent discredited by the criticism referred to in note 23 to this section, has not been impugned in so far as it sustains the statement in the text.

⁵ *Lightly v. Clouston* (1808) 1 Taunt. 112, 9 Revised Rep. 713; *Stout v. Woody* (1868) 63 N. C. 37.

⁶ *James v. Le Roy* (1810) 6 Johns. 274, Auth. on N. P. 159 (apprenticeship not known), distinguishing the case of an apprentice from that of a hired servant, the second employer of such a servant not being answerable unless he had notice of the fact that the employee was the servant of another.

"The defendant's obligation to pay the plaintiff arises from his use of his property; and although he might suppose the right to be in another, or might be ignorant of the plaintiff's rights, his misapprehension or ignorance cannot change his legal liability." *Boves v. Tibbets* (1831) 7 Me. 457. The court contrasted the rule which precludes a master from maintaining an action for the enticement of his servant, unless

of the apprentice had been suspended by his breach of trust in assigning the apprentice, and before he had actually exercised his right to reclaim the apprentice.⁷

Except under the circumstances mentioned at the conclusion of the preceding paragraph, the liability of the second employer is not terminated by the payment of the apprentice's wages to the apprentice himself.⁸ If the money earned by the apprentice has been paid to him by the second employer, his master may recover it from him.⁹

The effect of one of the older English decisions is that, if the existence of an apprenticeship *de facto* is established, the master may

the former knew of the existence of the contract of service.

For other cases sustaining the statement in the text, see *Conant v. Raymond* (1827) 2 Aik. (Vt.) 243 (apprenticeship not known); *Munsey v. Goodwin* (1825) 3 N. H. 273 (apprenticeship known).

In a Massachusetts case, however, the court observed, *arguendo*: "If the instrument had been executed according to the requirements of the statute, the plaintiff might follow the apprentice, and claim payment for his services of any person who should employ him with notice that he was bound to the plaintiff as an apprentice." *Harper v. Gilbert* (1850) 5 Cush. 417.

⁷ This is the effect of the judgment in *Ayer v. Chase* (1837) 19 Pick. 556. See note 15, *infra*.

⁸ In *Bardwell v. Purrington* (1871) 107 Mass. 419, the apprentice had left the plaintiff, his master, and gone with his father to work on the defendant's farm. He then left and did work elsewhere, and several months afterwards was found by his master and taken home. There was no evidence that the defendant knew that the boy was an apprentice, or that he had even been notified of the plaintiff's right to his earnings. Discussing an exception taken to the refusal of the trial judge to admit evidence offered by the defendant to show that he had paid the boy for his services, the supreme court said: "It was not offered in connection, as we understand the report, with any evidence tending to show that the plaintiff had abandoned any of his rights, or had been wanting in due and reasonable exertion and diligence to reclaim the apprentice. If he had not lost his right to the services of the apprentice

by any fault of his own, the fact that a stranger who had had the benefit of them, had paid a party who had no right to the payment would be immaterial. There might be circumstances from which the jury might very properly infer that the plaintiff had abandoned the right to hold the apprentice. The propriety of such an inference would depend on what the plaintiff knew, or had the means on reasonable inquiry of knowing, as to where the apprentice was and what he was doing. If the plaintiff knowingly suffered the apprentice to make and perform contracts for service, or if the plaintiff, knowing where he could be found, made no efforts, or neglected opportunities, to reclaim him and hold him to his service, he could not maintain his action; in other words, his relinquishment of all right to hold the apprentice under the indenture could be proved by circumstantial evidence. Mere payment by the defendant to the apprentice, without the knowledge or default of the plaintiff, would not affect the question."

Where the testamentary guardians of an infant, by indenture, covenanted with A, that the infant should labor for him until he should become of age, and A covenanted to pay the guardians the sum of \$150, and the infant labored for A the time specified in the indenture, without objection, and assented to and ratified the indenture after becoming of age,—held, that the payment of the money by A to the infant did not discharge him from his liability to the guardians. *Balch v. Smith* (1841) 12 N. H. 437.

⁹ *Le Blanch, J., in Foster v. Stewart* (1814) 3 Maule & S. 191, 15 Revised Rep. 459.

assert his right to the money earned by the apprentice while in the service of another person, although the contract of apprenticeship may not have been legally binding.¹⁰ But this doctrine is essentially antagonistic to more recent decisions by the English courts to the effect that a master cannot maintain an action for the enticement or harboring of an infant apprentice, unless a valid and enforceable contract existed at the time when it was interfered with.¹¹ But, even apart from the apparent antinomy there indicated, it is not easy to see upon what ground any proprietary rights can reasonably be ascribed to the master in respect of wages accruing to the apprentice under circumstances which necessarily import that his privilege of terminating the relationship has previously been exercised. In such a situation the rule frequently invoked in settlement cases (see § 2128, *post*.) that third persons cannot take advantage of the non-obligatory quality of a contract as long as the apprentice has refrained from avoiding it, is manifestly inapplicable. In New York it has been categorically laid down that the existence of a valid contract of apprenticeship is a condition precedent to the successful maintenance of an action against the second employer.¹²

The assignment of an apprentice without the consent of the apprentice or of his parent or guardian, supposing one or other of them to be a party to the indenture, is invalid as involving a violation of the master's trust, whether the assignee is or is not exercising the same trade as the master.¹³ On the one hand, therefore, the master cannot make such an assignment, on the terms that he is to receive the earnings of the apprentice from the assignee; and a custom the effect of which is to authorize such an arrangement is directly repugnant to the leading stipulation of the contract to give instruction, and

¹⁰ *Barber v. Dennis* (1706) 1 Salk. 68, 6 Mod. 69.

¹¹ *Gye v. Fulton* (1813) 4 Taunt. 876, *Cox v. Muncey* (1859) 6 C. B. N. S. 375; *De Francesco v. Barnum* (1890) L. R. 45 Ch. Div. 430, 63 L. T. N. S. 438, 39 Week. Rep. 5.

¹² *Barton v. Ford* (1885) 35 Hun, 32.

¹³ See the cases cited in the two following notes, and in § 2139, *a*, *post*.

A colored boy was bound out by an order of a county court in North Carolina, to A, as an apprentice. A kept the boy for a time, and then sold the residue of the term to B, who lived in another county, with the agreement that, if the boy did not serve B for the whole of the residue, B should pay only

for the actual service. The boy returned to A before the term expired, and on B's refusal to pay unless A deducted a part of the bill for clothing furnished by B, the deduction was made, and B said the bill was right and he would pay it. Held, in a suit by A to recover the value of the boy's services, that the contract of apprenticeship was not assignable, and the contract with B, as it carried the boy out of the county in which he was bound to A, was void; but that A could recover on the distinct promise of B to pay, as that promise was supported by a valid consideration. *Futrell v. Vann* (1848) 30 N. C. (8 Ired. L.) 402.

therefore bad.¹⁴ On the other hand the apprentice is entitled to abandon the assignee at any time, and whatever wages he may earn by rendering services to another party, after the abandonment and before he has been reclaimed by his master, belong to himself.¹⁵

Wages earned by an apprentice after his master's death cannot be recovered by the master's personal representatives, unless by the express terms of the indenture he is bound to the master's executors and administrators.¹⁶ This rule is a necessary deduction from the general doctrine that the master's death ordinarily operates so as to dissolve the contract. See § 2210, *post*.

In England the accepted doctrine apparently is that the wages of an apprentice who enlists in the Army or Navy, whether with or without his master's consent, belong to his master.¹⁷ On the other hand it has been laid down in New York that the wages of an apprentice who enlists in the Army belong to himself.¹⁸

b. Extraordinary gains.—It is agreed, both in England and the United States, that any "extraordinary gains"¹⁹ which an apprentice who enters the Army or Navy may acquire out of the usual course of his service belong to himself, and not to his master, this doctrine being referred in different cases to different considerations.²⁰ But it

¹⁴ *Randall v. Rotch* (1831) 12 Pick. 107 (apprentice to a cooper cannot be sent abroad on a whaling voyage).

¹⁵ Where the plaintiff put his apprentice into the service of another person exercising the plaintiff's trade, for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded and went to sea, it was held that as such transfer of the apprentice was a breach of trust, the plaintiff's right to his services was suspended, and that it did not revive upon his absconding, so as to entitle the plaintiff to his earnings on the voyage. *Ayer v. Chase* (1837) 19 Pick. 556.

¹⁶ *Kennedy v. Savage* (1812) 2 Browne (Pa.) 178.

¹⁷ The statement seems to be warranted by the language used in *Carsan v. Watts* (1784) 3 Dougl. K. B. 350, in which, as will be seen by referring to note 21, *infra*, the only point in dispute was whether the distinction conceded to exist, as regards the Royal Navy, between ordinary wages and "extraordinary gains," was predicable with respect to a privateer.

¹⁸ *Johnson v. Dodd* (1874) 56 N. Y.

76. The decision was put upon the ground that the apprenticeship was dissolved by the enlistment, whether the master had or had not consented thereto whether it was voluntary or under compulsion by the government. The court said: "The government may dissolve the relation of master and apprentice, existing by force of municipal regulations, and the obligation of service resulting from indentures executed under or sanctioned by the local law. If the relation is dissolved by the action of the government in calling the apprentices into its service in time of war, it is reasonable that his right to the wages earned in this perilous service should be recognized; and if the obligation of service on the part of the apprentice under the indentures is discharged, the correlative duty of protection and maintenance on the part of the master would be discharged also."

¹⁹ A phrase used in *Carsan v. Watts* (1784) 3 Dougl. K. B. 350, where the recovery of part of a wreck by the exertions of the apprentice was considered.

²⁰ In *Carsan v. Watts* (1784) 3 Dougl. K. B. 350, prize money was

is apparently still an open question whether, in the absence of specific proof of an established usage entitling an apprentice to retain prize money earned in a privateer, or letter of marque, he can hold it against his master.²¹ That a master is not entitled to "extraordinary

said to go to the apprentice because it is not "earnings" but the bounty of the Crown. This case (as to which see further, note 21, *infra*), was followed in *Cain v. Snyder* (1865) 6 Phila. 24.

That a bounty received by an apprentice at the time of his enlistment belonged to him was held in *Johnson v. Dodd* (1874) 56 N. Y. 76, on the ground that the apprenticeship was dissolved by the enlistment, whether the master consented to it or not.

In *Hudson v. Worden* (1867) 39 Vt. 382, the minor had placed in the hands of the defendant, his former master, the money paid him for enlisting as a substitute. The court, proceeding upon the ground that the indenture was voidable, and had in point of fact been avoided by the enlistment, held that the apprentice could recover the money by a suit brought in his guardian's name.

An apprentice enlisting as a substitute is entitled to money allowed by the state to a drafted man to aid in procuring a substitute; and an agreement that the master should receive the money is deemed to be in contravention of the meaning, object, and policy of the statute regulating enlistment. *Turner v. Smithers* (1864) 3 Houst. (Del.) 430.

In *Kelly v. Sprout* (1867) 97 Mass. 169, it was held that the bounty money to which a minor apprentice becomes entitled by his enlistment as a soldier belongs to himself, and not to his master, and that an agreement by his apprentice to give to his master that money, if the master would permit him to enlist as a soldier, is voidable by the apprentice by reason of his infancy. The court could find nothing in the statute on the subject of bounties to show that the privilege of infancy was taken away.

²¹ In *Carsan v. Watts* (1784) 3 Dougl. K. B. 350, where the master was unsuccessful in an action to recover such prize money, Lord Mansfield apparently relied entirely upon the usage proved as being the controlling factor in the case. But the other two judges, who concurred with him, seem to have rested their conclusion on the general ground

that the money in question was an "extraordinary gain." During the argument of counsel, Buller, J., interposed the remark: "If the boy went with the master's consent, the reason of the thing seems to be that the master shall have the wages; if he went without such consent, the master may recover a satisfaction for the loss of the service—the damages he has sustained by it in his trade—what he himself has lost, not what the apprentice may have gained. There can be no reason why he should take the large fortune his apprentice may have gained by the risk he has run." In his judgment he said "Independently of statutory regulations, the prize money is as much a bounty of the Crown on board privateers as on board King's ships. There does not seem to be much difference in the case from that circumstance." Ashurst, J., who dissented, explained his position as follows: "Suppose that, instead of prize money, the captain of the ship had agreed to give higher wages,—would not the master of the apprentice be entitled to such wages? The doubt seems to me to have arisen from the practice in King's ships where prize money is not earnings, but the bounty of the Crown, and therefore does not go to the master. In privateers and letters of marque, prize money is not bounty, but stipulation, and I do not see how it can be distinguished from wages."

In two earlier cases Lord Hardwicke assumed that a master had a legal right to the share of an apprentice in a prize taken by a privateer on which the apprentice had taken service without his consent, and based his decision upon the principle that, in the absence of some special circumstance to justify its interference, a court of equity would not relieve against that right. *Hill v. Allen* (1747) 1 Ves. Sr. 83, 85 (i); *Meriton v. Hornsby* (1747) 1 Ves. Sr. 48. In the first-mentioned case the following remarks were made: "If a case comes before me in equity, where the master, instead of instructing him in the particular business his parents

gains" derived by an apprentice from a purely civil employment may be regarded as an established doctrine.²²

intended, encouraged and seduced him to go to sea, and to a different course of life, I should incline to relieve the apprentice against the master's legal right; otherwise it would destroy the faith of the contract between the parents and the master."

The language ascribed to the learned judge in the report of the case in (1747) 1 Dick. 130, is somewhat more decided in the same sense.

²² In *Carsan v. Watts* (notes 19, 20, *supra*) it was conceded that the apprentice in question would have been entitled to treasure trove or salvage; and although the point was mentioned in relation to service on a privateer, the doctrine adverted to is evidently intended as a general one.

In *Mason v. Blaireau* (1804) 2 Cranch, 270, 2 L. ed. 276, the lower court had held that an apprentice in the merchant service was entitled to salvage money, and stated its position as follows: "It was said in behalf of the apprentices that the master's right attaches only to those earnings which flow from their ordinary occupation and industry, not to anything given as a reward for an extraordinary and voluntary service rendered. When an apprentice goes on board a privateer, his business is to make prizes; it then becomes his ordinary occupation, and the master is entitled to his share of prize money. Suppose a gentleman riding out in his carriage; his horses take fright, and run away; an apprentice runs out of his master's shop and stops the horses, for which service the gentleman gives him \$100. Can it be contended that the master has a right to the money? There is no difference between that case and the present. In the case of *The Beaver* (1801) 3 C. Rob. 239, Sir W. Scott distinguished between the master and his apprentice, and gave a share expressly to the apprentice. In the present case it was a voluntary act on the part of the apprentices. The captain had no right to compel them to risk their lives in this service. It was not within the course of their ordinary business. The cases cited only show that the master is entitled to what the apprentice earns in the regular course of business, whether it be that to which he

was bound, or that in which he chooses to engage in derogation of the rights of his master. But salvage is not a regular business; it is not a matter of contract. A mariner or an apprentice is bound only to do such duty as appertains to the ship on the voyage. If the master of the apprentices is entitled to their share of the salvage, because they are subject to the orders of the captain, by the same rule he would be entitled to the shares of all the seamen, for they are all equally under the command of the captain." Replying to the argument of the counsel for the master of the apprentice, that in the case of *The Beaver* (*ubi supra*) Sir William Scott did not decide whether the master was entitled to the share of his apprentice, or not, but left that question to be determined. The court said: "The case of a gratuitous gift is different from that of a right which has accrued, and which can be enforced by law; and therefore the case stated for illustration does not apply. If the captain has no right to send his seamen to the assistance of a vessel in distress, it can never be in his power to render a service; and he loses all command over those who remain, because they may say, we were only bound to labor with the assistance of the others." The judgment was affirmed by the Supreme Court. Marshall, Ch. J., said: "The claim of the master to the salvage allowed his apprentices is one which the court feels no disposition to support, unless the law of the case can be clearly with him. The authorities cited by his counsel do not come up to this case. The right of the master to the earnings of his apprentice in the way of his business, or of any other business which is substituted for it, is different from a right to his extraordinary earnings, which do not interfere with the profits the master may legitimately derive from his service. Of this latter description is salvage. It is an extra benefit, the reception of which does not deduct from the profits the master is entitled to from his service. But the case cited from Robinson, where salvage was actually decreed to an apprentice, is in point. The counsel does not appear to the

c. Waiver of tort in actions for enticing or harboring apprentice.—

The doctrine is now well settled that the master of an apprentice who has been seduced into the service of a third person, or retained by a third person, with the knowledge that he has deserted his master, may waive his action for the tort so committed (see subsequent chapter upon enticement) and bring against the person who employed the apprentice an action of assumpsit for his work and labor.²³ The master's right in this regard is in no degree affected by the terms upon which the apprentice agreed to work for the third person.²⁴

court to construe that case correctly, when he says that it does not determine the right as between the master and the apprentice. The fair understanding of the case is that the money was decreed to the apprentice, and was to be paid for his benefit. Considering the case strictly on principle, that portion of the salvage allowed ought to be paid to the master which would compensate him for having risked the future service of his apprentice; but as this would not amount to a very considerable sum, and as a liberal salvage has already been decreed to the master, this further allowance will not be made in this case."

²³ *Lightly v. Clouston* (1808) 1 Taunt. 112, 9 Revised Rep. 713 (apprentice enticed away); *Foster v. Stewart* (1814) 3 Maule & S. 191, 15 Revised Rep. 459 (apprentice harbored.)

In an earlier case in which the declaration charged the defendant with retaining the plaintiff's apprentice, knowing that he had run away from his master, the Chief Justice said that he thought such an action would not lie, but that the proper remedy was by way of action for so much money, in wrong to the plaintiff. *Aynsworth v. Wood* (1729) 1 Barnard K. B. 312.

In *Eades v. Vandeput* (1785) an unreported case cited in a note to *Ex parte Lansdown* (1804) 5 East, 39, 4 Dougl. K. B. 1, an action was brought against the captain of a ship of war by the master of an apprentice to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. A verdict for the plaintiff was upheld on the ground that, after the boy had, as the evidence tended to show, stated that he was an apprentice, the captain

acted at his peril in keeping him on the ship without making inquiry as to the truth of the statement. But in *Foster v. Stewart*, *supra*, this case was thus criticized by Lord Ellenborough, Ch. J., "When this case was before me at nisi prius, the plaintiff's right to recover was rested upon *Eades v. Vandeput*; and it occurred to me at that time, and afterwards still more strongly upon looking into that case, that it is but a very loose note; for as to the defendant Vandeput, who was in the King's service, supposing an action for work and labor could have been maintained, yet it was work and labor for the King, and not for Vandeput; and therefore in his character of captain of a ship of war he could not have been the object of such an action. It does not appear, however, by the note of that case, what the form of the action was; if the captain had enticed away the apprentice, perhaps he might have been liable to tort. But under the uncertainty both of fact and form which attends that case, I think no very material argument is to be derived from it." The present writer ventures to suggest that the action may really have been brought to recover damages for the wrongful detention, and that its nature is misstated by the reporter. This explanation would dispose of the difficulty pointed out by Lord Ellenborough with respect to a naval captain's being held liable in assumpsit, and it derives some support at least from the fact that the case to which the summary of *Eades v. Vandeput* is appended as a note was an application for a habeas corpus, and therefore involved the master's right to the person of the apprentice, and not to his earnings.

²⁴ In *Foster v. Stewart* (1814) 3 Maule & S. 191, 15 Revised Rep. 713,

2037. Proprietary interest of the master in the earnings of his servant. Rights as dependent upon the time when the work in question was performed.— There is considerable authority for the view that a master is not entitled to maintain an action against a third person to recover the wages earned by his hired servant, a distinction being taken in this regard between the incidents of contracts of apprenticeship and service.¹ But there does not seem to be any satisfactory ground upon which such a distinction can be predicated, and it has been ignored in all the other decisions reviewed in this and the following sections. The doctrine embodied in those decisions is that all money or other property which a servant earns by extraneous work performed either on his own account or for third persons, during a period of time which he is bound, under the terms of the contract of

the plaintiff's apprentice went on board the defendant's ship, and secreted himself until the defendant's ship sailed, when he discovered himself to the defendant, who carried him to H., to which place he worked his passage, receiving his food. During the passage to H. the plaintiff's and defendant's ships were within hail, but defendant did not make known to plaintiff that he had the apprentice on board. On the arrival of defendant's ship at H. the apprentice wished to leave her, but defendant persuaded him to remain, promising him either wages or clothes and pocket money. Under this persuasion the apprentice sailed with him to E., and did duty as one of the crew, but received no wages, or clothes or pocket money. Held, that plaintiff was entitled to recover a reasonable compensation for the services of the apprentice from H. to E.

Where A, an apprentice, ran away from his master, in New York, and entered on board of a ship, and signed articles, by which he engaged to perform the whole voyage, and to forfeit his wages in case of desertion or embezzlement, and during the voyage he deserted, having been guilty of embezzlement, it was held that the master was entitled to recover his whole earnings from the shipowners during the time he was on board, without any deduction for wages advanced to the apprentice. *James v. Le Roy* (1810) 6 Johns. 274.

¹ In *Rex v. St. Nicholas* (1737) Burr. Sett. Cas. 91. Lord Hardwicke remarked *arguendo*: "A master cannot bring an action for wages of his

servant, though for the wages of an apprentice he may; because the time of an apprentice is considered as the time of the master, and what is earned by the apprentice is considered as belonging to the master."

In a Virginia case in which the actual point involved was whether a master is bound to provide medical attendance for his servant, the court remarked, *arguendo*: "If the servant should, during his service, acquire anything by his labor for any other, the master would not be entitled to it. The only remedy of the master would be against the servant himself, if he had been injured by the servant's laboring for another, unless that other had seduced the servant from the master's service." *Easley v. Craddock* (1826) 4 Rand. (Va.) 423.

In *Bowes v. Tibbets* (1831) 7 Me. 457, the court observed, *arguendo*: "It seems from the authorities that this is the only action which can be sustained for employing the servant of another of full age. In the case of a minor indentured as an apprentice or servant, his services actually become the property of his master. A right may be acquired to the labor of a servant of full age; but it is a right resting in contract, for the breach of which there may be a recovery in damages. The master has no lien upon his subsequent earnings; but may obtain satisfaction for the injury he has sustained by the ordinary process of law, of the servant, or of any other person who knowingly seduces him." The "authorities" referred to were not specified by the court.

hiring, to devote to the discharge of his duties, should be deemed to belong to his master, except in so far as the rights of the parties may have been modified by an express or implied agreement.²

² In *Roorbach v. North River S. B. Co.* (1822) 6 Johns. Ch. 469, where the masters of certain river boats had made contracts with the Postmaster General for the carriage of the mails, it was held that they were not entitled to take the profits without the consent of their employers. The employers therefor had the right to demand from them, at any time, an assignment of the contracts, and appropriate the profits, without paying them any compensation beyond their stipulated wages. It was also held that, after having consented and continued to receive additional salary, in lieu of all fees and perquisites for carrying the mails, they could not claim any share of these perquisites.

In *Wallace v. De Young* (1881) 98 Ill. 638, 38 Am. Rep. 108, De Young had for several years been employed by F. & R. insurance agents, as their salaried clerk, cashier, and bookkeeper. During the same period he had also acted, both during and outside his business hours, as the accountant of W., a person engaged in lending money and buying commercial paper. It was contended by F. & R. that the latter services were within the scope of their business, and therefore covered by his salary. With regard to the services rendered to W. during business hours, the rights of the parties were thus stated by the court. His employers could not "require him to perform such service . . . unless it was within the terms or scope of the agreement when his services were hired. They had no legal right to employ him to perform one kind of service and require him to do another kind. If he chose to do so as a gratuity to his employers, then he had no right to recover for such services as being outside of and beyond his employment. On the other hand, if they, in terms or by fair implication, consented that he might perform services during office hours for Wallace, and receive compensation therefor, then neither they nor Wallace could object to his recovery for such labor and services." Whether his employers had given their consent was held to be a question of fact for the jury, and the court refused M. & S. Vol. V.—396.

to disturb a verdict in his favor. Discussing the other services rendered by De Young, the court said: "It is believed that no one will contest the proposition that Frisbie & Rappleye were entitled only to his labor and skill in the pursuit of the business which he had been employed to transact; during business hours. They could have no possible claim to his earnings or labor after or before business hours. They only had a right to appropriate his labor and skill during the time devoted to the business which he was employed to transact. All that defendant in error earned by laboring for Wallace out of business hours, surely, on every principle of reason, justice, and law, belonged to him. If Wallace employed him, and agreed to pay him for his labor and skill performed out of business hours, Wallace could not be heard to say defendant in error was precluded from recovering, because he was at the same time employed by Frisbie & Rappleye to labor for them during business hours. He was clearly entitled to recover for all labor thus performed at the request of Wallace."

That an agent or servant on a fixed salary, who sells articles to his employers, under a contract with the owner of such articles for a remuneration, his employers having knowledge of his interest, can claim his salary from the vendors of the articles, was laid down in *Wright v. Welch* (1879) 3 MacArth. 479 (held to be error to refuse instruction embodying this principle when evidence of knowledge was introduced).

In *M'Rae v. M'Beath* (1847) 5 N. B. 446, it was held that money given to the driver of a stagecoach by the owner of a horse which was led behind the coach on one of its trips was a mere gratuity to the driver for his trouble in looking after the horse, and that the master was accordingly not entitled to it. So far as the report shows, the difficulties of a position which seems to involve the broad consequence that all gratuities of this sort may legally be appropriated by a servant, irrespective of his master's permission, do not seem to have occurred either to the judges or to counsel. But as it was proved

A servant who is merely required to attend to his appointed duties during a definite portion of the time covered by the contract is entitled, during his leisure hours, to undertake for his own benefit any kind of work the performance of which will not be prejudicial to his master.³ Such prejudice is always inferable wherever the extraneous

that the driver had on other occasions been paid money by passengers for small services, the decision may possibly be referred to the conception of an implied consent on the master's part that he was to retain such earnings. This seems to be the only ground upon which the conclusions of the court can be sustained. The true doctrine seems to be that the right of servants to retain gratuities given by third persons must rest, in the last analysis, upon the consent of their masters, and that a claim founded upon the existence of such a right cannot be supported, unless that consent is established by proof of a usage known to the master, or by other suitable evidence.

In *Genco v. Remington* (1905) 100 App. Div. 223, 91 N. Y. Supp. 223, defendants operated a canning factory; raising peas of their own as well as using peas raised by farmers. Plaintiff entered into a written agreement with defendants to secure sufficient help to take care of defendants' pea crop, and was to receive a stated compensation per week for looking after the help, "work to commence June 1st, 1902, and to continue through pea-picking time." Plaintiff procured hands and remained with defendants during the pea-picking time; but, as defendants did not have enough peas to occupy the entire time of plaintiff and the laborers, he also, with defendants' acquiescence, superintended the picking of peas for the farmers, receiving compensation from them. This additional labor did not interfere with the picking of defendants' crop, and nothing was said between plaintiff and defendants as to compensation for the time during which plaintiff was employed by the farmers. Held, that whether what plaintiff was paid by the farmers was to be applied to reduce the compensation due him from defendants was a question for the jury, and it could not be declared, as a matter of law, that it was to be so applied.

In *Johnson v. Bicknell* (1843) 23 Me. 154, the defendant was sued for the value of work performed for him by a

minor whose services had been assigned to the plaintiff by the minor's father, with the minor's consent, for a consideration enuring wholly to the father. Held, that the claim could not be resisted on the ground that the father of the minor had no legal right to sell his time. The court said: "It does not appear that the father or Samuel (the son) laid any claim to compensation for the services, or that the defendants had paid, or claimed a right or pretended a liability to pay, anyone else therefor. What possible concern can they have with the nature or efficacy or inefficacy of the contract between the father and the plaintiff? There can be no pretense that, if the defendants pay the plaintiff, they will be answerable again for the amount either to the father or to the son. In the first place, it does not appear that either makes any such claim, and secondly, if they should do so, the contract with the father by the plaintiff would be an estoppel."

³ That an article clerk who performs all his master's business may, at leisure hours, work for wages with another attorney, was held in *Ex parte Blunt* (1771) 2 W. Bl. 764 (application to strike an attorney off the rolls as having been irregularly article to a second attorney).

In *Jones v. Linde British Refrigeration Co.* (1901) 2 Ont. L. Rep. (C. A.) 428, reversing s. c. (1900) 32 Ont. Rep. 191, the manager of a cold-storage company, and not the company itself, was held to be entitled to a commission which he had earned by effecting a sale of a cold-storage plant for the defendants, in pursuance of a contract of agency which he had entered into before his appointment to the managership of the other company. Moss, J. A., said: "I do not think the law is so extreme in the case of employees or servants as to prevent them absolutely from engaging their minds in other occupations out of the hours of their service, where the occupation is not inconsistent with or antagonistic to the master's business

work undertaken by him is such as will entail a conflict between his personal interests and his duty to his master. See § 2039, subsec. *b*, *post*. Nor can it reasonably be doubted, although there appears to have been no explicit judicial pronouncement to this effect, that a court would not suffer a servant to retain the benefit of work done outside of business hours, in any case where it appeared that he could not engage in the work without appreciably impairing his capacity for the performance of his regular duties.

In some kinds of occupations a servant is deemed by implication to undertake to devote the whole of his time and attention to his master's concerns. Such is the position of the captain and the crew of a sea-going vessel,⁴ and of domestic servants.⁵ There is also authority

or interest. In the case of this plaintiff, possessed of special skill in a branch of knowledge which his employment with the Toronto Cold Storage Company did not call upon him to devote to the furtherance of its business, there seems no good reason why he should not be allowed to profit by it, if in doing so he was not interfering with the company's business or prejudicing its interests."

In *Williams v. Crane* (1908) 153 Mich. 89, 116 N. W. 554, plaintiff became a tenant on defendant's farm for a year under an agreement for a share of the crops. During the year it was agreed that the relation of landlord and tenant should not exist, and that plaintiff should work the farm as an employee from the beginning of the tenancy. Plaintiff sued for the services rendered, and defendant sought a credit for the money earned by plaintiff working for third persons during the existence of the relation of landlord and tenant. It did not appear that any loss occurred to defendant by plaintiff's absence while working for others. Held, that the credit was properly refused. The report contains merely a short statement of the conclusion arrived at by the court, and the precise rationale of the decision is not apparent. Presumably the contract was construed as one which merely required plaintiff to give such time to his work as might be necessary to keep the farm in good order.

See also *Wallace v. De Young*, cited in note 2, *supra*.

⁴ That the right of a shipowner to the services of a shipmaster is regarded as being exclusive in its nature is shown by the language used by Lord Ellen-

borough in *Thompson v. Havelock* (1808) 1 Campb. 527 (see § 2038, note 1, *post*).

In an old English case it was laid down that, if the master of one ship takes a servant that belongs to the master of another ship, whatsoever wages he receives from the King upon his account shall be to the use of his first master, being acquired by the labor and industry of his servant. *Curreis v. Bridges* (1697) Comb. 450. Apparently this was a case of impressment for the navy. Compare the similar decisions regarding apprentices, cited in the last section, note 4.

⁵ In *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. (C. A.) 416, 64 L. T. N. S. 716, 60 L. J. Ch. N. S. 428, 39 Week. Rep. 433, it was taken for granted by Kay, L. J., that the contract of a domestic servant is to give up the whole of his time to his master's service. In fact it is manifest that, having regard to existing social conditions, the only possible view is that, in the absence of an express agreement, such a servant must be presumed to be subject to the control of his master, even at the times when he is not actually engaged in the performance of his duties. This presumption, it is apprehended, is equally applicable whether, during the period of the suspension of his work the servant remains on his master's premises, or goes abroad, with his master's permission, for recreation or any other purpose.

By the Codes of two of the American states it is provided: "The entire time of a domestic servant belongs to the master, and the time of other servants

for the doctrine that, in some other descriptions of employment, the obligations of the servant are equally extensive. But the decisions on the subject are not harmonious.⁶ In these instances the completeness of the master's control over the servant's time is in itself a sufficient reason for refusing to allow the servant to retain the benefit of work extraneous to his ordinary functions. But in some of the cases involving engagements of this character, reliance has also been placed upon the additional consideration that he could not engage in the given transaction without having "an interest against his duty."⁷

The decisions concerning the effect of an express stipulation on the part of a servant to give all his time to his employer are conflicting. By one court it has been laid down broadly that a servant who has

to such an extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day." Cal. Civ. Code, § 2013; S. D. Civ. Code, § 4973.

⁶ In *Leach v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 27, 56 Am. Rep. 408, where the stock agent of a railway company, employed at a specified monthly salary, had acknowledged on various pay-rolls the receipt of that salary "in full of all demands" for work done during regular and irregular hours in the service of the company, it was held that, prima facie, the agent sold to the company his entire time for this salary, and that the fact of his having rendered services as notary in and about the company's business would not make the company liable for the statutory fees therefor, unless there was evidence of some agreement, or understanding, or course of dealing between the parties, showing that the fees were not to be included in his salary.

In *Stevens v. Crane* (1889) 37 Mo. App. 487, it was laid down that, as the servant had been employed to perform such duties as might be required of him for the management of an estate, all his time could be required, if necessary for the performance of his duties, and that in an action for wrongful dismissal the jury should not be directed to allow in mitigation of damages only the wages earned within such time as would have been required for the performance of said duties. Such an instruction remitted the jury to mere conjecture. The position of the court is indicated by its remark that if the plaintiff's services had been, by the term of the con-

tract, confined to stated parts of days, weeks, or months, then it would be unreasonable that he should account for the value of that portion of his time which fell outside the limits which the defendant controlled by the contract.

See also *Stebbins v. Waterhouse* (1890) 58 Conn. 370, 20 Atl. 480, § 2040, note 1, *post*, where a similar employment was involved.

That a custom allowing traveling salesmen the privilege of acting as retail salesman during the holiday trade and retaining their earnings does not entitle a traveling salesman to retain the amount so earned, where his contract made no provision therefor, and the employer was not aware of the custom, was held in *Milligan v. Sligh Furniture Co.* (1897) 111 Mich. 629, 70 N. W. 133. It should be observed, however, that, abstracting the element of custom or usage, the servant's freedom of action is here assumed to be more circumscribed than is consistent with the theory upon which another Michigan case as to a commercial traveler, cited in § 2040, note 1, *post*, was decided. *Geiger v. Harris* (1869) 19 Mich. 209.

The stricter view of the obligations of this class of employees has also been adopted in another case cited in that note. *Seaburn v. Zachmann* (1904) 99 App. Div. 218, 90 N. Y. Supp. 1005. But the decision in *Jaffray v. King* (1870) 34 Md. 217 (see same note), is *contra*.

⁷ *Thompson v. Havelock* (1808) 1 Campb. 527; *Diplock v. Blackburn* (1811) 3 Campb. 43, 13 Revised Rep. 744; *Gardner v. M'Cutcheon* (1842) 4 Beav. 534.

made such a stipulation has "no legal or moral right to devote a part of it to an independent business of his own," irrespective of the question whether that business does or does not interfere with his service to his master.⁸ Another doctrine is that a provision of this tenor does not entitle the master to control the entire earning capacity of the servant, and that the right which it confers is exclusive merely in respect of the period during which it is understood that the servant is to hold himself in readiness for the performance of his duties. In this point of view, money paid to him for extraneous work done at any other time will belong to him, and not to his master, unless it was derived from a business or transaction which gave him an interest conflicting with his obligations under the contract.⁹ The latter of these

⁸ In *Jackson v. Seevers* (1902) 115 Iowa, 370, 88 N. W. 931 (action for wages and for an accounting), the court said that if the record before it were such as to enable it to determine what the personal earnings of the plaintiff were as a member of a stock partnership to which he belonged, it would have given the defendant the benefit of such earnings. But as it had been shown that the profits received by the servant from the stock-buying business were merely the returns from his investment, and the business was entirely carried on by his partner, the master was held to have no claim on the money thus accruing to him. The court relied upon *Mechem, Agency*, § 471, where the unqualified rule in the text is enunciated. The learned author cites, as one of his authorities, *Leach v. Hannibal & St. J. R. Co.* (1885) 86 Mo. 27, 56 Am. Rep. 408. But that was a case in which the exclusive right of the master was based upon implication. The other precedent cited is *Stansbury's Case* (1864) 1 Ct. Cl. 123. But this does not sustain the doctrine propounded. See § 2039, note 2, *post*.

A doctrine not less broad than that of the Iowa court was enounced in *Sumner v. Nevin* (1906) 4 Cal. App. 347, 87 Pac. 1105. There an employee of a real-estate broker, who had been hired under a contract which bound him to devote his entire time and attention to his work, entered into a second contract by which he became the agent for the sale of another person's land. Held, that whatever the employee received on account of his services as agent during the term covered by the first contract

belonged to the real-estate broker, and that the broker was entitled to an accounting in respect of the commissions received by him.

For other decisions embodying the same theory regarding the extent of the servant's obligations, see § 2040, note 1, (b), *post*.

⁹ In *Clarke v. Kelsey* (1894) 41 Neb. 766, 60 N. W. 138 (action to compel servant to account for profits of another business), the employee had agreed to take charge of the employer's business at a certain place, consisting of a toll-bridge, a hotel, and a stock of general merchandise, and, in consideration of a specified salary, "to give his whole time, skill, and attention to the business." After entering upon the discharge of his duties, the employee engaged, on his own account, in trading in certain articles which his employer had never handled, and also accepted the agency for a stage company. The extent of his obligation to his employer was thus defined by the court: "If all his time was necessary for the successful prosecution of the business, it was his duty to bestow it; otherwise not. While it is true that an agent has a perfect right to engage in an enterprise or business for his own benefit, when not in conflict with the interest of his principal, unless the business of the agency is such that it requires the agent's whole time and attention, he may not, however, engage in an enterprise on his own account of the same kind as that of his principal, nor will he be permitted to neglect his employer's business for his own. *Adams Exp. Co. v. Trego* (1871) 35 Md. 64."

theories is possibly the correct one. When considered with relation to the circumstance that, in most kinds of occupations, it is under-

The effect of the case cited is stated in § 2040, *post*.

It has been held that a contract by a bank cashier to give all his time to the bank does not entitle the bank to earnings of such cashier in a business entirely foreign to that of banking. Such a contract, it was declared, cannot be construed as meaning that all the servant's outside earnings were to belong to the bank. *Hillsboro Nat. Bank v. Hyde* (1898) 7 N. D. 400, 75 N. W. 781. The court observed: "They [i. e., the directors examined as witnesses] purport to give the whole agreement in their testimony, and yet not a word is said by them about earnings. The utmost scope of the contract, as they swear to it, is that defendant was to give all of his time to the bank. Such an agreement is widely different from that which plaintiff has set forth in its complaint. A contract to give all of one's time to the employer does not mean that outside earnings of the employee are to belong to the employer. The servant cannot devote himself to his own business at the expense of his master without violating his contract. But his personal earnings are his own. There is no evidence in the case that the defendant neglected his duties as cashier, in the performance of the work in which such outside earnings were made. . . . Under the contract, as testified to by Mr. Plummer, defendant could not engage in a banking business, over plaintiff's counter, for his own profit. The earnings of such work would belong to the plaintiff, not by reason of any special contract for earnings, but because they would be the earnings of the bank itself; the defendant being under obligations, through his contract, to give the bank all his time,—not to set himself up as a rival banker while actually engaged in the plaintiff's work. But such a case is not before us. Defendant, without neglecting his duties as cashier, acted as agent for others in the sale of real estate.—a business foreign to that of banking,—and in this way earned certain sums of money, which he is entitled to retain, unless it appears that he sold them in advance to the plaintiff. The evidence of only one witness comes near to establishing

the alleged contract. In view of the fact that the evidence of the other witnesses for plaintiff—one of them plaintiff's president, and the very man who appears to have done the talking at the meeting of the board of directors—negatives the existence of the contract set forth in the complaint, we are satisfied, considering the extraordinary nature of such an agreement, that the only witness who spoke of 'earnings' used the word in the same sense as the word 'time.' What his testimony means is that defendant was to give the bank the benefit of his whole time in and about the legitimate business of the bank. We do not think that he intended to say that it was understood that if defendant, in spare moments, wrote a book, or taught a night school, or sang in a church choir, the fruits of his extra toil on his own behalf should be swept into the tills of the bank. Taking all the evidence together, and construing it fairly in the light of known business usages, we think that it amounts to no more than this: That defendant should have no right to complain if plaintiff exacted of him exceptional labors in its banking business; that he would give the defendant all his time and energies in the endeavor to make profit for the plaintiff, however long might be the hours of work required, and without reference to the fact that the demands on him might be unreasonable, in view of the work required of their cashiers by other banks."

In *Atlantic Compress Co. v. Young* (1903) 118 Ga. 868, 45 S. E. 677, where an employee who had agreed to devote all his time to his work was sued for money earned by using the master's appliances for the performance of work for a third person, an instruction was held to be erroneous for the reason that it was in conflict with the rule that where an employee has bargained his time to his employer he has no right to appropriate any part of it to his own use without the consent of his employer. It is apparent, however, from the following passage in the opinion, that the actual scope of the decision is much narrower than this language, if taken literally, would indicate: "If the evi-

stood that employees are expected to work for a definite portion of the day only, a stipulation of this character becomes susceptible of two constructions. It would seem to be not unreasonable, therefore, to take the position that a servant should not be saddled with the consequences of an arrangement so onerous as one which involves a total surrender of his earning capacity, unless his intention in that regard has been expressed in clear and unambiguous language, or the na-

dence had shown satisfactorily that the employee in this case was not, during regular working hours, constantly occupied with duties he owed to his employer, a due regard for the obligations imposed upon him by his contract of employment would have required him to obtain the consent of his employer before he should undertake, for his own benefit, duties outside of his regular business."

In a recent Canadian case it was held that, if a servant does work in a capacity different from that to which his engagement relates, and does not use time which should be devoted to his master's business, or engage in competitive undertakings, he is not liable to pay to his master the earnings or profits received by him in respect of such work. *Sheppard Pub. Co. v. Harkins* (1905) 9 Ont. L. Rep. 504. It was considered to be absolutely clear from the evidence that the profits claimed by the plaintiffs were made "in independent transactions undertaken by the defendant as principal, and in no wise connected with or arising out of his employment by the plaintiffs." The case was accordingly declared not to be controlled by the doctrine which "requires agents to account for secret commissions and other profits and advantages derived by them from the transaction of the business of their principals, beyond the remuneration for which they have agreed to render their services." The principles which governed the rights of the parties were thus discussed by Anglin, J., in the judgment delivered for the court: "No doubt the rights of the master over the person, as well as the time and labor of his servant, were much more extensive formerly than they are to-day. Many of those rights which arose out of the feudal system of vassalage are inconsistent with modern ideas of human liberty and the inalienable freedom of citizenship. To apply in its pristine force even to the menial

servant of the present day the maxim, *Quicquid acquiritur servo acquiritur domino*, would shock the twentieth century mind. . . . The implication, in the case of a partner, of a covenant to do for the partnership all business within its scope in which he may engage, is not, in my opinion, to be extended to the case of a servant or agent, though he has promised to give to a particular undertaking of his employer exclusive service. It is a covenant implied from the nature of the partnership contract, which is in substance that the partners will do that class of business which is within the partnership undertaking for the partnership. The contract of the agent or servant is merely to do his employer's business for his employer's benefit. He may violate his contract, express or implied not to engage in any other business, or to devote his whole time and attention to his master's work, by undertaking other employment; but it is quite another thing to say that he must be deemed to have agreed that, if he does other business than that of his employer, it shall be on his employer's account or for his benefit. The right of the employer to the earnings or profits derived from such extraneous employment of his servant must, if it exists, rest upon something other than such an implied agreement on the part of the servant. . . . The covenant of an employee to devote his entire time to the undertaking of his employer must, moreover, receive a reasonable construction. It cannot, for instance, be deemed to require that the employee should give to the service hours of the day or night usually devoted to rest and recreation. It does impose upon him an obligation to employ diligently, in advancing that undertaking or business of his principal to which he has agreed to devote himself, during such hours as it is customary for men in positions such as his to work, all the time and ability he can bestow advantageously

ture of the employment is such that he may fairly be presumed to have agreed to such a surrender.

In cases where a servant continues to perform work after his term has expired, and at the same time renders services to another person by whom he has been engaged with the knowledge and consent of his original employer, but without any explicit agreement as to the ownership of the remuneration derived from the new position, the question whether he is entitled to retain that remuneration must be determined from the evidence as a whole.¹⁰

to his principal. Even during those hours of the day usually devoted to work of the kind for which he is engaged, the servant is not obliged by such a covenant to sit in idleness. *Nemo tenetur ad inutilia*. If he is unable to utilize his time for the benefit and advantage of his employer at that for which he is employed, he may, without becoming liable to account for benefits so acquired, make other use of it not inconsistent with the discharge of the duties to his employer which he has undertaken. To hold otherwise would be in effect to place the employee of the present day in a position little, if at all, better than that of the villein of former times. . . . Subject to what is said below as to competitive or rival business, even though he has promised to devote all his time and attention to a definite undertaking of his employer which he has been engaged to promote, a servant is not, in my opinion, bound to account to his master for profits or earnings made by devoting to other affairs time and energy that he has not agreed to devote to, or that could not be usefully expended upon, the master's undertaking. In other words, upon such a contract, fairly and reasonably construed, the servant's spare time is his own. *Wallace v. De Young* (1881) 98 Ill. 638, 38 Am. Rep. 108. But if he employs for his own purposes portions of the day usually devoted to such business as that for which he has been engaged, the onus is certainly upon him to furnish convincing proof that the time so spent was not required for and could not have been profitably used in that business of his master which has been intrusted to him."

¹⁰ In *Reid v. Macdonald* (1907) 4 Australian Comm. Rep. 1572, A, a manufacturer of refrigerating machinery, engaged B as manager of his business in

one of the cities where he had had an establishment. By the contract B was to devote his whole time and ability to his duties, one of those duties being the promotion of syndicates or companies which should purchase machinery from A. With the knowledge and consent of A, B promoted, towards the close of the term of his engagement, an ice-skating rink in another city, and was appointed consulting engineer of the concern. It was also arranged between the parties that B should, for a period which was not precisely defined, but which was expected to last until the rink was established, continue in the employment of A, and attend to his duties as manager as well as to the other project. One of the documents in evidence was a letter in which A wished B every success, and even declared that he would not take any shares in the company unless B became manager. In his capacity as consulting engineer of the rink company he was called upon to draw plans and specifications of machinery, prepare the contract for its supply, and superintend its erection. The tender of A for the work to be performed was accepted, and the machinery erected under the supervision of B, who received as his remuneration 2,000 paid-up shares. Held, that A was not entitled to claim these shares. Griffith, Ch. J., with whom concurred —, generally, took the position that, as the defendant was to be the manager of the new rink, it was extremely doubtful whether the promotion of that concern was a piece of business which he was to transact in behalf of the plaintiff. But, assuming that it was such a business, his employment would have terminated with the formation of the company. To the learned judge it appeared to be proved "that the shares in question were to be acquired by the defend-

In one case it has been held that the employer was not entitled to the commission of an employee who had been appointed postmaster.¹¹

2038. Same subject. Rights of master considered with reference to the fact that the work in question gave the servant an interest conflicting with his duty.—It is fully settled that whether the extraneous work in question was or was not performed at a time when the servant should have been engaged in, or holding himself in readiness to discharge, his duties, the master is in any event entitled to claim the money earned by the work, if it was of such a nature that it gave him an interest conflicting with his contractual obligations.¹ Even a custom prevalent in the business in which he was engaged will not be recognized by a court as a circumstance authorizing him to place himself in this situation, unless it is apparent that the master was aware

ant as remuneration for services rendered to the company, not for services rendered to the plaintiff, and at a time when he was detached from the plaintiff's service so far as necessary to enable him to enter into the company's service for that purpose." Isaacs, J., observed: "As a question of fact, I arrive at the conclusion that both plaintiff and defendant thoroughly understood and acted on the basis that the defendant in his capacity of consulting engineer of the company was completely severed from all relations with the plaintiff, and that both of them felt that a double relation was impossible, because the functions were incompatible."

¹¹ In *Bailey v. Sibley Quarry Co.* (1910) 166 Mich. 321, 129 N. W. 17, the plaintiff was employed at an annual salary by defendant as manager of its store, and was appointed postmaster, and kept the postoffice in the store, where it was looked after by him and his clerks, and the business conducted as a department of the store. In an action by him for his commissions, the court said: "The defendant's inquiry upon what theory plaintiff can claim the commissions leads us to the inquiry upon what theory defendant can claim them. The plaintiff, and not the defendant, was postmaster. The commissions belonged to the postmaster. How and when and by what right did defendant become entitled to them? Defendant claims to have been influential in securing the plaintiff's appointment, that it furnished a place in which to keep the office, and provided light, heat, and oc-

casional help, but, conceding it did all these, it would not thereby be entitled to the official salary of one of its employees because he was in its employ, if there were no agreement to that effect. The plaintiff may or may not be indebted to defendant for rent, heat, and light, but, if he were, that would not entitle it to retain plaintiff's salary as postmaster."

¹ In *Thompson v. Havelock* (1808) 1 Campb. 527, the plaintiff, the captain of a ship which a government officer had chartered as a transport, had stipulated that, in addition to the freight, a certain sum should be paid to him for his own benefit. It was held that he could not recover this money from the owner. Lord Ellenborough said: "Is it contended that a servant who has engaged to devote the whole of his time and attention to my concerns may hire out his services, or a part of them, to another? It would have been a different thing if the owner had been suing for this money; but I am clearly of opinion that at all events the present plaintiff has no right to it. Under this contract he must have been taken from superintending the defendant's ship; and I don't know how far it might go, if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty. I will assume that the plaintiff obtained as high a freight as possible for his owners, and that his services to government were meritorious: Still there would be no security in any department of life or of business, if servants could

of the custom, and contracted with reference to it.² For the purposes of the rule, it is immaterial whether the servant, when he earned the money, was working on his own account or for a third person.³

2039. Same subject further discussed.—*a. Statutory provisions, effect of.*—In a few of the American states the respective rights of the master and servant have been defined by statutory provisions, which are apparently intended to be declaratory of the common-law principles developed in the preceding section, and are presumably to be construed on that footing.¹

legally let themselves out in whole or in part. My opinion upon the subject is quite decisive."

²In *Diplock v. Blackburn* (1811) 3 Campb. 43, the master of a ship in a foreign port claimed to retain for his own benefit the premium received by him upon a bill drawn upon England on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use. But Lord Ellenborough held that the money belonged to the owner, and not to the captain, and stigmatized the usage set up as a usage of fraud and plunder. "What pretense," he says, "can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty."

In *Gardner v. McCutcheon* (1842) 4 Beav. 534, where an alleged custom of trade was relied upon, Lord Langdale made the following remarks: "I could not, even if it were uncontradicted, which it is not, pay much attention to it on the present occasion. The master of a ship is an agent bound to give all his time and attention to his principal; in this case the duty of the defendant as master was, when the ship was employed on a trading adventure, to act for the common benefit of the owners; and when the ship was freighted or chartered, to obtain freight on the best terms he could for the owners, free from all bias of separate interest in himself, or of leave given to himself by the charterers to trade for himself; and I think that it will be very difficult to support a custom which, if legal, as alleged, would entitle him to trade for himself separately, when it was his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own

interest in competition with the joint interest, an option to give the advantage to himself, whenever he pleased, without the knowledge of his co-owners, and without giving them notice of his proceedings in this respect; a custom also which would make it valid for a person in the relation of co-owner or partner, having complete control over the ship, which was partnership property, to employ it at the joint risk for his private benefit. I cannot, on the present occasion, assume that there is any such custom; I can well conceive that the master of a ship, undertaking a long voyage, and necessarily taking out provisions or private effects of some value, which may require change, may not be precluded from parting with those effects for others, and in that respect carrying on some trade; and if this were the sort of custom alleged, it would deserve more attention on this occasion; but the defendant claims something far beyond this; and taking all the evidence into account, I cannot rely on the alleged custom: and it appears to me that there are strong grounds for thinking that the wools were purchased with partnership property, or with money for which the defendant was accountable to the partnership, and that they belong to the partnership."

³*Sheppard Pub. Co. v. Harkins* (1905) 9 Ont. L. Rep. 504.

¹By § 1985 of Cal. Civ. Code, it is provided: "Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

The same provision is found in § 4954 of the Civil Code of South Dakota.

The civil servants of the Federal government in the United States are subject to the provision of the act of Congress, of 26th of August, 1842 (5 Stat. at L. 525, chap. 202, U. S. Comp. Stat. 1901, p. 1206, § 12), which declares that a person whose salary is fixed by law can hold no other office, and can receive no other or additional compensation for any service whatsoever. This statute prevents a civil servant to whom it is applicable from receiving additional compensation, even though the services in question were valuable and were rendered upon the assurance of the superior officer who employed him that he would be justly remunerated for them.²

b. Master's right to wages earned by servant whose services have been temporarily transferred with the master's consent.—In cases where the servant suspends, with his master's consent, the performance of his contractual duties, and transfers his services to a third person, the extent of the right of his original master to maintain an action for the wages earned by him while working for the third person depends upon the nature of the arrangement between the two employers.³ So far as services rendered in a civil employment are concerned, the only reported case which bears upon this question seems to be one which turned upon points of pleading.⁴ But the following

This provision was construed in *Burns v. Clark* (1901) 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12, where it was declared to have no application to acquisitions not coming within the scope or purpose of the employment. An employee was held to be entitled to retain possession of some gold which he had found while grading a site for a mill on government land. The court said: "Had the object of the grading been the acquisition of the ores to be extracted, the provision would no doubt apply, but the casual finding of gold by an employee in the course of an employment is in no way related to such an object, though doubtless an acquisition made by reason or cause of the employment cannot with propriety be said to have been by virtue of it."

² *Stanbury's Case* (1864) 1 Ct. Cl. 123 (clerk in the Department of the Interior appointed agent of the United States at the Industrial Exhibition in London); *Wilson's Case* (1865) 1 Ct. Cl. 206 (clerk in the General Land Office, with the consent of his superior, the Commissioner of the Land Office, was employed by the Clerk of the House of Representatives to prepare a map

of the public lands under a resolution of the House). In neither of these cases did the court refer to the general principles which regulate the rights of employer and employee apart from statute.

³ It is scarcely necessary to point out that no stipulation between the two employers can, without the servant's consent, affect the rights of the servant to look to his original master for the payment of his wages during the period covered by the contract.

⁴ In *Treswell v. Middleton* (1623) Cro. Jac. 653, the plaintiff declared in debt upon several retainers to do several sorts of work, and, among others, that the defendant should retain one J. S., the plaintiff's servant, to work for him and with him five days, *capiendo pro salario suo pro quolibet die 2s.* The defendant pleaded *non debet*, and upon judgment being given for the plaintiff error was brought. On behalf of the defendant it was urged that the action lay not for the master for the retainer of the servant to work with the defendant for five days: for it was not alleged that he did the service for his master, but for himself; and the retaining was

statement of the law, which is found in an English text-book of high authority, is apparently approved by one of the most eminent of American jurists: If the effect of that arrangement is to leave the original master still in control of the servant during the period of the substituted employment, "the inference would arise that he still considered the servant as his own, and did not intend to waive the benefit of his earnings. But if by previous agreement he were released from a proportionate amount of wages, then the contrary conclusion would be the more reasonable. If payment have been made to the servant in ignorance that he was the servant of another, probably in that case the employer would be discharged."⁵

c. Master's rights, when forfeited by failure to assert them.—The principle has been laid down that a person who is entitled to the services of another, and stands by and permits a third person to avail himself of those services, without interposing a claim or giving notice of his right, cannot maintain an action for the services.⁶ In the case cited, the services in question were rendered by a slave. But it is apprehended that the same conclusion would be proper where a free servant is concerned. It would at all events harmonize with the rule that an action cannot be maintained against a third person for harboring a servant, unless it is shown that the defendant knew of the existence of the contract of service.

d. Profits incidentally acquired by a servant while engaged in his duties.—In some instances it would seem that the right of a master to money or property acquired by a servant as an incident of the performance of the stipulated work may be referred simply to the consideration that the acquisition was a necessary or probable result of his being engaged in that work.⁷

e. Rights of master where the servant enlists in the Army or

of the servant for his own proper labor, and by a contract with him; and if it were the retainer of the servant by the command and appointment of his master, he ought to have shown that he retained the master, and not the servant; for then he ought to have counted accordingly, and he retained the master, who by himself or servant should work, etc. This contention prevailed, and the judgment was set aside. For the comments of Cockburn, Ch. J., upon the decision in *Morison v. Thompson* (1874) L. R. 9 Q. B. 480, 482, 43 L. J. Q. B. N. S. 215, 30 L. T. N. S. 869, 22 Week. Rep. 859, see § 2041, note 4.

⁵ This passage occurs in Mr. Lloyd's

note to Paley on Agency, p. 340, and is inserted by Judge Story in his work on Agency, § 421, note 1.

⁶ *Demyer v. Souzer* (1831) 6 Wend. 436 (son of a testator who had bequeathed a slave to his son-in-law permitted the slave to perform labor for the legatee without giving notice that he held a bill of sale of the slave).

⁷ Where one person employed another to pursue and capture a horse thief, and paid the expenses, it was held that, under the principle embodied in the maxim, *Qui facit per alium, facit per se*, the employer was entitled to the standing reward offered by the county for the apprehension and conviction of

Navy.—The effect of two American decisions, in which the rights of a father with regard to an enlisted son were involved, is that, where a servant enlists, either with or without his master's consent, in the Army or Navy, his master is not entitled either to the bounty money paid to the servant at the time of his enlistment, or to the wages or prize money subsequently received by him.⁸

The writer has not found any direct expression of opinion upon this point in the English reports. But, as already remarked, it seems reasonably certain from the language used by the judges in a case relating to the prize money of an apprentice serving in the Navy⁹ that they considered the master to be entitled to his ordinary wages, and a similar doctrine would probably be applied in dealing with the wages of a hired servant. If this surmise is correct, there is a conflict between the American and English courts.¹⁰

f. Right of master to the benefit of special knowledge possessed by the servant.—In one case it was held that, as the defendants, a firm of druggists, were entitled to the skill and services of the plaintiff, and as he was compensated therefor by the stipulated salary, a promise made by one of the partners to allow him a royalty for a compound for the preparation of which he owned the formula was not supported by a valuable consideration.¹¹

the thief. *Montgomery County v. Robinson* (1877) 85 Ill. 174. Contrast the ruling in *Burns v. Clark*, note 1, *supra*.

⁸In *United States v. Bainbridge* (1816) 1 Mason, 71, Fed. Cas. No. 14,497, Story, J., expressed the opinion that, as against his father, an infant enlisting in the Army or Navy of the United States was entitled to the pay, bounties, and prize money earned and acquired in the service.

On the authority of this case it was held, in *Caughy v. Smith* (1872) 47 N. Y. 244, that a father did not by taking out letters of administration for the estate of his son who had died after enlistment, ratify the contract of enlistment, in such a sense as to estop him from claiming damages from a person who had induced the son to make the contract, and aided him therein. The court said: "As a principal of his son as an agent, or of the defendant as an agent, the plaintiff could never, by any ratification of the contract of enlistment, have obtained or claimed the bounty paid to his son. Had he accompanied his son to the provost marshal's office, and there signed a consent

to his enlistment, the bounty money would not have become his. It would still have remained the property of the son who enlisted; and it was the son's to the exclusion of the parent or master. *Carsan v. Watts* (1784) 3 Dougl. K. B. 350; *United States v. Bainbridge* (1816) 1 Mason, 84, Fed. Cas. No. 14,497; *Kelly v. Sprout* (1867) 97 Mass. 169. As the plaintiff did not and could not obtain this bounty as principal, it cannot be said, merely from the fact that he has obtained it, that as principal he has originally authorized or subsequently ratified the contract. He obtained it in fact as an administrator, as an officer of the law, and, so far as appears from the case, he holds it as such, as the estate of his intestate."

⁹*Carsan v. Watts* (1784) 3 Dougl. K. B. 350. See § 2036, note 19, *ante*.

¹⁰For the cases as to the wages of an enlisted apprentice, see § 2036, note 17, *ante*.

As to the bounty money of an enlisted apprentice, see § 2036, note 20, *ante*.

¹¹*Lamar v. Russell* (1887) 77 Ga. 307, 2 S. E. 467.

g. Rights of masters under special contracts.—The rights of the employer and employed may sometimes depend simply upon the construction to be placed upon a special agreement regarding the disposition of the profits derived from certain work which it is understood that the latter is to perform outside the course of his regular duties, during the period covered by his engagement.¹²

h. Right of master to tips.—In a few cases it has been held that the employee is entitled to any gifts in the way of “tips” given, over and above the regular charge for the service rendered, which may be given to a servant by the patrons of the employer.¹³

Under the English workmen’s compensation act, “tips” are considered as a part of the weekly earnings in computing the amount of compensation to be awarded. See § 1833, *ante*.

2040. Performance of extraneous work, viewed as a breach of duty justifying dismissal of, or an action against, the servant.—As has already been observed (§ 2035, *ante*), the question whether in a given instance a servant was guilty of a breach of duty in undertaking certain extraneous work for another employer without the consent of his master depends upon considerations similar to those which are controlling in the cases reviewed in the preceding section. The cases bearing upon the subject are collected in the note below.¹

¹² B. was employed by S., as musical director of a band, under a contract which provided, also, that he should devote all his time to the furtherance of the business interests of B., and that the profits of the sale of all musical compositions made by S. during or prior to the period of employment should be divided between them. Held, that the estate of B., on termination of the contract by his death, was entitled to royalties accruing thereafter on sales of the compositions made during or prior to the employment. *Blakely v. Sousa* (1900) 197 Pa. 335, 47 Atl. 289.

¹³ *Zappas v. Roumeliote* (1912) — Iowa, —, 137 N. W. 935; *Polites v. Barlin* (1912) 149 Ky. 376, 41 L.R.A. (N.S.) 1217, 149 S. W. 828. Both of these cases were actions to recover the amount of the tips from the master to whom they had been inadvertently given by the servant.

¹ (a) *Duty of servant considered with reference to the question whether the master was or was not prejudiced by the extraneous work.*—That a traveling commercial agent does not commit a violation of duty justifying his dis-

missal by taking gratuitously orders for goods upon a house in whose service he has formerly been employed, if without prejudice to the interests of his employers, was held in *Geiger v. Harris* (1869) 19 Mich. 209. The court said: “The claim of the plaintiffs in error [*i. e.*, that the instruction given was erroneous] is placed upon the assumption that an agent employed as Harris was, is during the agency so bound to his employers that all of his time belonged to them, and all of the profits and fruits of his labors or occupations, of whatever kind, belonged to them, and not to him, so that any use of his time for any but them is a violation of duty. This is a doctrine that cannot be admitted in regard to free persons. The charge of the court below was correct, and the rule laid down is sensible and fair. An agent violates his duty if he neglects to use all reasonable and thorough diligence to further the interests of his employers. He also violates it still more plainly by doing or furthering any business which can in any way hinder or compete with theirs. But there must be seasons of leisure, and there may be

The circumstances under which a court of equity will restrain a servant from giving his services to a third party during the period covered by his contract are discussed in chapter XII., *ante*.

circumstances under which their work cannot be done. And in doing their work, he may find it profitable for them to secure bargains or advantages by civilities and services which can in no way prejudice them. They have no claim against him except for faithful service. In everything else, subject to this, he is his own master, and may do what he pleases, so long as they are not prejudiced." This decision seems to be essentially inconsistent with the later decisions by the same court in *Milligan v. Sligh Furniture Co.* (1897) 111 Mich. 629, 70 N. W. 133 (see § 2037, note 6, *ante*).

Where, during the term of the employment, the employer prevented the employee from working under the contract, the fact that the latter devoted a small portion of the period to other work, which did not interfere with his efforts on the former's behalf under the contract, was held not to constitute such a breach of contract by the employee as would preclude his recovery of salary accrued. *Stone v. Bancroft* (1902) 139 Cal. 82, 70 Pac. 1017, affirmed on rehearing in (1903) 139 Cal. 78, 72 Pac. 717.

In *Jaffray v. King* (1870) 34 Md. 217, J., a dry goods merchant doing business in New York, engaged K., a resident of Baltimore, to act as salesman for him in that city, for a certain number of months, at a fixed monthly salary. Before the expiration of the term for which he was engaged, K. was dismissed on the ground that he had violated his contract by selling dry goods for other firms. The court thus explained its reasons for holding the dismissal to have been wrongful: "It is not an agreement of hiring, by which, as for a menial employment, the master or employer is entitled to the entire time and services of the servant or employee in any service he may choose to dictate, for stipulated wages, but a contract by which the plaintiff became the defendants' agent for special purposes, and with limited powers, that is, to sell by sample and promote the sale of their goods, and increase their business connections in a particular and distant market. In the discharge of

that duty, he was bound to serve them in good faith and to the extent of his ability; but if doing this did not require his whole time, he could, without violating his engagement with them, occupy the remainder in any other pursuit he might deem advantageous to himself, provided it was not inconsistent with his contract, not detrimental to their interests, and did not impair the value of his services to them as salesman of their goods in that market."

On the other hand it has been held that, under a written contract by the terms of which one of the parties thereto employs the other party as a traveling salesman at a salary of \$25 per week and traveling expenses, for a term of six months, the employer is entitled to the exclusive service of the employee during the continuance of the contract, or of a concurrent or collateral agreement in respect thereto. *Seaburn v. Zackmann* (1904) 99 App. Div. 218, 90 N. Y. Supp. 1005.

In an action by an employee for breach of contract of his employer in discharging him, evidence that plaintiff engaged in other business is not sufficient defense, where the contract does not exclude him from engaging in other business, and such business does not interfere with the employer's business. *Brownell v. Ehrlich* (1899) 43 App. Div. 369, 60 N. Y. Supp. 112.

In *Glaser v. National Alumni* (1906; Sup. Ct.) 97 N. Y. Supp. 984, where a canvasser for subscriptions to books, whose contract bound him to render exclusive services to his employer, had done work for another employer, it was held that his employer was justified in discharging him without assigning any reason therefor, and that the burden of proving an alleged modification of the contract, permitting the plaintiff to serve another employer, rested upon the plaintiff.

In one of the lower New York courts it has been held to be error to instruct a jury, without qualification, that a master has a right to discharge a servant on the ground that he did work for another person. *Freide v. Weissenthanner* (1899; N. Y. City Ct.) 57 N. Y. Supp. 831.

In *Duckett v. Poole* (1890) 34 S. C. 311, 13 S. E. 542, it was held not to be error to instruct the jury "that it was not necessary, in order to create the relationship of master and servant, that one receiving a share of the crops in lieu of wages should be bound under his contract to render his exclusive personal service to his employer." The court said that the trial judge had correctly explained that the term "exclusive" was "not to be construed as preventing the servant from devoting a part of the time covered by his contract to his own purposes, or even to the service of another, provided he is under an obligation to devote so much of that time as may be necessary to perform properly and in the usual way the service for which he is employed by the master. For example, . . . one who is employed to serve another, even under a written contract, as a farm laborer, for a given period of time, is not debarred from making baskets for his own use or profit at night, when his services as a farm laborer are not expected or required; and his doing so would be no violation of his contract with his master,—the test being that he is required to render such service and devote such time as is usual and necessary to perform the work for which he is employed to the master exclusively, and he cannot, without a breach of his contract, devote any of the time in which he ought to be engaged in the service for which he is employed to the service of anyone else."

In *Morrison v. Ogdensburgh & L. C. R. Co.* (1868) 52 Barb. 173, the *ratio decidendi* was that the plaintiff while in the defendant's employ could accept no employment hostile to the interest of his employer, and that his having done so, and received remuneration therefor, afforded sufficient ground for his discharge.

In *Stoney v. Farmers' Transp. Co.* (1879) 17 Hun, 579, the plaintiff, as "freight salesman" on one of the defendant's boats, attended to that part of its business which consisted in selling on commission produce collected from farmers along its route. Held, that he had been properly dismissed for having engaged in transactions of the same description as those which fell within the scope of his duty.

To act as agent for a rival insurance company is a breach of an insurance

agent's agreement "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of his employer," and is sufficient justification for his dismissal. *Eastmure v. Canada Acci. Assur. Co.* (1895) 22 Ont. App. Rep. 408, affirmed in (1896) 25 C. S. C. 691.

In *Cameron v. Gibb* (1867) 3 Scot. L. R. (Ct. of Sess.) 282, the circumstance that the servant had, without his master's knowledge, carried on business for his own benefit during service, was viewed as one of the elements in the computation of damages in an action against him for wrongfully abandoning the service.

(b) *Specific agreements defining extent of servant's obligations, effect of.*—In an action to recover damages for the defendant's failure to perform his contract, it was held that a contract to labor on an orange grove for a year, at a salary for a year, with quarterly payment, besides house rent, fuel, and necessities for the table, requires the employee to give his services for the whole of the time to his employer. *Stebbins v. Waterhouse* (1890) 58 Conn. 370, 20 Atl. 480. The principle upon which the court proceeded was that, "where the pay is constant, the inference is well nigh irresistible that the service is likewise to be constant."

An agent who, having contracted to devote his entire time and energy to the business of his principal, gives a considerable portion of his time to other lucrative business, and absents himself from his place of business for two months in the year, commits a breach of the contract. *Ehrlich v. Aetna L. Ins. Co.* (1884) 15 Mo. App. 579.

The propriety of the discharge of a traveling salesman who had expressly agreed he would devote his whole time and attention solely to the interests of his employers was held to be established by evidence that, for a part of the time covered by the contract, he had been engaged in taking orders for another person for the sale of his goods. *Orr v. Ward* (1874) 73 Ill. 318, 320.

In one case the doctrine enounced is that, while an employee who has bargained all of his time to his employer has no right to appropriate any part thereof to his own use, yet where the work at which he is employed has been suspended, a temporary absenting of himself, where no injury results to the

2041. Rights of the master in respect of unlawful profits obtained by the servant while engaged in the discharge of his duties.—a. General rule stated.—In its most general form the rule which is now to be

employer, will not justify his discharge by the employer. *Vidalia Compress & Power Co. v. Mathews* (1907) 1 Ga. App. 56, 57 S. E. 902.

An assistant architect who has agreed to devote his whole time and services to the interest of his employer does not, by performing a small amount of work for other parties during holidays and at night, render himself chargeable with a substantial breach of the contract. *Hermann v. Littlefield* (1895) 109 Cal. 430, 42 Pac. 443.

That a servant who enters into a contract to devote his entire time and attention to the interests of his master, and to engage in no other business, is liable in damages for the breach of that contract, was conceded by the court, *arguendo*, in *Sheppard Pub. Co. v. Harkins* (1905) 9 Ont. L. Rep. 504.

In *Kelly v. London Pavilion* (1897) 77 L. T. N. S. (Q. B.) 215, the plaintiff, K., a music-hall *artiste*, agreed to perform, for ten weeks certain, every evening at the time notified her employers, in "her usual entertainment as mimic" in one of her contracts, "as singer and mimic" in the other, subject to the following conditions (*inter alia*) viz., "that the said *artiste* shall not perform before nor during this engagement at any theater, music hall, club, concert, or place of entertainment within one mile from the said music halls respectively." At the end of the contract was this clause: "In the event of the above-named *artiste* not observing these conditions in every respect, the company shall have the option of canceling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club, one Sunday evening, within a mile of these music halls, by invitation. Nobody except members and their guests were admitted to this club, and no admission money was paid. At this concert she sang a song and danced for a few minutes. During the ensuing week the contract was canceled. In action for wrongful dismissal, *Hawkins, J.*, held, in a considered judgment, that the word "engagement" did not include Sundays, that day in such contracts being a *divine*

non; that the performance was not within the meaning of the word "perform" as contemplated by the parties, for the plaintiff did not use her powers of mimicry, that, although singing was included in one contract, singing before a private audience, such as the present case, was not a performance.

In 1846 the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service by a notice, to expire on March 25th, 1850. On January 7th, 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-day, and to be at once discharged, in order that he might go to London, and remain there until he could meet with another engagement. To this letter the plaintiff replied, assenting to the defendant's proposal, saying: "Of course I should have expected your services if you were in Amersham, but as you request me at once to pay your salary to Lady-day, in order that you may go to town until you meet with another engagement, I consent to your request;" and on the following day the plaintiff asked the defendant whether, if he paid him up to March 25th, he intended going to town and remaining there till he got another engagement, to which the defendant answered that he did; whereupon the plaintiff said, "On these conditions I am prepared to pay your salary at once up to Lady-day; but if you remain in Amersham, I shall expect your services,"—and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice. Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels v. Charsley* (1851) 11 C. B. 739.

considered may be stated thus: A servant who, without his master's knowledge and sanction, procures from a transaction in which he is acting as his master's agent a personal advantage not provided for, nor contemplated by, the contract of hiring, is guilty of a breach of duty.¹

b. Remedies of the master against the servant in equity.—If at the time when the facts are discovered the servant has already obtained possession of the fruits of his misconduct, the master may compel him to account, as a trustee, for the money or other valuable interest which he has acquired by engaging in the prohibited transaction.² But such

1 "There can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act, whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it." Bowen, L. J., in *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L. R. 39 Ch. Div. 339, 363.

In *Hay's Case* (1875) L. R. 10 Ch. 593, James, L. J., remarked that the whole current of authority sustained the doctrine that "no agent can, in the course of his agency, derive any benefit whatever without the sanction or knowledge of his principal."

An undisputed equitable principle is that, if an agent employed to purchase an estate becomes the purchaser himself, he is to be considered a trustee for his principal. *Lees v. Nuttall* (1829) 1 Russ. & M. 53, Tamly, 282, affirmed in (1834) 2 Myl. & K. 819.

In a case in the court of Queen's bench it was laid down that "the profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belong to the master or principal." *Morison v. Thompson*

(1874) L. R. 9 Q. B. 480, per Cockburn, Ch. J., (p. 483), who quotes with approval the following statements of the rule by two eminent text writers:

"It may be laid down as a general principle that, in all cases where a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." Story, Agency, § 211.

"Not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. If an agent who has purchased goods according to order sell them again to advantage, with the view of appropriating the gain to himself, although he should have answered the loss, if any, yet his employer is entitled to the profits." Paley, Principal & Agent, p. 51.

See also, to the same effect, Evans, Agency, pp. 287, *et seq.* Mechem, Agency, §§ 469, 470.

² In *Massey v. Davies* (1794) 2 Ves. Jr. 317, it was decreed that the manager of a mine who was to have no emolument beyond his salary should account for a profit made by a clandestine sale of timber to his employer on his own account. Discussing the contention that if a man in breach of trust charges to the person who employs him more than he ought to have charged, the person so injured cannot recover it, either by an action for money had and received, or by a bill in equity, but ought to recover damages in an action for breach of the agreement, Lord Arden said: "It is clear, if a person makes any profit by being employed contrary

a suit is regarded as being one which is founded on a breach of duty, or a fraud by a person who is in the position of a trustee, and not one which is based on the theory that the master is seeking, as a *cestui que trust*, to recover property which was his own before any act wrongfully done by the trustee. The relation between the master and the delinquent servant is merely that of creditor and debtor, and the money or other valuable interest which has been transferred to the servant by the other participant in the transaction is not deemed to be the property of the master before a final judgment against the servant has been rendered. Accordingly, where a servant employed

to his trust, the employer has a right to call back that profit. . . . It is admitted that if a servant charges his master with more than he actually paid, the master may recover in an action, or bill, if a bill would lie at all; but it is contended it would not. How am I to prevent such frauds as these, but by giving the relief I am now called upon to give? Where a man undertakes to buy for me in the most beneficial manner what my colliery shall want, can it be possible that I can trust him to sell those articles to me himself? The clearest evidence is necessary to show consent. It is opening a door to a monstrous fraud."

In *Morison v. Thompson* (1874) L. R. 9 Q. B. 480, 484, Cockburn, Ch. J., referred to this case as embodying the doctrine that "the profits directly or indirectly made in the course of or in connection with his employment by a servant or agent, without the sanction of the master or principal, belong absolutely to the master or principal."

In *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L. R. 9 Ch. Div. 339, where the manager of a company contracted for the construction of certain fishing smacks, and, unknown to his employers, took a commission from the shipbuilders on the contract, Cotton, L. J., said that the question to be decided was "not whether the company could directly have claimed this sum, but whether, when their agent has received this profit in respect of a contract which he had entered into on behalf of the company as their agent for goods supplied to the company, the company are not entitled, as against their agent, to claim that money. In my opinion they are. It is a profit arising from a contract which he, on the part

of the company, entered into in consequence of the supply to the company by his order of a particular quantity of ice. It was said that he was entitled under the articles to enter into contracts and business with the company. He was so, but that, in my opinion, did not justify him, when contracting in behalf of the company, to put into his own pocket a profit obtained simply and entirely in consequence of the goods being supplied under that order to the plaintiff company."

Where a confidential employee of the lessee of a theatre, who, from his position, was well acquainted with the profits of his employer in the use of the building, and who knew, some months before the old lease expired, that the latter was desirous of renewing his lease, offered privately to lease the theatre of the owner, proposing to give a larger rental than was reserved in the old lease, and denied to his employer that he was competing with him for the lease, but in fact did procure a lease to be made to himself, it was decreed that the employee should hold the lease as a trustee for his employer. *Davis v. Hamlin* (1883) 108 Ill. 39, 48 Am. Rep. 541.

Plaintiffs, as warehousemen, were occupying premises of which the lease was about to expire, and were negotiating with the lessor for a renewal at a reduced rental. Defendant A. was their clerk or agent, and had access to their books and papers, and knowledge of their business, and pending the plaintiffs' negotiation, without their knowledge, applied to the lessor and obtained a lease of the premises for himself and the defendant R., who had notice of the facts. Held, that it was error, in an action to compel the transfer of the

to buy certain materials used in his master's business received, under a corrupt bargain, from one of the persons with whom he dealt, certain sums by way of commission, a portion whereof he invested, and the master brought an action against the servant to recover the moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof, the court refused to grant either an injunction to restrain the defendant from dealing with the investments, or an order directing him to bring the moneys and the investments into court.³

lease, to refuse an application for an injunction *pendente lite* to restrain the defendants from proceeding to recover the premises. *Gower v. Andrews* (1881) 59 Cal. 119, 43 Am. Rep. 242.

In *Morrison v. Ogdensburgh & L. C. R. Co.* (1868) 52 Barb. 173, the court recognized the principle that a salaried purchasing agent of a railroad company could not take a commission from the vendor of property purchased upon his advice by his principal, and hold it as against that principal, and that the undertaking of such an agent is to buy in the most beneficial manner for his principal, and that it is contrary to his duty and trust to be himself the seller, unless it be so understood between him and his principal.

In *Anonymous* (1684) Skinner, 149, it was stated by Lord Keeper North that Lord Hide had ruled in *Vandervaldy and Barry*, that where a factor smuggles goods into a foreign country without paying the customs duty, and yet sets them down to his master as paid upon account, chancery would not relieve, as the factor had ventured his life. But the Lord Keeper said he was not satisfied with this decision, because the factor ventured his master's goods as well as his own life. The decisions in *Smith v. Oxenden* (1664) 1 Ch. Cas. 25, and *Knipe v. Jesson* (1667) 1 Ch. Cas. 76, were to the same effect as the ruling in *Vandervaldy and Barry*.

In a case where the master's goods had been smuggled into England, it was held that a usage that factors should have the benefit of the customs themselves was not good, being grounded on a fraud. It was accordingly decreed, in a suit for an accounting, that the servant should answer whether he paid the customs or not. *Borr v. Vandall* (1664) 1 Ch. Cas. 30, Nelson, 87.

The writer is not aware of any recent case that throws light upon the point involved in these decisions. But it may perhaps be assumed that a modern court of equity would attach no importance to the considerations that the servant had run certain risks in smuggling, and that the circumstances would be regarded as falling within the scope of the general principle stated in the text. A case in which the master unsuccessfully resorted, under similar circumstances, to an action at law, is cited in note 4, *infra*.

³*Lister v. Stubbs* (1890) L. R. 45 Ch. Div. (C. A.) 1. In the lower court Stirling, J., said: "It seems to me that the decision in *Morison v. Thompson* [see note 4, *infra*] which I assume to apply, does not settle the question I have to decide. I assume that the money could be recovered as money had and received to the use of the plaintiffs at law; but it seems to me that it is not a necessary consequence that the plaintiffs in this case could follow the money. It is not true as a general proposition that, in every case in which an action for money had and received will lie, the money can be followed in the hands of the defendant." In the court of appeal, Cotton, L. J., said: "In my opinion this is not the money of the plaintiffs, so as to make the defendant a trustee of it for them, but it is money acquired in such a way that, according to all rules applicable to such a case, the plaintiffs, when they bring the action to a hearing, can get an order against the defendant for the payment of that money to them. That is to say, there is a debt due from the defendant to the plaintiffs in consequence of the corrupt bargain which he entered into: but the money which he has received under that bargain cannot, in view

c. —*at law*.—The nature and rationale of the legal remedy open to the master has been thus explained by Cockburn, Ch. J., in a leading case:

"The result of these authorities is that, whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer. This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff; it was actually in his hands, subject to an immediate duty to hand it over to his employer. Under such circumstances the money, being the property of the employer, can only be regarded as held for his use by the agent, and must consequently be recoverable in an action for money had and received."⁴

which I take, be treated as being money of the plaintiffs [the vendors of the material], which was handed by them to the defendant to be paid to Messrs. Varley in discharge of a debt due from the plaintiffs to Messrs. Varley on the contract between them. When the facts are ascertained, the plaintiffs will have the opportunity of setting aside the contract altogether and returning the stuffs, or, without setting aside the contract, of suing Messrs. Varley for the money which they have fraudulently handed over to the defendant." Lindley, L. J., referring to the position of the defendant, said: "I apprehend that he is liable to account for it [the commission] the moment that he gets it. It is an obligation to pay and account to Messrs. Lister & Co., with or without interest, as the case may be. I say nothing at all about that. But the relation between them is that of debtor and creditor; it is not that of trustee and *cestui que trust*. We are asked to hold that it is—which would involve consequences which, I confess, startled me. One consequence, of course, would be that, if Stubbs were to become bankrupt, this property acquired by him with the money paid to him by Messrs.

Varley would be withdrawn from the mass of his creditors, and be handed over bodily to Lister & Co. Can that be right? Another consequence would be that, if the appellants are right, Lister & Co. could compel Stubbs to account to them, not only for the money, with interest, but for all the profits which he might have made by embarking in trade with it. Can that be right? It appears to me that those consequences show that there is some flaw in the argument. If, by logical reasoning from the premises, conclusions are arrived at which are opposed to good sense, it is necessary to go back and look again at the premises, and see if they are sound. I am satisfied that they are not sound,—the unsoundness consisting in confounding ownership with obligation."

⁴ *Morison v. Thompson* (1874) L. R. 9 Q. B. 480. There the plaintiff authorized defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of £9,000, but eventually the ship was purchased through defendant for £9,250. Prior to the sale an arrangement had been made between the vendor and a broker, S., that if S. could sell the ship

d. Liability of the third person who participated in the wrongful transaction.—A third person who agrees to pay a secret commission to a servant may be compelled to surrender to the servant's master

for more than £8,600, he might retain for himself the excess; and it was arranged between S. and defendant, without the knowledge or sanction of plaintiff, that defendant should receive from S. a portion of such excess; and accordingly defendant received £225, part of the excess over £8,500. On discovering this the plaintiff brought an action for money had and received for the £225. In addition to the above facts, the jury also found that defendant was the agent of plaintiff to purchase the ship as cheaply as she could be got, and that plaintiff could have got her cheaper, but for a corrupt arrangement between the vendor and S. Held, that the action would lie. It was contended that the only form of action maintainable, if at all, under the circumstances, against the defendant, was an action to recover damages for breach of duty; that in such an action the amount received by the defendant from S. would not necessarily be the true measure of damages; and that it could not be regarded as the money of the plaintiff, or as received for his use. It was contended, further, that at the utmost the defendant could only be regarded as trustee for the plaintiff of the money in question, and that, being only entitled to it in equity, the plaintiff could not maintain an action to recover it at law. Chief Justice Cockburn observed that his contention as to the form of action proceeded mainly upon the authority of a note of Messrs. Hargrave and Butler, in their edition of Coke upon Littleton (Co. Litt. 117a, note 1), in which the learned editors, after discussing the question as to the right of a master to the earnings of his apprentice or servant, proceed to say: "Some of the cases go so far as to give the master a right to the wages or earnings, whether the service [that is, to a third person] is performed by the apprentice with or without the master's license; and even though the earnings accrue in a trade or service different from that to which the apprentice is bound." They add: "Independently, too, of authority, the master's proper remedy in

all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action, either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer than a right to the profits accruing from it." Discussing this theory, the learned Chief Justice said: "The case which seems to have suggested their observation as to the form of action is a case of *Treswell v. Middleton* (1623) Cro. Jac. 653, in which, on error from the common pleas, it was held that a declaration for work and labor done by a servant must state it to have been done by the master or on his account. But this evidently proceeds on the ground merely that there is in such case no privity of contract between the master and the person employing his servant; and the case by no means justifies any doubt as to the right of the master, as between him and his servant, to the earnings of the latter; and certainly is no authority that, if the earnings have been received by the servant, the master may not sue for them as money received to his use. The remaining cases cited in the note [*viz.*, *Barber v. Dennis* (1704) 6 Mod. 69; *Anonymous* (1701) 12 Mod. 415] directly support the conclusion that whenever the earnings acquired in the service of a third person have reached the hands either of the servant or the master, they must be regarded as belonging to the master."

The doctrine laid down in this case was subsequently assumed by the court of appeal to be correct. *Lister v. Stubbs* (1890) L. R. 45 Ch. Div. 1. (See note 3, *supra*.)

The principle that a servant who takes a bribe from a third person, whether he calls it a commission or any other name, "for the performance of a duty which he is bound to perform, must give up to his master whatever he has by reason of the fraud received beyond his due," was also applied in

any profits which he may derive from the fraudulent transaction.⁵ On the other hand, the third person clearly cannot be sued by the servant himself on an agreement of this character. "When a bribe is given, or a promise of a bribe is made, to a person in the employ of another, by someone who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agree-

Salford v. Lever [1891] 1 Q. B. (C. A.) 168, 60 L. J. Q. B. N. S. 39, 63 L. T. N. S. 658, 39 Week. Rep. 85, 55 J. P. 244.

In *Rogers v. Boehm* (1799) 2 Esp. 702, one of the cases relied upon in *Morison v. Thompson*, Lord Kenyon ruled at nisi prius that interest made by an agent by the use of his principal's money belonged to the principal, and might be recovered by him in an action for money had and received.

In an action at law it was held that a factor, and not his master, should have the benefit of the duty saved by smuggling goods into a foreign country, for the reason that it was due from his master, and ought to have been paid, and that therefore he could not make a title to it against one who had the possession, that being sufficient against all persons but against him who had the very right, and that the nonpayment in this case was at the peril of the factor. *Boulton v. Arlson* (1698) 3 Salk. 235. But at the present day this decision would probably not be followed, any more than the rulings of the court of chancery to the same effect which are cited in note 2, *supra*.

In *Concord R. Co. v. Clough* (1870) 49 N. H. 257, a conductor of the plaintiff, whose duty it was to sell tickets issued by the plaintiff, purchased for his own profit, joint tickets issued by other companies, under a contract with the plaintiff, entitling the holder to a passage on its line, and sold these tickets to passengers who would otherwise have bought the tickets intrusted to him for sale. The plaintiff derived a larger profit from its own tickets than from the joint tickets issued by other roads. The conductor bought and sold the joint tickets with the knowledge and consent of the superintendent of the Concord Railroad, but the corporation and its directors had no actual knowledge of it. Held, that the plaintiff could recover of the conductor in assumpsit for money had and received,

the profits made by him in thus buying and selling the joint tickets. The court said: "The superintendent's knowledge and consent do not justify the defendant's acts in purchasing and selling the 'joint tickets.' In that transaction the defendant was competing with and injuring the business of his employer. If, in the absence of any statement on that point, we are to infer that Mr. Gilmore had all the authority usually conferred upon railroad superintendents, still it is not within the ordinary authority of such officials to empower employees of the road to make use of their position as employees to compete with and injure the business of their employer. The purchase and resale of these 'joint tickets' constituted a breach of trust, and the defendant is chargeable for the profits just as he would have been for profits made by speculating with money received for fares. In equity and good conscience, these profits are so much money had and received to the defendant's use."

⁵"Not only the servant acting contrary to his trust, but a man who, knowing the servant was guilty of a breach of trust, entered into the transaction with him, would be answerable." *Massey v. Davies* (1794) 2 Ves. Jr. 317.

In *Salford v. Lever* [1891] 1 Q. B. (C. A.) 168, it was held that a municipality might recover from a dealer the additional price which he had charged for coal supplied to the city gas works, the manager of which had accepted a bribe of 1s. on every ton sold. Lord Esher said: "Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received."

ment is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be." ⁶

e. Breach of duty good cause for discharging the servant.—The breach of duty committed by a servant, who secures for himself clandestine profits in the course of a transaction in which he represents his master is a good ground for discharging him. ⁷

⁶ *Harrington v. Victoria Graving Dock Co.* (1878) L. R. 3 Q. B. Div. 549, per Cockburn, Ch. J., p. 551, 47 L. J. Q. B. N. S. 594, 39 L. T. N. S. 120, 26 Week. Rep. 740. In that case the defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done.

In *Smith v. Sorby*, a similar case decided at the same time (see [1875] L. R. 5 Q. B. Div. 552), the law was thus stated by Cockburn, Ch. J.: "It is unnecessary to decide whether the secret payment of a gratuity to an agent by the party with whom he is authorized to negotiate on behalf of his employer, supposing that it had no effect at all on the mind of the agent, so as to induce him to make an agreement less beneficial to his employer than he might otherwise have the opportunity of making, will vitiate the contract made by an agent under such circumstances. It is enough, for the decision of the present case, to say that, in my opinion, if a party with whom an agent is negotiating on the part of another agrees to give or does give the agent a secret gratuity, and that gratuity does influence the mind of the agent, directly or indirectly, in assenting to anything

prejudicial to his employer in making the contract, the contract is vitiated."

⁷ In *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) L. R. 39 Ch. Div. 339, the facts of which are stated in note 2, *supra*, Cotton, L. J., in discussing the suggestion that, if the court should hold that the manager had been properly discharged, it would be laying down new rules of morality and equity, said: "In my opinion, if people have got an idea that such transactions can be properly entered into by an agent, the sooner they are disabused of that idea the better. If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger. I do not, however, rely on that, but what I say is this, that where an agent enters into a contract on behalf of his principal, and, without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to his employer, whether a company or an individual, and whether the agent be a servant or a managing director, power and authority to dismiss him from his employment as a person who by that act is shown to be incompetent of faithfully discharging his duty to his principal."

B. INVENTIONS OF EMPLOYEES.

2042. Rights of employers and employees considered without reference to the patent laws.—Abstracting the element of the effect of the patent laws, the respective rights of an employer and employee with reference to the discoveries of the latter are determined by the application of principles similar to those discussed in the foregoing sections which deal with the general question of the extent of an employer's interest in things acquired or produced by the exercise of the mental or bodily powers of an employee. See preceding subtitle. Accordingly, an employer is entitled to the benefit of all the discoveries of his employee, which have a direct and immediate connection with the work which the latter was engaged to perform, and were made during that part of the day which he was bound to devote to the discharge of his contractual duties.¹ The right of the employer in this regard is especially clear, where it is shown not only that the discovery in question was made during the working hours of the employee, but that the employer's materials and machinery were being used under the employer's direction for the avowed purpose of making such a discovery.² A custom which would give to an employee work-

In *Bulfield v. Fournier* (1895) 11 Times L. R. (C. A.) 282, the court laid down the rule that an employee is not entitled to anything more than his stipulated commission, and held that the fact of the plaintiff's having made certain undisclosed profits by not crediting his employer with the discounts allowed on certain orders given on the employer's account was a good cause of dismissal.

¹ That a calico printer was entitled, after having discharged his head color-man, to the book in which that servant had entered the processes for mixing colors during his service, although many of the processes were the invention of the servant himself, was held in *Makepeace v. Jackson* (1813) 4 Taunt. 770. This was an action of trover to recover possession of the book. But the following passage from the judgment of Chambre, J., seems to justify a citation of the case as an authority for the general principle formulated in the text: "The master has a right to something beside the mere manual labor of the servant in the mixing of the colors; and though the plaintiff invents them, yet they are to be used for his master's benefit, and he

cannot carry on his trade without his book."

It has been held that secret processes and compounds invented by an employee of a firm, in pursuance of an employment for that purpose, became the property of the firm without an express assignment, and that he may be compelled to account for profits derived from manufacture and sale thereof on his own account. *Baldwin v. Von Micheroux* (1893; Sup. Ct.) 5 Misc. 386, 25 N. Y. Supp. 857.

² In a case involving the obligation of an employee to disclose a secret process discovered by him under such circumstances the court remarked: "Independently of any special contract to that effect, the resulting discovery was just as much . . . [the employing company's] property, as if, instead of being the formula of a secret process, it had been a material product; so that the defendant in refusing disclosure was refusing to give up to the corporation what belonged to it." *Silver Spring Bleaching & Dyeing Co. v. Woolworth* (1890) 16 R. I. 729, 19 Atl. 528. In *Dempsey v. Dobson* (1896) 174 Pa. 122, 32 L.R.A. 761, 52 Am. St. Rep. 816,

ing under such conditions an exclusive title, as against his employer, to the results of his experiments, is unreasonable, and cannot be sustained.³

2043. —considered with reference to the patent laws. Generally.—

a. Employee entitled to inventions independently made by him.— In a recent English case it was conceded to be a well-settled principle that “the mere existence of a contract of service does not, *per se*, disqualify a servant from taking out a patent for an invention made by him during his term of service, even though the invention may relate to subject-matter germane to and useful for his employers in their business, and that, even though the servant may have made use of his employers’ time and servants and materials in bringing his invention to completion, and may have allowed his employers to use the invention, while in their employment.”¹ The same doctrine is rec-

34 Atl. 459, it was the duty of a color mixer employed in a carpet factory to prepare the dyes or colors used for the purpose of reproducing in the carpets the various tints indicated by the design, and to enter in a book called a “color book,” the number of the carpet and the formula corresponding to each shade of color. He was also required to keep a book in which a piece of yarn, colored according to the formula for each shade in the carpet, was preserved with the number of the carpet to which the shades belonged. Held, (1) that the recipes prepared by the color mixer for the use of his employers belonged to them to the extent of giving them the right to continue the use of the various colors and shades corresponding to the recipes produced by them; (2) that the mixer was entitled, if he wished, to preserve the recipes for his own use, but that his right was not an exclusive one as against his employers; (3) that if, in violation of his duty, he kept only private books of his own, his employers had a right to a copy of their own recipes when he left their employment; (4) that in an action by the mixer to recover damages for the detention of such private books, the value of the recipes should not be considered in estimating his damages; (5) that he was merely entitled to recover damages on account of the detention of the books themselves, and also proper compensation for any unnecessary violence in the manner of their detention, or disregard for his sensibilities or self re-

spect; (6) that in instructing the jury as to damages the court should direct them to consider the conduct of the plaintiff, his breach of duty in omitting to make entries in his employers’ color books, his failure to inform them of this omission, and his having left them under the honest belief that he was removing from their mill their own color books.

³ In *Dempsey v. Dobson* (1898) 184 Pa. 588, 40 L.R.A. 550, 63 Am. St. Rep. 809, 39 Atl. 493 (former appeal of case cited in preceding note), evidence of such a custom with regard to the various combinations and shades of color devised by him was held to have been properly rejected.

¹ *Byrne, J., in Worthington Pumping Engine Co. v. Moore* (1902) 19 Times L. R. 84.

The rule that if a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master, was recognized by Abbott, Ch. J., in the nisi prius case of *Bloxam v. Elsee* (1825) 1 Car. & P. 558, Ryan & M. 187.

“If an employer takes out a patent for an invention discovered and worked out by a workman in his employ, and the patentee has no more connection with the invention than that he is the employer of the workman, the patent will be void on the ground that the workman, and not the patentee, is the true and first inventor.” *Frost, Patents*, 2d ed. p. 14, citing *Rex v. Arkwright* (1785) Dav. Pat. Cas. 61; *Barker v.*

ognized by the American courts.² So far as regards its application, there is no difference between the rights of persons working for the government and for other employers.³

Shaw (1832) 1 Webster, Pat. Cas. 126, note.

The same author (p. 15) cites several rulings of the Patent Office as having established the principle that, in the absence of special contract, the invention of a servant, even though made in the employer's time and at the expense of the employer, does not become the property of the employer so as to justify him in opposing the grant of a patent for the invention to the servant, who is the proper patentee. *Frost, Patents*, 2d ed. p. 15.

To the same general effect is Edmund on Patents, p. 265, and Nicholas on Patent Law, p. 27. In the latter treatise is cited *Re Marshall* (1900) 17 Rep. Pat. Cas. 553, a ruling of Farwell, J.

In a case where the evidence indicated that a manufacturer and his foreman were the joint inventors of the improvement in question, and the master sought letters patent the granting of which was opposed by the foreman, Lord Cranworth was of opinion that they ought only to be granted on the terms of their being vested in trustees for the benefit both of the master and of the foreman. *Re Russell's Patent* (1857) 2 De G. & J. 130, 6 Week. Rep. 95, per Lord Cranworth.

² "Persons employed, as much as employers, are entitled to their own independent inventions." *Agawam Woolen Co. v. Jordan* (1868) 7 Wall. 583, 603, 19 L. ed. 177, 182. This statement was repeated in *Union Paper Collar Co. v. Van Dusen* (1874) 23 Wall. 530, 23 L. ed. 128.

"If the employee makes an invention wholly independent of the employer, it is the law that the invention belongs to him who actually makes it, and that it does not enure to the benefit of the employer." *Miller v. Kelley* (1901) 18 App. D. C. 163.

"The mere fact, . . . that the appellant was in the employment of appellee, and received wages, and even used the material of appellee in the manufacture of his models, and even received assistance in making models, from the latter's employees, would not give it the property in the invention to

the exclusion of the former." *Dice v. Joliet Mfg. Co.* (1882) 11 Ill. App. 109, 114, affirmed in (1883) 105 Ill. 649.

A mechanic hired for the purpose of perfecting certain machinery, and bound to devote his skill and labor to the interest of those for whom the machinery is being worked, is not, by that fact, under any obligation to abstain from applying for a patent in his own name for such machinery, if otherwise entitled thereto. *Green v. Willard Improved Barrel Co.* (1876) 1 Mo. App. 202.

A man in the employ of the Fire Department of New York invented a heating apparatus, and attached it, himself, to two of the engines, many other engines being also provided with it. The effect of U. S. Rev. Stat. § 4899, U. S. Comp. Stat. 1901, p. 3387, under these circumstances was held to be that the city had no right to the use of the invention, except in respect to those machines to which it had been applied before the employee had taken out a patent for it. *Brickill v. New York* (1880) 18 Blatchf. 273, 7 Fed. 479.

In *Burton v. Burton Stock Car Co.* (1898) 171 Mass. 437, 50 N. E. 1029, the court affirmed the exclusive ownership of a servant who had taken out a patent at his own expense, had not used the materials of his master in perfecting his invention, and had consistently asserted his ownership. The contention of the master was that the case was controlled by the doctrine discussed in § 2044, *post*; but it was held that no implied license in his favor was predicable under the given circumstances.

"The law is settled that, in the absence of an express contract or agreement, the relation of employer and employee, under whatever circumstances short of a specific employment to make an invention, does not invest the employer with the entire property right in an invention of the employee." *Johnson Furnace & Engineering Co. v. Western Furnace Co.* (1910) 102 C. C. A. 267, 178 Fed. 819.

³ "The government has no more power to appropriate a man's property invested in a patent than it has to take his

It has been laid down that any patentable device which suggests itself with respect to an article during the progress of experiments made by the employer with a view to its improvement will be presumed to have been conceived by the employer, and that it is incumbent on the employee to overcome this presumption by satisfactory proof.⁴ But it is difficult to admit that a simple presumption can ever furnish an adequate basis for an adjustment of the rights of the parties. A commissioner of patents would not issue a patent to anyone who was unable to show, by positive and specific evidence, that he was the inventor, or the assignee of the inventor, and there seems to be no valid reason why a court should, in a controversy between a master and his servant, proceed upon a different principle.

b. Employee subjected to duress.—On general principles it is manifest that an employer cannot, as against his employee, retain the benefit of letters patent which the latter has been prevented from applying for by coercive conduct of his superior, which amounts to actual duress. But duress will not be inferred from the mere fact that the employee feared he would lose his employment if he asserted his rights.⁵

c. Patent taken out by employee in violation of his fiduciary obligations.—Two English decisions proceed upon the principle that an employee may be declared a trustee for his employer in respect to any patent which, under the circumstances, he could not take out in his own name without violating his obligations as a fiduciary agent of his employer.⁶ It is not altogether easy to define the boundary between the cases controlled by this conception, and those reviewed in subd.

property invested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to or interest in it. An employee performing all the duties assigned to him in his department of service may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property." *Solomons v. United States* (1890) 137 U. S. 342, 34 L. ed. 667, 11 Sup. Ct. Rep. 88.

⁴ *Miller v. Kelley* (1901) 18 App. D. C. 163.

⁵ *Barr Car Co. v. Chicago & N. W. R. Co.* (1901) 49 C. C. A. 194, 110 Fed. 972.

⁶ In a case where a chemist employed in a factory had discovered certain

processes, *Kekewich, J.*, thus stated his reasons for a decision in favor of the employer: "For all purposes, except that of being the first and true inventor, he was the agent of his employers. His labors were theirs, he worked in their laboratory with their materials, as well as their assistance, and the benefits of his discovery, morally and equally belonged to them." *Kurtz v. Spence* (1888) 5 Rep. Pat. Cas. 181. Other rulings of the English Patent Office to the same effect are cited in *Frost, Patents*, 2d ed. p. 14.

In *Worthington Pumping Engine Co. v. Moore* (1902) 19 Times L. R. 84, the evidence showed that the relationship between the plaintiff and the defendant, as their general manager in England, was of the closest and most confidential character, and that it was

a, supra. But the decisions and *dicta* there referred to show clearly that the doctrine of agency cannot be successfully invoked by the employer unless something more is shown besides the facts of employment and use of the employer's time and appliances for the purpose of making the experiments which led to the discovery in question.

d. Acquiescence by employee in the taking out of a patent by his employer.—Where a servant has surrendered to his master his rights as an inventor, by expressly or impliedly permitting him to incur the trouble and expense of obtaining a patent, it cannot be said that the master obtained the patent surreptitiously, or in fraud of the servant's discovery.⁷

e. Assignment of patent rights by employee.—An inventor who is hired at a specified salary, without abatement for loss of time and without payment for extra time, and agrees that all the improvements made by him while engaged in setting up and operating certain machines shall be for the exclusive benefit of the employer, may be compelled to convey to the employer his interest in any improvement which he may actually make in the course of his work. Such a stipulation is not an independent covenant, but merely one of the provisions of an indivisible contract, and it is therefore supported by the same consideration as the stipulation to render the specified services. Nor will such a stipulation be declared invalid on the ground that it is against public policy, either in a general sense, or as being in restraint of trade.⁸

An agreement entered into by an employee to assign to his employ-

part of his duty to communicate and consult with the head office about any modifications in the construction of the article manufactured, and to offer such suggestions as might seem to him advantageous to the corporation in respect to the business he controlled. The inventions which he had patented were, upon examination, found to be largely based upon information communicated to him as manager, and, having regard to the manner in which fresh details of construction were from time to time brought into existence, it was extremely difficult to determine to whom, among the various officers of the company, the merit of such details should be attributed. Upon this state of facts it was considered that the plaintiffs were entitled to a declaration that the defendant was trustee for them of the patent in question.

⁷ *Dixon v. Moyer* (1821) 4 Wash. C. C. 68, Fed. Cas. No. 3,931 (action by master for infringement of patent).

⁸ *Hulse v. Bonsack Mach. Co.* (1895) 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864, affirming (1893) 57 Fed. 519. The court argued as follows: "Here we have the case of an ingenious man, without opportunity of developing his talent, and struggling under difficulties, enabled by this contract to secure employment in a large and prosperous corporation, where he could give his inventive faculties full play. He in this way was afforded every opportunity of discovering and removing defects in cigarette machines. He secured this employment by signing this contract. He could not have obtained it if it had been understood that this contract had no validity. Then, in all human probability, the public would have lost the

er all inventions made by him during the term of his engagement is obviously enforceable only in respect of such inventions as are shown

benefit of his discovery. In this point of view, a contract of this character cannot be said to be against public policy. . . . This is not literally an agreement in restraint of trade. It is simply a contract which, by analogy, can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favor of the competency of the parties to make the contract, and the burden is upon the party who alleges that it is unreasonable or against public policy. . . . The contract in this case has reference not to all inventions which Hulse might discover, but only to improvements in cigarette machines; and the question is not whether a court of equity would compel specific performance if Hulse had conceived the invention after he had severed his relations with the company, and at a time when it did not result directly from opportunities of his employment, but whether the court should do so in this case, where the invention was conceived while he was in the company's service, and perfected with its direct assistance, and in a case where Wright, the other party interested with him, was an agent and business manager of a department of the company's business. The case presents circumstances and elements calling for the exercise of this equitable remedy. We concur in the conclusion reached by the circuit judge in his opinion in this record: 'The public, in so far as questions relating to public policy are concerned, has no interest in this matter. Should the claim of the Bonsack Machine Company fail, the public would have no right to use the improvement. The device would then belong to Hulse, would be his secret, protected by patent, and guarded from the public use by provisions of law. The restraint provided for in the contract does not interfere with any interest of the public, and it only gives a fair protection to the party in whose favor it is given, for which proper compensation was stipulated for the party making it.' . . . The company lets them [its servants] into an intimate knowledge of its cigarette ma-

chines, affords them the opportunity of discovering any needed improvements in them, gives them at hand the means of testing any improvements which may suggest themselves. Naturally it seeks to protect itself from an abuse of these results. The protection sought is a fair one for the interests of the company. Does this protection interfere with the interests of the public? 'Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases, the public gains on the one side what is lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture.' Bowen, L. J., in *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630."

An additional point expressly decided by the lower court and agreed to incidentally by the court of appeals was that such a contract does not entitle the employer to the use of an improvement, made and perfected at a time when such employee is not in the employment, without making reasonable and just compensation.

A similar conclusion with regard to a contract of the same general type was arrived at in *Thibodeau v. Hildreth* (1903) 63 L.R.A. 480, 60 C. C. A. 78, 124 Fed. 892, affirming (1902) 117 Fed. 146. There it was held that an agreement by an employee, in consideration of his employment, that the employer should have the benefit of all inventions made by him while so employed, and that he would keep the same forever secret, if required by the employer, was not unconscionable: nor against public policy, and that the employee was not entitled to have it canceled on that ground after he had left the employment.

For other instances of an express contract of service providing that the patent of an employee should become the property of the employer, see *Malloy v. Mackaye* (1898) 86 Fed. 122; *Wright v. Vocalion Organ Co.* 148 F. 209, 79 C. C. A. 183.

by affirmative evidence to have been made before the end of that term.⁹

A patentee who conveys his patent rights in respect to a secret chemical preparation, on condition of his being paid a certain royalty, and being employed by his grantee at specified salary, so long as his services are rendered solely in his employer's interests and are satisfactory, is justified in terminating the contract if the employer fails to perform his obligations under the contract. A court of equity therefore will not restrain him from revealing the secret of his preparation to persons with whom he forms a partnership after exercising his right of leaving the employment.¹⁰

In the United States the cognizance of actions at law or bills in equity which involve the question of the validity of a patent is restricted to the Federal courts.¹¹ But a state court has jurisdiction to compel specific performance of an agreement by an employee to assign to his employer the patents for any inventions which he may make while the employment continues. In such a suit there is no question raised as to the legality of the issue of the patent, or as to the propriety of the action of the Commissioner of Patents. Relief is asked for on the theory that the patents were rightfully obtained by the servant, and ought to be assigned to the plaintiff in accordance with the agreement.¹²

f. Employer licensed by employee to use his inventions.—(See also next section). Where an employee allows his employer to use patented appliances, devised by him independently, and not in pursuance of any agreement contemplating the use of the employer's time, labor, or materials in developing or perfecting them, a promise on the employer's part to pay compensation for the benefit received from the use of the inventions will be implied.¹³

⁹ In *Universal Talking Mach. Co. v. English* (1901) 34 Misc. 342, 69 N. Y. Supp. 813, an injunction to restrain the employee from using his invention to the injury of his employer was refused on the ground that there was no such evidence.

In *Mississippi Glass Co. v. Franzen* (1905) 138 Fed. 924, the contract of employment provided that the employee was to execute any and all assignments in writing which might be deemed by the employing company proper and necessary to vest in it the entire right and title of the employee to all inventions and discoveries made by him during the term of his employment. A suit

brought by the employer to compel the employee to execute an assignment of a patent applied for after the termination of the engagement was dismissed on the ground that the plaintiff had not discharged the burden of proving that the invention covered by the patent had been made during the period covered by the contract.

¹⁰ *New York Chemical Co. v. Halleck* (1891) 15 N. Y. Supp. 517.

¹¹ *Stemmer's Appeal* (1868) 58 Pa. 155, 98 Am. Dec. 248.

¹² *Binney v. Annan* (1871) 107 Mass. 94, 9 Am. Rep. 10.

¹³ *Ft. Wayne, C. & L. R. Co. v. Haberkorn* (1896) 15 Ind. App. 479, 44 N.

Where an express license has been granted to an employer to use improvements patented by his employee, the extent of the privilege is determined by the provisions of the contract.¹⁴

2044. Engagement of employee for the purpose of making improvements in specific articles.—The accepted doctrine in the United States is that a contract by which a person merely agrees, for a stated compensation, to devote his time and services to devising and making improvements in articles manufactured by his employer, does not, in the absence of an express stipulation to that effect, operate so as to vest in the employer an inchoate legal title to the inventions of the workman or to patents obtained by him for those inventions.¹

Unless the contract embraces an express stipulation to that effect,

E. 322, distinguishing the class of cases referred to in § 2044, *post*.

Where the owner of a patented invention was a director and officer of a corporation, and the latter appropriated and used such invention with his consent and acquiescence, it was held that he was not necessarily precluded from recovering a reasonable compensation therefor by reason of his relationship to the company, but that such relationship, with other circumstances, was for the jury to consider in determining the question whether the license to use the patent should be implied to be for or without compensation. *Deane v. Hodge* (1886) 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917.

¹⁴ An employee who was the patentee of threshing machinery embodied in a threshing machine called the "New Peerless," manufactured by his employer under a license from him, granted to the employer an exclusive license to use such patents, and the exclusive right to use "all inventions and improvements in said machinery" thereafter made; also all "new designs of such machinery" made by him while in the employ of the licensee, and all inventions and improvements which should thereafter be made thereon. Held, that such license did not confer the right to use a patent issued to the licensor after he left the licensee's employ, for threshing machinery which was not an improvement on that of the New Peerless machines, nor an infringement of the patents under which such machines were made, but which embodied a different principle of operation, and devices which could not

be used in the New Peerless machines, except by substitution; such patent being for a "new design" within the meaning of the contract. *Frick Co. v. Geiser Mfg. Co.* (1900) 40 C. C. A. 291, 100 Fed. 94.

¹ *Whiting v. Graves* (1878) 3 Bann. & Ard. 222, Fed. Cas. No. 17,577; *Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 23 N. Y. S. R. 964, 5 N. Y. Supp. 190, and cases cited in the next note.

In a case where the only question involved was one of priority, it was laid down that one who is the first discoverer of a process is entitled to a patent therefor, even against one in whose employ he was at the time of the discovery, and at whose request and expense he was making experiments which led to the discovery. *Damon v. Eastwick* (1882) 14 Fed. 40.

Compare the analogous rule, that "one partner acquires no right or interest, legal or equitable, in an invention made by his copartner during the existence of the partnership, by reason merely of the copartnership relation, although the invention relates to an improvement in machinery to facilitate the business carried on by the firm, and although the partner making the invention uses copartnership means in his experiments, and is also bound by the copartnership articles to devote his whole time and attention to the firm business." *Burr v. De La Vergne* (1886) 102 N. Y. 415, 7 N. E. 366, citing *Slemmer's Appeal* (1868) 58 Pa. 155, 164, 98 Am. Dec. 248; *Belcher v. Whittemore* (1883) 134 Mass. 330.

the employee is under no obligation to assign to his employer the patents obtained by him for inventions made while engaged in his work.² A contract of this description, however, even if it contains no express provision on the subject,³ subjects the employee to an obliga-

² *Hapgood v. Hewitt* (1886) 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193, affirming (1882) 11 Biss. 184, 11 Fed. 422; *Dalzell v. Dueber Watch Case Mfg. Co.* (1893) 149 U. S. 315, 37 L. ed. 749, 13 Sup. Ct. Rep. 886; *Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 23 N. Y. S. R. 964, 5 N. Y. Supp. 190; *American Circular Loom Co. v. Wilson* (1908) 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133; *Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439; *Sendelbach v. Gillette* (1903) 22 App. D. C. 168; *Riley v. Barnard* (1892) 59 Off. Gaz. 1919 (employee of the government held to be entitled to a patent for an invention made at the expense and while in the employ of the government).

The decision of the lower court in *Hapgood v. Hewitt*, *supra*, was placed on the ground (1) that Hewitt was not expressly required, by his contract, to exercise his inventive faculties for the benefit of his employer, and there was nothing in the bill from which it could be fairly inferred that he was required or expected to do so; (2) that, whatever right the employer had to the invention by the terms of Hewitt's contract of employment was a naked license to make and sell the patented improvement as a part of its business, which right, if it existed, was a mere personal one, and not transferable, and was extinguished with the dissolution of the corporation. Both of these grounds were approved by the supreme court.

In *Pressed Steel Car Co. v. Hansen* (1905) 2 L.R.A.(N.S.) 1172, 71 C. C. A. 207, 137 Fed. 403, affirming (1904) 128 Fed. 444, a contract by which the defendant was employed as chief engineer of the plaintiff's factory at a large salary, with the understanding that he was to devote himself, as a part of his duties, to the improving and designing of the articles produced at the factory, was held not to create an obligation on his part to assign to the plaintiff the patents which he secured for articles improved or designed by him.

In his elaborate opinion, Gray, J., M. & S. Vol. V.—398

said: "We have been referred to no case, nor have we been able to discover one, in which, apart from express contract or agreement, and upon the mere general relation of employer and employee, and of the facts and circumstances attending it, the employer has been vested with the entire property right in the invention and patent monopoly of the employee, or with anything more than a shop right or irrevocable license to use the patented machine. Such a right in the employer the employee may be estopped to deny by the fact of his employment and his conduct in relation to the use of his inventions by his employer; and to that extent, and no farther have the cases gone." Acheson, J., dissented from the judgment, being of opinion that the rights of the parties were governed by the principles discussed in § 2046, *post*. It must be admitted that, having regard to the terms of the contract, the case is on the border line. The Supreme Court, however, denied a petition for a writ of certiorari to the court of appeals. (1905) 199 U. S. 608, 50 L. ed. 331, 26 Sup. Ct. Rep. 749.

In *Hopedale Mach. Co. v. Entwistle* (1882) 133 Mass. 443, a servant agreed to work for a master for a year at a given compensation per month, and to assign all inventions made by him to the master "while in his service." After the expiration of the year he remained in the plaintiff's employ, and made certain inventions. The court construed the words "while in his service" as referring to the period specified in the contract, and refused to compel the defendant to assign the inventions made by him.

³ For example of cases in which such a stipulation was involved, see *McAlcer v. United States* (1893) 150 U. S. 424, 37 L. ed. 1130, 14 Sup. Ct. Rep. 160 (written agreement given in evidence); *Bensley v. Northwestern Horse-Nail Co.* (1886) 26 Fed. 250 (preponderance of evidence held to be in favor of the servant's consent having been given by parol).

In *Meissner v. Standard R. Equip-*

tion, the nature and extent of which has been thus stated by the Supreme Court of the United States:

"When one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employees to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from his use of the property, and the assistance of the coemployees, of his employer, as to have given to such employer an irrevocable license to use such invention."⁴

ment Co. (1908) 211 Mo. 112, 109 S. W. 730, defendant contracted with plaintiff to pay the expenses of obtaining a patent for plaintiff's improvement on pneumatic hammers, and to pay plaintiff a royalty on the selling price of all hammers embodying plaintiff's invention. In consideration for these payments plaintiff granted defendant the exclusive right to use the invention and all improvements he should make thereon. Defendant paid the expenses of obtaining the letters patent, and afterwards employed plaintiff to invent improvements on pneumatic hammers. Plaintiff while so employed, and aided by the suggestions of defendant's officers, and at defendant's expense, invented other distinct improvements in pneumatic hammers, for which letters patent were issued in his name. Defendant understood it was to have the benefit of these improvements, and plaintiff knew that defendant so understood, and encouraged him in that belief. Held, that plaintiff could not recover royalties for hammers sold which embodied only such other improvements, since the written contract embraced only the original invention and improvements thereon, and had no reference to other and distinct improvements. It was furthermore held that even if the latter description of improvements had been covered by the contract, the plaintiff could not come into court claiming royalties, for the reason that during the time that he continued in the defendant's employ, making experiments at the defendant's expense, he had become possessed in confidence of the secrets of defendant's business, that he had betrayed those

secrets, and sold his patent rights to the defendant's rival in business, and that he had subsequently instigated a suit by the rival against the defendant for infringement of the patents thus sold.

⁴ *Solomons v. United States* (1890) 137 U. S. 342, 346, 34 L. ed. 667, 669, 11 Sup. Ct. Rep. 88. There the facts upon which the court held that the license should be implied were as follows: The patentee was in the employ of the government when he invented an improved stamp. His experiments were wholly at the expense of the government. He was consulted as to the proper stamp to be used, and it was adopted on his recommendation. He notified the government that he would make no charge if it adopted his recommendation and used his stamp, and for the express reason that he was in the government employ, and had used the government machinery in perfecting his stamp. He never pretended, personally, to make any charge against the government. The court considered that the mere fact that the servant's wages were not increased in this case, while in the case next cited such an increase was granted, was not sufficient to create a distinction between the two cases.

An earlier decision which was relied on in the *Solomons Case*, as a precedent precisely in point, was *McClurg v. Kingsland* (1843) 1 How. 202, 11 L. ed. 102. There it was held that a license to the employer to use the invention might justifiably be presumed from evidence to the effect that the patentee, while working for wages in a factory, had, after making several un-

In a later case the same court carried the doctrine still further in the master's favor by declaring that the presumption of a license will be entertained, irrespective of the consideration whether the property of the employer and the services of his coemployees were or were not used in the experiments necessary to develop the invention, or in the preparation of patterns and working drawings and the construction of the completed machines. The principle was stated to be "really an application or outgrowth of the law of estoppel *in pais*, by

successful experiments at the expense of his employer, invented the improvements patented; that his wages had been increased on account of the useful result; that he remained for some months afterwards in the same employment, continuing during that period to manufacture the improved article for his employers; that he finally applied for and obtained a patent; that, while continued in the employment, he proposed that his employers should take out a patent and purchase his right, which they declined; that he made no demand on them for any compensation for using his improvement, and gave them no notice not to use it, till, on some misunderstanding with regard to another subject, he gave them such notice, about the time of his leaving their establishment, and after making the agreement with the plaintiffs for an assignment to them of his right.

For other cases which illustrate the doctrine stated in the text, see *Lane & B. Co. v. Locke* (1893) 150 U. S. 193, 37 L. ed. 1049, 14 Sup. Ct. Rep. 78 (engineer and draftsman, at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop valve, which the firm used, with his knowledge, in certain elevators constructed, until its dissolution, and after that a corporation organized by the firm used it in the same way and with the like knowledge); *Keyes v. Eureka Consol. Min. Co.* (1895) 158 U. S. 150, 39 L. ed. 929, 15 Sup. Ct. Rep. 772 (employee of smelting company who had invented a new method of withdrawing molten metal from a furnace, took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years); *Chabot v. American Button-Hole & Over-Seaming Co.* (1872) 9 Phila. 378, 6 Fisher, Pat. Cas. 71, Fed. Cas. No. 2,567 (presumption of

license held to be strengthened by the terms of an express contract which had been made before the employee applied for a patent, and which provided that a large number of machines should be manufactured by the use of the defendant's factory, machinery, tools, and materials, the employee supplying, at a specified price, merely the labor expended upon them, and his own services); *Continental Windmill Co. v. Empire Windmill Co.* (1871) 8 Blatchf. 295, Fed. Cas. No. 3,142 (suit for infringement held not to be maintainable by the assignee of the patent against a former employer of the patentee, who had engaged him on a salary, with the understanding that he was to receive \$500 for any patentable improvements he might make); *Magoun v. New England Glass Co.* (1877) 3 Bann. & Ard. 114, Fed. Cas. No. 8,960 (articles constructed by or under the direction of the employee, and with his knowledge and consent placed by his employers at their own expense in their factories); *Davis v. United States* (1888) 23 Ct. Cl. 329 (cost of experiments by foreman of a division of the Ordinance Department was paid by the United States; patents were taken out under the advice of the chief of the Ordinance Bureau; after they were issued the Navy Department paid employee a sum of money to reimburse him for the expense incurred in securing them, as a royalty for the right to their use); *Barry v. Crane Bros. Mfg. Co.* (1884) 22 Fed. 396; (complainant, by introducing into his employer's business certain improved tools which he had produced while working as a departmental foreman, was held to have licensed or consented to the use of those tools by the defendant company, not only for the time that he was in its employ, but so long as the tools should last); *Bensley v. North-Western Horse-Nail Co.* (1886) 26 Fed.

which a person looking on and assenting to that which he has power to prevent is held to be precluded ever afterwards from maintaining an action for damages." ⁵

If the license which is thus implied from the general terms of the

250 (patented improvements developed and perfected at the sole expense of an employer, by employees who receive extra pay on account of their known ability as inventors); *American Tube-Works v. Bridgewater Iron Co.* (1886) 26 Fed. 334 (inventor and patentee had supervised and directed the building of a machine for the defendant company while he was in its employ); *Withington-Coolley Mfg. Co. v. Kinney* (1895) 15 C. C. A. 531, 37 U. S. App. 117, 68 Fed. 500 (right to continue constructing machines after patterns which an inventor had been employed upon a salary to devise, held not to have been terminated by the destruction of the original patterns in a fire); *Herman v. Herman* (1886) 29 Fed. 92 (employee was superintendent of employer's business, and accustomed, as a part of his functions, to prepare new designs for his employer, who had continued for several months to manufacture from certain designs prepared on this footing); *Barber v. National Carbon Co.* (1904) 5 L.R.A. (N.S.) 1154, 64 C. C. A. 40, 129 Fed. 370 (employers of mechanical engineer who was bound to devote his time and skill to the improvement of the various processes used by his employers were held to have an implied license to use seven machines invented by him in the course of his employment, and installed, partly under his own direction, and partly after he had been dismissed, in buildings specially designed by him); *Jencks v. Langdon Mills* (1886) 27 Fed. 622 (employee, while experimenting upon his invention, of which he had several, took the time which belonged to the defendants, used their tools, workmen, and materials, and tested the inventions in the machinery which was run by them); *Fuller & J. Mfg. Co. v. Bartlett* (1887) 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747 (superintendent of a manufacturing company, knowing its intention to perfect and put upon the market a new machine, voluntarily disclosed his conception of a device to be used in connection therewith, and, under the direction of the company, and with its material and

at its expense, voluntarily went to work to perfect such device and construct the machines, and to aid in putting them on the market).

In *Eustis Mfg. Co. v. Eustis* (1893) 51 N. J. Eq. 565, 27 Atl. 439, where the defendant had been paid a salary as an officer of a corporation, and given a certain amount of its capital stock in consideration for the transfer of a certain patent, and afterwards, while still in the service of the corporation, experimented in its factory and took out other patents at the expense of the corporation, and let the corporation use them without any claim for compensation, it was held that under the rule applied in the *Solomons Case*, *supra*, the corporation had an irrevocable, exclusive license for their use and that the fact that the defendant, when he was about to break with the company, directed the bookkeeper to transfer the expense charges of the patents to his account, did not exclude the operation of that rule.

The rule adopted in the above case is held to be equally applicable in cases where a machine is constructed, with the inventor's knowledge and consent, before his application for a patent, by a partnership of which he is a member. The machine may be used by his copartners after the dissolution of the partnership, although the agreement of dissolution provides that nothing therein contained shall operate as an assent to such use, or shall lessen or impair any rights which they may have to such use. *Wade v. Metcalf* (1889) 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct. Rep. 271.

⁵ *Gill v. United States* (1896) 160 U. S. 426, 430, 40 L. ed. 480, 482, 16 Sup. Ct. Rep. 322. The court said: "This case raises the question, which has been several times presented to this court, whether an employee paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent upon such invention, recover a roy-

employment and the acquiescence of the employee in the use of his invention by the employer relates to an improvement in a process, the employer is ordinarily deemed to be authorized to continue to use the improvement during the whole period covered by the patent. If it relates to a certain description of machine, only the specific machine or machines which are set up during the term of the employment are protected.⁶

alty or other compensation for such use.' After pointing out that the existence of any such right had been uniformly denied, the court proceeded thus: "It should be borne in mind that the fact upon which so much stress has been laid by both sides, that the patentee made use of the property and labor of the government in putting his conceptions into practical shape, is important only as furnishing an item of evidence tending to show that the patentee consented to and encouraged the government in making use of his devices. The ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions by the government without demand for compensation. . . . [The servant's consent may be] shown by parol testimony, or by conduct on the part of the patentee proving acquiescence on his part in the use of his invention. The fact that he made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of such employer, or an implication of bad faith on the patentee's part in claiming the fruits of labor which technically he had no right to enlist in his service. . . . The acquiescence of the claimant in this case in the use of his invention by the government is fully shown by the fact that he was in its employ; that the adoption of his inventions by the commanding officer was procured at his suggestion; that the patterns and working drawings were prepared at the cost of the government; that the machines embodying his inventions were also built at the expense of the government; that he never brought his inventions before any agent of the government as the subject of purchase and sale; that he raised no objection to the use of his inventions by the government; and that the commanding officer never undertook to incur a legal

or pecuniary obligation on the part of the government for the use of the inventions or the right to manufacture thereunder."

This case was followed in one where it was held that an employee who, while earning weekly wages, constructs with his employer's tools and materials, and in his shop, machines which the latter uses as part of his tools, without knowledge of any objection thereto, cannot, after obtaining a patent, enjoin his employer from further use of the particular machines. *Blauvelt v. Interior Conduit & Insulation Co.* (1897) 26 C. C. A. 243, 51 U. S. App. 291, 80 Fed. 906.

⁶*Wade v. Metcalf* (1883) 16 Fed. 130. The authorities cited for the statement with regard to processes were—*McClurg v. Kingsland* (1843) 1 How. 202, 11 L. ed. 102; *Chabot v. American Button-hole & Over-seaming Co.* (1872) 6 Fisher Pat. Cas. 71, Fed. Cas. No. 2,567. The precedents relied upon to sustain the second branch of the rule laid down were *Pierson v. Eagle Screw Co.* (1844) 3 Story, 402, Fed. Cas. No. 11,156; *Brickhill v. New York* (1880) 18 Blatchf. 273, 7 Fed. 479.

The points thus decided in *Wade v. Metcalf* were not referred to by the Supreme Court on the appeal of the case ([1889] 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct. Rep. 271); but the doctrine enunciated in the text has received the approval of the court of appeals in *Boston v. Allen* (1898) 33 C. C. A. 485, 50 U. S. App. 447, 91 Fed. 248, where the scope of the doctrine was restricted by a ruling to the effect that, where an engineer employed by a city to build a ferry makes and afterwards patents an improvement in the gangway used, no presumption, either of law or fact, arises in favor of an implied license to the city to use the patented device at another ferry built at another place several years afterwards. It was intimated, however, that, when the patented matter is a

An implied license of this description is not transferable by the employer to a third person.⁷

The existence of a license is treated by the courts as a mixed question of law and fact, and a determination of this issue in one suit does not furnish a decisive precedent for another.⁸

2045. Engagement of employee for the purpose of perfecting an original conception of the employer.—The rule applicable to cases in which an employee is hired to render assistance in perfecting the mechanical details and arrangements requisite for the complete elaboration of an invention of which the general idea has been conceived by the employer was thus formulated by Erle, J., during the trial of a patent case, in terms which were afterward approved by all the other judges of the court of common pleas:

"If a person has discovered an improved principle, and employs engineers, . . . and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent; and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle."¹

product, particularly if it is a minor product, or even if it is a minor machine, so that in either case it is used in quantities, its unlimited use during the time of employment may raise an implication of fact in favor of a license for a time likewise unlimited, as in the case of a process.

⁷ *Haggood v. Hewitt* (1886) 119 U. S. 228, 30 L. ed. 370, 7 Sup. Ct. Rep. 193, relying upon an earlier case in which the general rule was laid down that "a mere license to a party without having his assigns or equivalent words to them, showing that it was meant to be assignable, is only the grant of a personal power to the licensees." *Troy Iron & Nail Factory v. Corning* (1852) 14 How. 193, 216, 14 L. ed. 383, 393, citing *Curtis, Patents*, § 198.

⁸ *Boston v. Allen* (1898) 33 C. C. A. 485, 50 U. S. App. 447, 91 Fed. 248.

¹ *Allen v. Rawson* (1845) 1 C. B. 551, 567. In the court of common pleas, Tindal, Ch. J., thus stated his views as to the facts in evidence: "It would be difficult to define how far the sug-

gestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them taken out by his employer. Each case must depend upon its own merits. But when we see that the principle and object of the invention are complete without it, I think it is too much that a suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void. It seems to me that this was a matter much too trivial and too far removed from interference with the principle of the invention to produce the effect which has been contended for."

That a mechanic employed for the purpose of enabling the employer to carry his original conception into effect is not an inventor was assumed by Alderson, B., in his direction to the jury in *Barker v. Shaw* (1832) Webster, Pat. Cas. 126, note.

The following statement of the principles which are controlling under such circumstances is taken from the judgment of the Supreme Court of the United States in a leading case.²

"Where the employer has conceived the plan of an invention, and is engaged in experiments to perfect it, no suggestion from an employee, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvements."³ But where

² *Agawam Woolen Co. v. Jordan* (1868) 7 Wall. 583, 603, 19 L. ed. 177, 182.

³ In a later judgment by the same court we find the passage: "Where a person has discovered a new and useful principle in a machine, manufacture, or composition of matter, he may employ other persons to assist in carrying out that principle, and if they, in the course of experiments arising from that employment, make discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention." *Union Paper Collar Co. v. Van Dusen* (1874) 23 Wall. 530, 563, 564, 23 L. ed. 128, 133, 134.

The general rule has been said to be that "one who, by way of partnership or contract, or in any other, empowers another person to make experiments upon his own conception for the purpose of perfecting it in its details, is entitled to the ownership of such improvements in the conception as may be suggested by such other person." *Gedge v. Cromwell* (1902) 19 App. D. C. 192, 198.

"A person may be the real author of the plan of a complicated machine or other invention which requires for its perfection and skill, and, to some extent, the inventive faculties, of workmen or engineers in adapting the best means to the successful application of the principle." Curtis, Patents, 3d ed. 121, quoted with approval in *Fraser v. Gates* (1885) 118 Ill. 99, 1 N. E. 817, where it was held that the rights of an employer as an inventor are not impaired by his having obtained the assistance of skilled workmen.

"Invention is the work of the brain, and not of the hands. If the conception be practically complete, the artisan who

gives it reflex and embodiment in a machine is no more the inventor than the tools with which he wrought. Both are instruments in the hands of him who sets them in motion and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains, in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated." *Blandy v. Griffith* (1869) 3 Fisher, Pat. Cas. 609, Fed. Cas. No. 1,529.

For other cases in which the general rule was affirmed, see *United Shirt & Collar Co. v. Beattie* (1907) 79 C. C. A. 442, 149 Fed. 736, affirming (1905) 138 Fed. 136; *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.* (1908) 164 Fed. 47; *King v. Gedney* (1856; D. C.) 1 MacArth. Pat. Cas. 444, Fed. Cas. No. 7,795; *Milton v. Kingsley* (1896) 7 App. D. C. 531; *Gallagher v. Hastings* (1903) 21 App. D. C. 88; *Kreag v. Geen* (1906) 28 App. D. C. 437; *Larkin v. Richardson* (1906) 28 App. D. C. 471; *Orcutt v. McDonald* (1906) 27 App. D. C. 228; *Braunstein v. Holmes* (1908) 30 App. D. C. 328; *Neth v. Ohmer* (1908) 30 App. D. C. 478; *McKillop v. Fetzer* (1908) 31 App. D. C. 586; *Broadwell v. Long* (1911) 36 App. D. C. 418; *Ladoff v. Dempster* (1911) 36 App. D. C. 520.

Suggestions made by the mechanic to construct the machine, as to its form or proportions, are not sufficient to invalidate the patent, although they may be incorporated in the specification.

the suggestions go to make up a complete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another. The latter branch of the rule may also be stated in the more general form that if in doing the work the employee goes further than mere mechanical skill enables him to go, and makes an actual invention, he is entitled to the benefit of that invention.^{3a}

A person engaging the services of an inventor, under an agreement that he shall devote his ingenuity to the perfecting of a machine for their benefit, can lay no claim to improvements conceived by him after the expiration of such agreement.⁴

2046. Employment of workman for the express purpose of making inventions for the employer's benefit.—The rule applicable to another class of cases has been thus formulated by the Supreme Court of the United States:

"If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title there-to as against his employer. That which he has been employed and

Pennock v. Dialogue (1825) 4 Wash. C. C. 538, Fed. Cas. No. 10,941.

But in *Berdan Fire-Arms Mfg. Co. v. Remington* (1873) 3 Off. Gaz. 688, Fed. Cas. No. 1,336, it was held that an improvement which becomes necessary in the manufacture of a patented implement, in order to overcome a difficulty growing out of a departure from the form of the model, and which is introduced into it by the workmen without the knowledge of the patentee, cannot be appropriated by him as his invention.

Where one employs another to make a device, pointing out the distinct and dominating feature of his improvement, but does not make anything resembling a perfect drawing for the guidance of the other, or describe the proposed construction in detail, the maker of the device is not entitled to claim the invention, though by reason of his mechanical skill he may have made a neater and more perfect device than was in the mind of his employer. *Huebel v. Bernard* (1899) 15 App. D. C. 510.

To enable an employer to claim the benefit of his employee's skill and achievement, it is not sufficient that the

former had in mind the desired result, and hired the latter to devise means for its accomplishment, he must also show that he had an idea of the means to accomplish the particular result, which he communicated to the employee in such detail as to enable him to embody the same in some practical form. *Robinson v. McCormick* (1907) 29 App. D. C. 98, 10 Ann. Cas. 548.

In *Miller v. Kelley* (1901) 18 App. D. C. 163, it was laid down that when in the course of experiments in regard to an invention there is suggested for its improvement a device which would of itself reach the dignity of an independent invention, and a dispute arises concerning the party to whom its conception is to be attributed, the presumption is in favor of the employer.

^{3a} *Robinson v. McCormick* (1907) 29 App. D. C. 98, 10 Ann. Cas. 548; *McKeen v. Jerdone* (1909) 34 App. D. C. 163; *Smith v. Phelps* (1910) 35 App. D. C. 358.

⁴ *Appleton v. Bacon* (1862) 2 Black, 699, 17 L. ed. 338 (case involving merely an examination of evidence bearing upon the date of the invention).

paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer."¹ More briefly,—“If the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do.”²

The rationale of the cases governed by the rule thus stated is that

¹ *Solomons v. United States* (1890) 137 U. S. 342, 346, 34 L. ed. 667, 669, 11 Sup. Ct. Rep. 88.

From a remark made by Bayley, J., during the argument of counsel in *Bloxam v. Elsee* (1825) 1 Car. & P. 565, he appears to have been of the opinion that, in a case where a skilful person is employed for the express purpose of inventing, the inventions made by him will so far belong to the master as to enable him to take out a patent for them. But no explicit ruling was made on this point.

² *Gill v. United States* (1896) 160 U. S. 426, 435, 40 L. ed. 480, 483, 16 Sup. Ct. Rep. 322.

Compare also the following statement: “Where one person agrees to invent for another, or to exercise his inventive ability for the benefit of another, the inventions made and patents procured during the term of service covered by the contract belong in equity to the employer, and not to the employee.” *Connelly Mfg. Co. v. Wattles* (1891) 49 N. J. Eq. 92, 23 Atl. 123 (injunction restraining use of patents by employee was denied on the ground of the alleged contract’s not having been satisfactorily proved).

In an Illinois case it was conceded, *arguendo*, that “where the employer hires a man of supposed inventive mind to invent for the employer an improvement in a given machine, under a special contract that the employer shall own the invention when made, and under such employment such improvement is invented by the person so employed, such invention may, in equity, become the property of the employer.” *Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649, 652.

In *Pape v. Lathrop* (1897) 18 Ind. App. 633, 46 N. E. 154, where the employee stipulated to render services “as inventor,” and to assign any patents

which he might apply for by the desire of his employer, the court stated the accepted doctrine as being to the following effect: “Where a servant during his employment, and while using the time and material of his employer, invents new devices, compounds, or machinery, or any useful appliances in connection with the business of his employer, and which are used in the business of the employer, with the intention or understanding that they shall belong to the employer, the same become his absolute property, and such inventor has no interest therein.”

In *Wilkins v. Spafford* (1878) 3 Bann. & Ard. 274, Fed. Cas. No. 17,659, a contract that the employer should have the “exclusive use” of the inventive faculties of the employee, and of such inventions in machinery as he should make, during the term of service, was held to entitle him, without any new agreement, to the exclusive use of the machines invented by the employee, during the prolongation of his service after the expiration of the term of his original engagement.

In *Portland Iron Works v. Willett* (1907) 49 Or. 245, 89 Pac. 421, 90 Pac. 1000, the contract of employment was for an indefinite period terminable by either party on thirty days’ notice. It was stipulated that drawings, patterns, or designs of machinery made by the employee during the term of the employment should belong to the employer. The employee made improvements and made applications for patents before quitting the employment. Held, (1) that the inventions, having been worked out during the term of employment, belonged to the employer; (2) that the word “designs” was intended by both parties to cover the invention of any new machine or improvement thereof; (3) that, as a condition precedent to enforcing specific performance of the

there is a special employment for the limited and definite purpose of inventing. The employee is regarded as having hired out to his employer the whole of his inventive powers, natural and acquired, so far as regards the particular improvements to the attainment of which his experiments are to be directed.³ The ground upon which such cases are distinguishable from those discussed in § 2044, *ante*, is that in the latter a merely general employment is involved.⁴

It has been laid down that "the law inclines so strongly to the rule that the invention shall be the property of its inventor, that nothing short of a clear and specific contract to that effect will vest the property of the invention in the employer, to the exclusion of the inventor."⁵

contract, the employer must pay expenses incurred by the employee in making applications and procuring patents.

For a case in which the law was recognized, but in which the existence of a contract was held not to have been proved, see *American Circular Loom Co. v. Wilson* (1908) 198 Mass. 182, 126 Am. St. Rep. 409, 84 N. E. 133.

In a Canadian case it was laid down in general terms that where a servant has been expressly employed to invent or improve a machine, the invention belongs to the master. *Bonathan v. Bowmanville Furniture Mfg. Co.* (1871) 31 U. C. Q. B. 413.

For cases which turned simply upon the question as to what particular articles among those manufactured by the employers the contracts regarding their proprietary rights were applicable, see *Wright v. Vocalion Organ Co.* (1906) 79 C. C. A. 183, 148 Fed. 209, reversing (1905) 137 Fed. 313; *Detroit Lubricator Co. v. Lavigne* (1908) 151 Mich. 650, 115 N. W. 988.

³In a case in which the right of a servant to take out letters patent in his own name was denied, the court observed: "The special service of inventing is the entire scope of the employment; . . . the servant has no right to think or invent for himself on this particular subject-matter in hand. He must get out of such a relation before he can claim the product of his work under such an employment. He cannot carry off both his salary and the only valuable product of his work under such an employment, leaving his master with his useless models, the results of his uselessly spent money on tools, machin-

ery, time, labor of self and employees, with only a license or shop right which is not assignable or useful in any way save to himself. Such a result would necessarily defeat the whole purpose of the contract and the contracting parties. The cases resulting in mere license were those of general employment; at all events, they were not special employments for the limited service of inventing." *Annin v. Wren* (1887) 44 Hun, 355.

⁴In one of those cases, *Hagood v. Hewitt* (1886) 119 U. S. 227, 30 L. ed. 370, 7 Sup. Ct. Rep. 193, the doctrine laid down is explicitly declared not to be applicable where there is a special employment to invent.

⁵*Joliet Mfg. Co. v. Dice* (1883) 105 Ill. 649, affirming (1882) 11 Ill. App. 109. There it was held that an agreement by an employee to give his employer the benefit of any improvements he might make in two specified kinds of machines should not be construed in such a sense as to entitle the employer to demand the assignment of his interest in an invention relating to a machine of another description, although the employer had added the manufacture of that machine to his other business, and the employee had, with the consent of his employer, and with the assistance of his coemployees, spent a portion of his time in perfecting his invention. It was urged that a provision of the contract, to the effect that the employee "would work for the best interests of the company in every way that he can," and that such aid, in whatever way given, should belong to the company,—that is, future improvements that he

As a general rule, an employer who has entered into an agreement which secures to him the benefit of the inventions made by his employee is not entitled to inventions made by the latter after he has terminated the contract for a valid reason.⁶

2047. Duty of employee to disclose the results of discoveries made by him.—An employer's enjoyment of such specific benefits as he may be entitled, under the contract of hiring, to derive from the experiments of an employee, is necessarily dependent upon his acquiring a knowledge of the results of those experiments. Accordingly, an employee who refuses, when requested, to disclose to his employers the discoveries made in the course of his investigations, is guilty of a breach of duty which will justify the employer in rescinding the contract.¹ Compare the analogous rule referred to in § 286, *ante*.

may cause to be made,—was broad enough to include the invention of the improvements in the third machine. But the court was of opinion that, taken in connection with the context, these words clearly had reference only to improvements to be made in the specified machines, and had no reference to any other. With respect to the argument that when the employee consented to devote part of his time in superintending the manufacture of the third machine, and also to devote part of his time to the making of an improved machine of that kind, he thereby necessarily contracted that the invention, when perfected, should be the exclusive property of complainant, the court remarked that these circumstances might render the machine actually made the property of complainant, and in equity might amount to a license to complainant to use the machine made, and possibly to a license to make and use other like machines; but this was the most the employer could claim.

⁶ This rule was taken for granted in *New York Automobile Co. v. Franklin* (1905; Sup. Ct.) 49 Misc. 8, 97 N. Y. Supp. 781. The case turned simply upon the questions whether the fact that the defendant was a director both of the corporation which had originally employed the inventor, and of the corporation whose service he had subsequently entered, created fiduciary obligations which would preclude him from claiming the benefit of the later inventions. With regard to this point the court

said: "I know of no rule which prohibits a director of a corporation engaging in a business similar to that carried on by the corporation, either in his own behalf or for another corporation of which he is likewise a director. True, he owes to his stockholders the most scrupulous good faith. He may not deal with the trust property for his own advantage. He may not deal in his own behalf in respect to any matter involving his rights and duties as a director. He may not seek his own profit at the expense of the company or its stockholders. But so long as he violates no legal or moral duty which he owes to the corporation or its stockholders, he is entirely free to engage in an independent competitive business."

¹ The discharge of the employee was held to be proper where the employer, in consideration of giving permanent work to the employee and increasing his salary from year to year, was to have the benefit of all experiments and discoveries of the employee, and the employee refused, without extra compensation, to disclose a process which he had discovered. *Silver Spring Bleaching & Dyeing Co. v. Woolworth* (1890) 16 R. I. 729, 19 Atl. 528. Discussing the attempt of the employee to excuse himself by setting up that the corporation was the first to break the contract by previously refusing an increase of salary, the court said: "The answer of the corporation is that it was only for valuable discoveries that the increase was to be given, and that the previous

C. LITERARY WORK OF EMPLOYEES.

2048. Right of an employer in respect to the results of literary or artistic work performed by the employee. Generally.—One who employs another person to perform literary or artistic work is not deemed to be, within the meaning of the copyright acts, the “author” of what is produced by the labor of his employee,¹ unless the contract is one which provides that he shall participate in the work to an extent sufficient to entitle him to be regarded as a “joint author.” In order

discoveries were without value, and the jury may have deemed this answer sufficient. The remedy for the defendant, if he was not satisfied with the compensation which he was receiving, was to decline to undertake the experiment until he was satisfied; not to make the experiment at the expense of the corporation, as its servant, and then refuse to disclose the result. . . . The defendant refused disclosure unless the corporation would agree beforehand, not to carry out the alleged contract, but to do something entirely different. He thus repudiated the contract which he now claims that he is entitled to the benefit of, and put himself in an attitude of hostility to his employer, indeed defying his employer, if he used the language attributed to him. And the jury, if this was so, might properly consider the dismissal justified.”

The statement in the text is also sustained by the decision in *Clark v. Fernoline Chemical Co.* (1889) 25 Jones & S. 36, 23 N. Y. S. R. 964, 5 N. Y. Supp. 190.

¹ In *Nottage v. Jackson* (1883) L. R. 11 Q. B. Div. (C. A.) 627, A. and B. carried on business in copartnership as photographers under the firm name of the L. Company. They did not take photographs themselves, but employed managers and a large staff of photographic artists and assistants. One of their managers, thinking that the photograph of the Australian Cricketers would sell well, arranged for the photographs to be taken without any payment being made for taking them, and sent one of the artists in the employ of the firm to take the negative. From this negative the photograph was in the usual way produced, and was sold by the firm in the ordinary course of business; and A. and B. registered them-

selves under the copyright act 1862, in their individual names, as the “proprietors and authors” of the photograph. In an action by the firm to restrain the pirating of their copyright in the photograph, held, that A. and B. were not the “authors” of the photograph, and that the registration was not a good one under the act, although the statement that the partners were “proprietors” was correct. Brett, M. R., said, “We understand that all the selling photographers have come to the conclusion that they are the authors of the photographs they sell,—that is, the people who pay the servants; that they are the only persons who are interested in the photograph at the time it is done; they think that they are the authors of the photograph because the photograph is made and formed by the work of their mere servants. I cannot tell whether the person who drew this act of Parliament had that idea or not; but I am not satisfied in my mind that he had, because it is full of difficulties.” It was intimated, but not expressly decided, that the person who took the negative was the “author.”

To the same effect, see *Kenrick v. Lawrence* (1890) L. R. 25 Q. B. Div. 99, 38 Week. Rep. 779, where a registration as “author” by a person who had employed an artist to make a drawing which he was himself incapable of making was held to be void.

See also the cases cited in the next three sections.

The American doctrine is the same. See *Pierpont v. Foulle* (1846) 2 Woodb. & M. 23, 46, Fed. Cas. No. 11,152; *Atwill v. Ferrett* (1846) 2 Blatchf. 39, Fed. Cas. No. 640; *Little v. Gould* (1852) 2 Blatchf. 362, Fed. Cas. No. 8,395.

to constitute such authorship, it must be the result of a preconcerted joint design. Mere alterations, additions, or improvements by the employer, whether with or without the sanction of the employee, will not entitle the former to claim to be "joint author" of the work.²

Under some circumstances, however, the employer may acquire, by virtue of the contract, the rights of a prospective "proprietor" of the work to be produced, and become entitled in this capacity to the protection of the acts. This situation is predicable whenever it is a reasonable inference that the parties intended that the ownership of the work was to vest in the employer as soon as it should come into existence. Their intention in this regard may be established by express evidence bearing directly upon the point,³ or it may be implied from the contract.⁴ Where the rights of the parties are to be determined on the latter footing, the effect of the contract is ascertained from a consideration not merely of its provisions, but also of the nature of the stipulated work. The question to be decided is one of fact, and each case must be dealt with on its own merits.⁵

Cases of the kind with which we are now concerned are not controlled by any rule analogous to that applied in the cases which proceed upon the principle that the produce of the labor of a servant

² *Levy v. Rutley* (1871) L. R. 6 C. P. 523. There the plaintiff, the lessee of a theatre, employed one W. to write a play for him, suggesting the subject. W. having completed it, the plaintiff and some members of his company introduced various alterations in the incidents and in the dialogue, to make the play more attractive, and one of them wrote an additional scene. Held, that these circumstances did not make the plaintiff joint author of the play with W.

The play being finished, a sum of £4 15s. was paid to W. on account, and he signed a receipt, drawn up by the plaintiff's attorney, as follows: "Received of Mr. L. (the plaintiff) the sum of £4 15s. [on] account of 15 guineas for my share, title, and interest as coauthor with him in the drama intitled, etc.; balance of 15 guineas to be paid on assigning my share to him." The balance was never paid, nor was any assignment executed by W. Held, no evidence that the plaintiff was either "joint author" or assignee of the author.

³ See, for example, *Trade Auxiliary*

Co. v. Middlesborough & D. Tradesmen's Protection Asso. (1889) L. R. 40 Ch. Div. 425, 58 L. J. Ch. N. S. 293, 60 L. T. N. S. 681, 37 Week. Rep. 337; *Lawrence v. Dana* (1869) 4 Cliff. 1, Fed. Cas. No. 8,136; *Mallory v. Mackaye* (1897) 86 Fed. 122.

⁴ For cases explicitly recognizing the principle that it is not necessary to show that the contract embraced express words conferring the copyright upon the employer, see the following cases, cited in § 2053, *post*, *Sweet v. Benning* (1855) 16 C. B. 459, 24 L. J. C. P. N. S. 175, 1 Jur. N. S. 543, 3 Week. Rep. 519; *Lawrence v. Aflalo* [1904] A. C. 17, 1 B. R. C. 314, 73 L. J. Ch. N. S. 85, 52 Week. Rep. 369, 89 L. T. N. S. 569, 20 Times L. R. 42; *Lamb v. Evans* [1893] 1 Ch. 218, 62 L. J. Ch. N. S. 404, 2 Reports, 189, 68 L. T. N. S. 131, 41 Week. Rep. 405. The same principle is taken for granted in most of the other cases cited in the following sections.

⁵ Lord Davey in *Lawrence v. Aflalo* [1904] A. C. 17, 1 B. R. C. 314, 73 L. J. Ch. N. S. 85, 52 Week. Rep. 369, 89 L. T. N. S. 569, 20 Times L. R. 42.

hired for the express purpose of making improvements in mechanical devices becomes the property of his master at the moment of production. It is considered that literary productions stand upon different and higher ground from that occupied by mechanical inventions; that the intention of the legislature in the enactments relating to copyright is to elevate and protect literary men; that such an intention can only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer who takes no intellectual part in the production of the work, can, without an assignment in writing, vest the proprietorship of it in the later.⁶

2049. Rights of parties in regard to books.—It has been held that a tradesman who employs a person for remuneration to compile a book of designs must be taken to be the equitable assignee of the copyright, and therefore entitled to restrain the publication of designs copied from the book.¹

On the other hand a surrender of an author's copyright will not be inferred where all the provisions of a contract by which he agrees to prepare a legal work at the expense of his employer, and to accept half the profits as his remuneration, have relation to the printing and publishing of the work, and to the mode of paying the expenses to be incurred. Under such circumstances the employee merely gives the sole right of printing and publishing to the employer.²

2050. —dramatic pieces.—One who employs another person to write a play for him does not, merely by reason of such employment, acquire an inchoate right of property in that play.¹ This rule holds,

⁶ *Shepherd v. Conquest* (1856) 17 C. B. 427, 444, 25 L. J. C. P. N. S. 127, 2 Jur. N. S. 236, 4 Week. Rep. 283.

¹ *Grace v. Newman* (1875) L. R. 19 Eq. 623, 44 L. J. Ch. N. S. 298, 23 Week. Rep. 517, 7 Eng. Rul. Cas. 86. This decision was distinguished in a later case in which it was held that the registration of a book under the copyright act of 1842, in the name of the author of the letter press, does not confer any protection in respect of drawings made, for the purpose of illustrating the book, by an employee in whom the art Copyright is vested. *Petty v. Taylor* [1897] 1 Ch. 465, 66 L. J. Ch. N. S. 209, 75 L. T. N. S. 545, 45 Week. Rep. 299.

² *Stevens v. Benning* (1854) 24 L. J. Ch. N. S. (C. A.) 153, 6 De G. M. & G. 223, 3 Eq. Rep. 457, 1 Jur. N. S. 74, 3 Week. Rep. 149 (assignee of origi-

nal publisher held not to be entitled to an injunction restraining a third publisher from bringing out another edition of the book.)

¹ *Levy v. Rutley* (1871) L. R. 6 C. P. 523, 40 L. J. C. P. N. S. 244, 24 L. T. N. S. 621, 19 Week. Rep. 976.

In *Shepherd v. Conquest* (1856) 17 C. B. 427, the proprietors of a theater employed an author to compose for them a dramatic piece, paying him a weekly salary and traveling expenses. There was no contract in writing, nor any assignment or registry of the copyright, but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London. Held, that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for

even though the employer may have suggested the subject,² or though the employee may be an actor in the service of the employer, and the agreement provides that the play is to be acted at the theater of the employer, and that the employee is to act in it himself, as long as it will run, receiving a share of the profits as a compensation.³

2051. —musical compositions.—Where a musical piece which can properly be described as independent is composed in pursuance of a contract of employment, it will not be inferred, from the mere fact of the employment, that it was the intention of the parties that the sole liberty of performing the piece should vest in the employer.¹

penalties under 3 & 4 Wm. IV. chap. 15, which gives the sole liberty of representing or causing to be represented at any place of dramatic entertainment, to the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece of entertainment (extended to musical composition by 5 & 6 Vict. chap. 45, §§ 20, 21). It was held that, though the jury had found that there was an agreement between the plaintiffs and the author by which the piece when composed was to be the property of the plaintiffs, who had agreed to pay for it, that finding was immaterial, because the effect of the statute was that, if the composition was solely that of the person so employed to produce it, he was the sole proprietor of the copyright and right of representation, and, in the absence of any assignment in writing, those who employed him could not set up any right in respect of such composition. Jervis, Ch. J., said: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say that, in such a case, the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the

first instance that the right is conferred by the statute which creates it."

² See cases cited in the last note.

³ *Boucicault v. Fox* (1862) 5 Blatchf. 87, Fed. Cas. No. 1,691 (employee held entitled to take out the copyright, even after the play had been acted). The court said: "The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case no such contract is proved. The most that could possibly be said in regard to the right of Stuart or his trustee in the play is that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, subject, at most, to a license or privilege, in favor of Stuart and Fields, to have the piece performed at the Winter Garden. . . . A man's intellectual productions are peculiarly his own, and, although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced."

A similar decision with respect to the same contract was rendered in *Roberts v. Myers* (1860) Brunner, Col. Cas. 698, Fed. Cas. No. 11,906.

¹ *Eaton v. Lake* (1888) L. R. 20 Q. B. Div. (C. A.) 378, 57 L. J. Q. B. N. S. 227, 59 L. T. N. S. 100, 36 Week. Rep. 277. There the plaintiff, who had been employed by the defendant, the proprietor of a music hall, as the conductor

On the other hand, a person employed by the author and designer of an entire dramatic representation or entertainment to compose the incidental music for the play to be produced, upon the terms that the music shall become a part of the play, and that the employees shall have the sole liberty of performing that music, as accessory to the play, is not regarded as being, within the language of the statute, the owner or proprietor of the musical composition. The principle upon which the court proceeded in the case cited was essentially this,—that, under any other doctrine, the labor, skill, and capital bestowed by the employer upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, as a result of one contributor's withdrawing his portion.²

of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions, composed the music for a Christmas ballet, to be performed at the decedent's music hall; but while the piece was running he threw up his engagement as conductor, and took away the musical score and band parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band parts to the defendant in consideration of a certain sum. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant. Held, that, in the absence of any assignment or consent to the representation of the composition in writing, given by the plaintiff, the performances were contrary to the right of the author, and that the action was maintainable. The finding of the jury was declared to be inconsistent with the view urged by the defendant, that the nature of the agreement was such that he was from the very inception of its existence the owner of this composition in law. The decision in *Shepherd v. Conquest*, § 2050, note 1, *ante*, was approved.

In *Storace v. Longman* (1788) an unreported case cited in *Clementi v. Golding* (1809) 2 Campb. 25, where the plaintiff sued for the infringement of his copyright in a musical air, the defendant adduced evidence to prove that the song was composed to be sung at the Italian Opera, and that all compositions so performed were the property of the house, not of the composer. Lord Kenyon said that this defense could not be supported, that the statute vests the property in the author, and that no such private regulation could interfere with the public right. It seems open to question, however, whether this evidence was not competent as bearing upon the intention of the parties.

² *Halton v. Kean* (1859) 7 C. B. N. S. 268; Crowder, J., said: "The music in question having been composed by the plaintiff under an express engagement with the defendant, and for the defendant, and having been paid for by the defendant, the plaintiff never had any separate property therein, and consequently he could have no right to prevent the representation of it by the defendant." With regard to this case Lord Esher, during the argument of counsel in *Eaton v. Lake*, note 1, *supra*, observed: "Assuming the facts alleged by the plea . . . to be true, a jury could not have found on those facts that the composition was an independent composition."

Halton v. Kean, was followed in *Wallerstein v. Herbert* (1867) 16 L. T. N. S. 453, 15 Week. Rep. 838. There the plaintiff was engaged, for certain reward, for the season as musical director,

2052. —abstracts from official records.—It has been held that, in the absence of evidence of a special agreement, it will not be implied that the copyright in abstracts made by an employee from registered documents in a record office belongs to the employer.¹

2053. —encyclopædias and periodicals.—In England the rights of employers and employee in relation to these descriptions of literary productions are defined by § 18 of the act 5 & 6 Vict. chap. 45, which provides that a publisher or other person who projects and carries on an encyclopædia, magazine, periodical work, etc., and employs other persons to compose portions of such works, "on the terms that the copyrights therein shall belong to the employer," shall have the same rights in those compositions as if he were the author.

In cases controlled by this provision the onus of proving it to have been the intention of the parties that the copyright is to be the property of the employer lies on him.¹ But the accepted doctrine is that, in the absence of special circumstances, or an express stipulation, indicating a contrary intention, a contract by which a person is employed and paid to execute work which is to constitute a portion of one of the publications which fall within the purview of the provision should be construed as vesting the copyright in the employer.² The basis of the construction thus attached to such contract in any given instance is an inference of fact, not a conclusion of

and he was to procure and pay all musical performers, to furnish all the musical instruments, to provide, lead, and perform overtures, *entr'acte* music, and all the music incidental to the dramatic performances, and they might be either original compositions of the plaintiff, or be selected from the works of other composers. Certain incidental music composed in pursuance of this engagement was held to have become part and parcel of the play to which it was accessory. In his work on Copyright, 4th ed. p. 109, Mr. Copinger expresses the opinion that the decision was erroneous, in view of the facts.

¹ *Trade Auxiliary Co. v. Jackson* (1887) 4 Times L. R. 130.

² *Lamb v. Evans* [1893] 1 Ch. 218, per Lindley, L. J. p. 225, 62 L. J. Ch. N. S. 404, 2 Reports, 189, 68 L. T. N. S. 131, 41 Week. Rep. 405; *Trade Auxiliary Co. v. Jackson* (1887) 4 Times L. R. 130; *Walter v. Howe* (1881) L. R. 17 Ch. Div. 708, 50 L. J. Ch. N. S. 621, 44 L. T. N. S. 727, 29 Week. Rep. 776 (proprietor of a newspaper not entitled to

sue in respect of a piracy of any article therein, where he merely proves that the author of the article has been paid for his services).

² In *Sweet v. Benning* (1855) 16 C. B. 459 (defendant sued for pirating the headnotes in the *Jurist Reports*), Jervis, Ch. J., laid down the law as follows: "Where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise, it might be that the author might, the day after his article has been published by the persons for whom he contracted to write it, republish it in a separate form or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made." (p. 480.) Maule, J., was of opinion that, "where a man employs

law, and its rationale is simply that, as an employer cannot adequately protect his interests in the entire publication, unless he owns

another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances or in the course of dealing between the parties to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer,—subject, of course, to the limitation pointed out in the 18th section of the act.”

In *Lamb v. Evans* [1893] 1 Ch. 218, reversing [1892] 3 Ch. 462 (proprietor of trades directory consisting of advertisements furnished by tradesmen and classified under headings denoting the different trades, which headings were composed by the plaintiff, the registered proprietor, or by persons paid by him to compose them,—held to have a copyright in all the headings, and, *semble*, in the mass of advertisements, as arranged), Lindley, L. J., said: “In drawing the inference, regard must be had to the nature of the articles, which are here merely the headings to groups of advertisements, with translations, and the view expressed by Mr. Justice Maule in *Sweet v. Benning* (1855) 16 C. B. 484, 24 L. J. C. P. N. S. 175, 1 Jur. N. S. 543, 3 Week. Rep. 519, may be very safely acted upon, *viz.*, that *prima facie*, at all events, you will infer, in the absence of evidence to the contrary, from the fact of employment and payment, that one of the terms was that the copyright should belong to the employer. That is not a necessary inference; but in a case of this sort, where any other inference would be unbusiness-like, I should not hesitate myself to draw that inference. Having regard to the employment and payment and the kind of work which one party was doing for the other, I draw the inference of fact that the work was done upon the terms that the copyright in these headings, which are of no use to anybody but the plaintiff, should be his.” “What,” said Kay, L. J., “is the fair inference from the facts of the case? Surely the inference is that the man who is to go to the expense of printing and publishing this book will, as between him and the agents he may have

employed to assist him in the compilation of it, have in himself whatever property the law will give him in that book. That is the inference I should certainly draw.”

In *Lawrence v. Aftalo* [1904] A. C. 17, 1 B. R. C. 314, reversing [1903] 1 Ch. (C. A.) 318, 72 L. J. Ch. N. S. 107, 51 Week. Rep. 360, 87 L. T. N. S. 605, 19 Times L. R. 133, which affirmed [1902] 1 Ch. 264, 70 L. J. Ch. N. S. 797, 50 Week. Rep. 24, 85 L. T. N. S. 342, 17 Times L. R. 729 (publisher of expensive encyclopædia of sport, held to be entitled to the copyright of articles written for it by the editor and by other persons employed by the editor), Lord Davey, after briefly stating the evidence, said: “Those are all the material facts of the case; and I have to ask myself what is the inference that I draw from those facts. That, I repeat, is a matter of fact, and not a matter of law. No doubt one may gain some assistance from the way in which a similar set of facts has been regarded in other cases; but after all, where it is a question of fact, each case must stand upon its own merits. My Lords, if I were to express my opinion as a jurymen upon the facts I have mentioned, I should say that it was one of the terms on which these gentlemen were employed to write articles for the encyclopædia, that the copyright should belong to the proprietor; and I say so for this reason. The encyclopædia was to be his property, it was to be his book, he was to enjoy the benefit and receive the profit to be derived from its publication; and therefore I should assume that, in buying the articles written by these gentlemen, the inference is that both parties intended that the proprietor should have the right that was necessary for him adequately to protect the property which he had purchased, and the enterprise for the purpose of which these articles were intended to be used.” Lord Halsbury observed: “I can entertain no doubt that this, like a great many other things in law, is one of those inferences which you are entitled to draw, but for which you can lay down no abstract rule.” In this case the House of Lords declined to adopt the view of Romer and Stirling, L. JJ., to

the copyright in the various parts, it is only reasonable to assume that the arrangement contemplated by him, as an ordinarily prudent business man, was one which would afford that protection.³

The proprietor of an encyclopædia, who employs a person to write an article for publication therein, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. This rule holds although no special agreement has been entered into with respect to the reservation of any right of publication by the plaintiff. The copyright being in the author except so far as he may have parted with it, no express reservation is necessary to constitute a right in him.⁴

In this section there is an express provision that an employer who under the terms of the contract becomes the proprietor of the copyright in the work of the employee shall not publish that work in a separate form without the consent of the employee or his assignees. Whether there has been, or is about to be, a separate publication, is a question to be determined from the evidence.⁵

the effect that the mere circumstance that the writer of an article for an encyclopædia is employed and paid by the proprietor of the encyclopædia is not in itself sufficient to justify the inference, either in law or in fact, that the copyright in the article belongs to that proprietor under § 18 of the act.

It may be observed that the general principle applied in these cases is essentially similar to that which was propounded in the following terms by Sir John Leach in *Barfield v. Nicholson* (1824) 2 L. J. Ch. 90, 102: "I am of opinion that, under that statute [8 Anne, chap. 19], the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it adapted to their own peculiar acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning, of the statute of Anne, which, being a remedial law, is to be construed liberally."

³ See the extract from the judgment

of Lindley, L. J., in *Lamb v. Evans*, as set out in the last note.

In the same case Bowen, L. J., used the following words: "From what are you to collect the terms? You may collect them from what passed between the parties,—that is to say, between the plaintiff and the persons whom he employed; but you may also collect them from the nature of the business itself; and it seems to me to be impossible, as a matter of business, to suppose that these headings were composed and furnished to the plaintiff upon any other terms than that he was to have the copyright in them, because otherwise those who composed them, having furnished them to the plaintiff, might themselves have published them and defeated his object."

See also the remarks of Lord Davey, and Lord Halsbury as quoted in the preceding note. Compare also the *ratio decidendi* in *Hatton v. Kean*, § 2051, note 2, *ante*.

⁴ *Bishop of Hereford v. Griffin* (1848) 16 Sim. 190, 197, 17 L. J. Ch. N. S. 210, 12 Jur. 255.

⁵ See *Mayhew v. Maxwell* (1860) 1 Johns. & H. 312, 3 L. T. N. S. 466, 8 Week. Rep. 118, where Wood, V. C.,

In the United States there is no special statutory provision concerning the copyright in articles first published in encyclopædias, magazines, and other periodicals, and the special points discussed in the English cases reviewed in this section cannot arise.⁶

2054. —notes to new editions of books previously copyrighted by the employer.—Title to the notes or other matter prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employee, by virtue of the contract of employment, without any written assignment; and when so acquired, the tenure of the property depends upon the terms of the contract. The contract cannot be held to operate as a mere license, where it is to the effect that the proprietor of the book shall take the exclusive right to the contributions for the new edition, together with the right to register those contributions for the protection of the property. Under such an arrangement an inchoate right of registration passes to the proprietor of the book, and he is deemed to register it for the protection of his own property in the notes, and in trust for the author whenever that property shall be determined.¹ The effect of such a contract, however, is restricted to the particular edition or editions to which it relates. It does not confer upon the proprietor of the copyright in the book any title, legal or equitable, to use the notes in a later edition of the annotated work, without the consent of the author of the notes.²

granted an injunction against the publication.

⁶ See *Drone, Copyright*, p. 259.

¹ *Lawrence v. Dana* (1869) 4 Cliff. 1, Fed. Cas. No. 8,135 (controversy regarding ownership of copyright was between the representative of a court reporter and the editor of the reports). Clifford, J., said: "Speaking of the first annotated edition, the agreement was distinct that the contributions were to be furnished without charge, and the edition of 1863 was prepared with the same explicit understanding between the parties. Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the

extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement. *Sweet v. Benning* (1855) 16 C. B. 480, 24 L. J. C. P. N. S. 175, 1 Jur. N. S. 543, 3 Week. Rep. 519; *Mayhew v. Maxwell* (1860) 1 Johns. & H. 315, 3 L. T. N. S. 466, 8 Week. Rep. 118. Delivery was made as the work was done; and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. . . . Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right."

² *Lawrence v. Dana, ubi supra*.

2055. —literary work done in connection with official duties.—

There is authority for the doctrine that some at least of the productions which fall within the purview of the copyright acts cannot be registered by a person who gathered the materials at the cost of the government while he was in the service of the state.¹ This doctrine certainly holds where the employee has expressly agreed that his productions are to be the exclusive property of the government.²

It has been held, however, that, in the absence of a special agreement to that effect, a college or similar institution is not entitled to the results of the literary labor of one of its professors, prepared by him for publication, although its preparation was incidental to his duty as professor, and was aided by the facilities available to him in his professional capacity.³

2056. Rights of parties as affected by the fiduciary obligations of the employee.—In one case an application by the manager of one theater for an injunction to restrain the manager of another from putting on the stage a piece which was still in manuscript was granted on the ground that he had obtained certain material additions to the words through a breach of confidence on the part of an actor in the

¹ On the ground that all the results of such labor belongs to the state, the publication of a map made by a draughtsman was enjoined in *Com. v. Desilver* (1858) 3 Phila. 31.

In *Little v. Gould* (1852) 2 Blatchf. 362, Fed. Cas. No. 8,395, a person engaged by the state to report the decisions of a court was held to be the "author" of the volumes containing the reports of such decisions, within the meaning of the copyright law, but it was held that under the terms of the contract of employment the copyright was vested in the secretary of state in trust for the state.

² Such an agreement was made by an artist with regard to such sketches and drawings as he might make while accompanying an expedition fitted out by the United States government, and receiving pay in the capacity of a master's mate. He was held not to be entitled to take out a copyright in certain sketches and drawings which were, on his return, incorporated, with his assent, in a report of the expedition, the evidence showing that a large number of copies of the report, containing prints and engravings made from those

sketches and drawings, had been, by the order of Congress, published for distribution. *Heine v. Appleton* (1857) 4 Blatchf. 125, Fed. Cas. No. 6,324.

³ In *Peters v. Borst* (1889) 24 Abb. N. C. 1, 9 N. Y. Supp. 789, a case involving a controversy between the director of an observatory and his assistant as to the ownership of a manuscript "Star Catalogue," upon which both had labored, it was shown that the director conceived the plan, selected the material and made the discriminations necessary, and that to him the correctness of the work was due; while the executive ability in working out the plan was that of the assistant. After the work had made much progress the assistant carried on the preparation of manuscript away from the observatory, and to an extent which he concealed from his principal, and finally claimed the whole as his property. Held, that those parts which were prepared by or under the supervision of the principal, or which were chiefly made up by copying from them, belonged to the principal, and he was entitled to recover possession of them from the assistant.

employ of the plaintiff.¹ The court said: "The written additions to the former manuscript were not independent literary productions, but accessions whose proprietorship was incidental to that of the principal composition. Had this been otherwise, their literary proprietorship would have been in the complainant, and not in the actor who conceived and suggested them when he was in her service, assisting her in adapting the drama to its intended first performance. His relation to her, as his employer, precluded him from acquiring, under such circumstances, an independent interest of his own in such products of his mental exertion in her service." But in another case in which the same play was involved, it was laid down that there is no legal reason why actors employed to commit to memory the various parts of a play still in manuscript should not repeat what they have learned, before different audiences and in different places.²

In a contract of employment for the purpose of making a certain number of copies of a picture belonging to the employer, there is a stipulation implied that the employee shall not make any additional copies for himself. If he does so, he will be liable to an action for damages,³ and may be enjoined from selling the additional copies in competition with his employer.⁴

¹ *Keene v. Wheatley* (1860; U. S. C. C. E. D.) 4 Phila. 157, Fed. Cas. No. 7,644.

² *Keene v. Kimball* (1860) 16 Gray, 545, 77 Am. Dec. 426.

³ So laid down in *Murray v. Heath* (1831) 1 Barn. & Ad. 804, 9 L. J. K. B. 111, where, however, the point actually decided was that neither the employee nor his assignee in bankruptcy were liable under the statute, 17 Geo. III. chap. 57, to an action for having disposed of pirated prints without the consent of the proprietor, inasmuch as that statute applied to impressions of engravings pirated from other engravings, and not to prints taken from a lawful plate.

⁴ *Tuck v. Priester* (1887) L. R. 19 Q. B. Div. (C. A.) 639. Lindley, L. J., said: "Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not."

As to the doctrine that an injunction may be granted to restrain the making of prints from a photographic negative which the defendants had been employed by the plaintiffs to take, see *Pollard v. Photographic Co.* (1888) L. R. 40 Ch. Div. 345, 53 L. J. Ch. N. S. 251, 60 L. T. N. S. 418, 37 Week. Rep. 266.

